

**APPLYING SECTION 362(a)(3) TO THE DEBTOR:
A SQUARE PEG IN A ROUND HOLE**

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INTRODUCTION

When title 11 of the United States Code (the "Bankruptcy Code") was enacted, the automatic stay was described by Congress as "one of the fundamental *debtor* protections provided by the bankruptcy laws."¹ The Supreme Court has quoted that characterization favorably.² In its most recent case on section 362, *City of Chicago v. Fulton*,³ the Supreme Court noted that the "automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by *preventing individual creditors* from pursuing their own interests to the detriment of the others."⁴ Lower courts have also characterized the automatic stay as a fundamental protection that is "provided to debtors" or "to the debtor"⁵ or "given to the debtor"⁶ or "for debtors"⁷ or "a fundamental debtor protection"⁸ or similar language in reliance on the legislative history. Commentators have described it in a like manner, saying it limits action by creditors against the debtor, property of the debtor, and property of the estate.⁹

Nevertheless, some courts have looked at the language of section 362(a) of the Bankruptcy Code—which makes the bankruptcy petition operate as a stay "applicable to all entities"—to find the debtor in violation of the automatic stay under section 362(a)(3), which bars "any act to obtain possession of property of the estate or of

¹ H.R. REP. NO. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.A.N. 5963, 5787, 5963, 6296–97 (emphasis added).

² See *Midlantic Nat'l Bank v. N.J. Dep't of Env't Prot.*, 474 U.S. 494, 503 (1986).

³ See *City of Chicago v. Fulton*, 592 U.S. 154, 156 (2021) (determining that a creditor retaining property during a chapter 13 bankruptcy proceeding was not exercising control over property in violation of the automatic stay).

⁴ *Id.* at 157 (emphasis added).

⁵ *In re Cole*, 552 B.R. 903, 911 (Bankr. N.D. Ga. 2016); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 910 (6th Cir. 1993).

⁶ *E.g.*, *Johnson v. Smith (In re Johnson)*, 501 F.3d 1163, 1171 n.7 (10th Cir. 2007).

⁷ *E.g.*, *In re Banks*, 549 B.R. 257, 262 (Bankr. D. Or. 2016); *In re Gardner*, No. 15-15192, 2016 WL 1576700, at *4 (Bankr. D.N.J. Mar. 31, 2016).

⁸ *E.g.*, *United States v. Waters (In re Waters)*, No. 21-1219, 2022 WL 17086310, at *1 (2d Cir. Nov. 21, 2022); *United States v. Colasuonno*, 697 F.3d 164, 172 (2d Cir. 2012); *B.F. Goodrich Emps. Fed. Credit Union v. Patterson (In re Patterson)*, 967 F.2d 505, 512 n.9 (11th Cir. 1992); *Skillforce, Inc. v. Hafter*, 509 B.R. 523, 528 (E.D. Va. 2014); *In re Teal Props., Inc.*, No. 22-BK-12203, 2023 WL 6150313, at *2 (Bankr. E.D. Tenn. Sept. 20, 2023); *In re Glenn*, 616 B.R. 429, 434 (Bankr. S.D. Ala. 2020).

⁹ See, e.g., Lawrence Ponoroff, *Putting With a Pitching Wedge: Indiscriminating Termination of the Automatic Stay*, 38 EMORY BANKR. DEV. J. 225, 232–33 (2022) (stay "is intended to prevent a chaotic, disorganized, and wasteful scramble for assets by individual creditors" and "halts the state law race of the diligent creditor"); 2 NORTON BANKRUPTCY LAW AND PRACTICE § 43:4, at 324 (William L. Norton, Jr. ed., 3d ed. 2008) (stay "is one of the fundamental debtor protections provided by the bankruptcy laws" and "gives the debtor a breathing spell from creditors"); Frank R. Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J.L. REFORM 3, 61 (1978) (stay "is necessary to prevent creditors from improving their positions by resort to means not under the control of the court of bankruptcy . . . [and] to stay their efforts to collect from the debtor if the fresh start is to become effective."); John Lindon Smaha, *Automatic Stay Under the 1978 Bankruptcy Code: An Equitable Roadblock to Secured Creditor Relief*, 17 SAN DIEGO L. REV. 1113, 1116 (1980) ("The automatic stay is designed to give the debtor a breathing spell from his creditors as well as to preserve what remains of his insolvent estate for the benefit of unsecured creditors.")

property from the estate or to exercise control over property of the estate."¹⁰ This use of the stay against the debtor rather than as protection for the debtor is contrary to the history of the stay, the structure of the provisions in the Bankruptcy Code describing the stay, its exceptions and remedies for breach, and the Supreme Court's interpretation of the phrase in *Fulton*. In this Article, I suggest that although other remedies are available when the debtor takes action that affects property of the estate, violation of the stay is not among them.

I. CASE LAW APPLYING SECTION 362(A)(3) TO THE DEBTOR

The earliest cases applying the automatic stay to debtor actions were decided not under section 362(a)(3), but under section 362(a)(1). Courts acknowledged that actions and proceedings against the debtor (and not by the debtor¹¹) were stayed but struggled with the question of whether the stay applied to affirmative actions taken by the debtor, such as appeals of adverse rulings or actions on a counterclaim or cross-claim by the debtor.¹²

The first case in which a bankruptcy judge suggested that section 362(a)(3) barred an action by the debtor was *In re Benefield* in which the court denied a claim against the estate brought by the recipient of an unauthorized post-petition lease of estate property for breach of the lease agreement and his estimated lost profit from the leased premises.¹³ The court said (in dictum) that in leasing the property, "the debtor acted in violation of the automatic stay and illegally transferred property of the estate."¹⁴ But the court went on to state that the remedy for the transaction was that "the trustee is authorized to avoid an unauthorized transfer of property of the estate"¹⁵ and the recipient of that transfer had a claim, if any, "against those who leased the land to him without authority."¹⁶ There was no further discussion of the alleged stay violation.

¹⁰ 11 U.S.C. § 362(a) (2018).

¹¹ See, e.g., *Carley Cap. Grp. v. Fireman's Fund Ins. Co.*, 889 F.2d 1126, 1126–27 (D.C. Cir. 1989) (per curiam) (finding appeal by debtors in action in which debtors were originally the plaintiffs was not stayed).

¹² Compare *Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982) (holding that an appeal by the debtor was stayed in an action against the debtor), with *U.S. Abatement Corp. v. Mobil Expl. & Prod'g U.S., Inc. (In re U.S. Abatement Corp.)*, 39 F.3d 563, 568 (5th Cir. 1994) (holding counterclaims asserted by debtor were not subject to stay and as a result "creditor's motion to reinstate and seek summary judgment of such" counterclaims also survived stay); *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991) (allowing "claims asserted by debtor [to] continue . . . while same-case proceedings arising out [of] claims asserted [against debtor] are stayed"); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989) (indicating "the automatic stay is inapplicable to suits by the [debtor]" and "it would be clear that a suit to enforce one's rights" as debtor "could be brought") (emphasis added); and *Boone v. Beacon Bldg. Corp.*, 613 F. Supp. 1151, 1155 (D.N.J. 1985) (holding that stay did not apply to debtor's cross-claim in an action against debtor).

¹³ 102 B.R. 157, 159 (Bankr. E.D. Ark. 1989).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 160.

A debtor was actually found to have violated section 362(a)(3), and was assessed damages as a result, in a bankruptcy case affirmed in an unpublished opinion of the 9th Circuit, *Mizuno Bankruptcy Estate v. Mizuno (In re Mizuno)*.¹⁷ The debtor had filed a petition under 21 U.S.C. § 853(n) in the District Court of Nevada seeking to establish a claim to property that was the subject of a criminal forfeiture proceeding that had been completed before the bankruptcy filing.¹⁸ The bankruptcy court held that the right to challenge the forfeiture was itself an asset of the bankruptcy estate, and the debtor therefore violated section 362(a)(3) by filing the petition, and the court of appeals affirmed.¹⁹ But arguably, the creditor who brought the motion in the bankruptcy court asserting that the debtor had violated the stay had no standing to do so at the time any more than the debtor had standing to file the petition.²⁰ The appropriate remedy for lack of standing was to dismiss the petition, and in fact that is exactly what the Nevada District Court did.²¹ The court of appeals affirmed that dismissal based on debtor's lack of standing,²² but also concluded that the debtor was too late to challenge the standing of the creditor who filed the automatic stay motion.²³

Mizuno illustrates one of three typical fact patterns presented by subsequent cases finding that the debtor violated section 362(a)(3). In many of these cases, the debtor

¹⁷ *Mizuno Bankr. Est. v. Mizuno (In re Mizuno)*, 125 F.3d 858, Nos. 96-55077, 96-55081, 96-55173, 96-55082, 1997 WL 579128 (Table), at *1 (9th Cir. Sept. 17, 1997).

¹⁸ *Id.* at *2.

¹⁹ *Id.*

²⁰ The facts behind the case are set out in more detail in *United States v. Ken Int'l Co.*, 113 F.3d 1243, Nos. 95-10225, 95-10390, 95-10435, 95-56130, 1997 WL 229114, at *2 (9th Cir. May 2, 1997). Ken Mizuno was a golf tycoon who owned Ken International Co., a Japanese company that pleaded guilty in 1993 to laundering money through the fraudulent over-selling of memberships at a golf course in Japan and transferring the funds to the U.S. to purchase country clubs, a private jet and other real property. *Id.* at *1. Mizuno was personally indicted for money laundering in the U.S. and for tax evasion and fraud in Japan. *Id.* The Mizuno's involuntary chapter 11 bankruptcy case was commenced by Kengo Ohashi, a Japanese attorney, who had been appointed by the Japanese court to be administrator of his personal bankruptcy and that of his company in Japan. *Id.* Ohashi also consented to the order for relief in the chapter 11 case on behalf of Mizuno in his capacity as administrator. *Id.* Mizuno had filed a motion to vacate the order for relief to which Ohashi had consented on the grounds that Ohashi had no authority to do so, but the bankruptcy court denied the motion, effectively permitting Ohashi to operate as the representative of the estate. *Id.* Mizuno failed to appeal that order until 2-1/2 years after its entry, which was clearly untimely. *Id.* Ohashi entered the guilty plea on behalf of Ken International. *Id.* As part of the plea, the company agreed to forfeit its assets, and Mizuno filed a petition with the district court overseeing the plea, asserting an interest in the forfeited assets. *Id.* The bankruptcy court granted Ohashi's motion to find that Mizuno's action violated the automatic stay. *Id.* Mizuno appealed from this order. *Id.* *In re Mizuno*, 1997 WL 579128, at *1. The bankruptcy court subsequently determined that Ohashi was neither the trustee, debtor, or debtor-in-possession in the U.S. bankruptcy, and the district court therefore held on Mizuno's appeal that Ohashi had no standing to file the motion. *Ken Int'l Co.*, 1997 WL 229114, at *2. A new trustee was appointed, who appealed the district court decision, and the Court of Appeals concluded that because the bankruptcy court had denied the motion to vacate the order for relief (and that order had not been appealed), Ohashi had standing to initiate the automatic stay action. *Id.* at *2.

²¹ See *Ken Int'l Co.*, 1997 WL 229114, at *2.

²² See *id.* at *4.

²³ See *In re Mizuno*, 1997 WL 579128, at *1. The court also found that the newly-appointed trustee had standing to prosecute the appeal, although he was not a party to the case below and had not sought to intervene or substitute for Ohashi. *Id.*

asserted a cause of action post-petition that the court concluded belonged to the bankruptcy estate.²⁴ Often the cause of action was not scheduled,²⁵ or was listed as having "unknown" value.²⁶ And although the debtor-initiated action was routinely and appropriately dismissed for lack of standing, in some cases, the court suggested that the debtor was violating section 362(a)(3) for bringing the unauthorized action.²⁷ When the debtor was penalized, often the debtor had taken other actions that demonstrated defiance of bankruptcy court orders or process.²⁸

The second typical scenario in which courts have found the debtor violated section 362(a)(3) is when the debtor makes a post-petition transfer of property of the estate.²⁹ As discussed in Part IV, interpreting section 362(a)(3) to avoid post-petition transfers by the debtor would render section 549 superfluous and may now be implicitly barred by section 362(b)(24).³⁰ Perhaps recognizing that section 362(a)(3) should not be used in a way that is inconsistent with section 549, most courts finding a violation by the debtor simply declare the transfer void, the same remedy that would be available under section 549.³¹ When the court has assessed penalties against the

²⁴ See, e.g., *In re McConathy*, No. 90-13449, 2022 WL 1612447 (Bankr. W.D. La. May 20, 2022); *In re DeLay*, No. 14-71512, 2018 WL 1596883, at *18–19 (Bankr. C.D. Ill. Mar. 29, 2018); *In re Garak*, 569 B.R. 684, 685 (Bankr. E.D. Mich. 2017); *In re Smith*, 501 B.R. 325, 326 (Bankr. E.D. Mich. 2013); *In re Lickman*, 297 B.R. 162, 190 (Bankr. M.D. Fla. 2003); *In re Mannie*, 299 B.R. 603 (Bankr. N.D. Cal. 2003); *In re Davis*, No. 98-30087, 2002 WL 33939739, at *3 (Bankr. D. Idaho Feb. 14, 2002); cf. *In re Deshazo*, No. 04-33859, 2006 WL 5217795, at *1 (Bankr. D. Md. Feb. 22, 2006) (debtor violated automatic stay by filing a prosecuting eviction action after commencement of case, but creditors had no standing to assert violation).

²⁵ See *In re McConathy*, 2022 WL 1612447, at *1; *In re Garak*, 569 B.R. at 685; *In re Lickman*, 297 B.R. at 171; *In re Mannie*, 299 B.R. at 606 (Bankr. N.D. Cal. 2003); *In re Davis*, 2002 WL 33939739, at *1.

²⁶ See *In re DeLay*, 2018 WL 1596883, at *11.

²⁷ See *In re McConathy*, 2022 WL 1612447, at *15 (imposing monetary sanctions on debtor's counsel for violations of the stay but not debtor); *In re Garak*, 569 B.R. at 685 (suggesting "continuing prosecution of these claims would violate the automatic stay"); *In re Smith*, 501 B.R. at 326 (suggesting debtor's continued prosecution of counterclaims would violate stay); *In re Mannie*, 299 B.R. at 610 (denying motion for reconsideration of order denying motion to annul stay to permit debtor to continue pursuit of state court action); *In re Davis*, 2002 WL 33939739, at *8 (denying motion for relief based upon debtor's stay violation).

²⁸ See, e.g., *In re Lickman*, 297 B.R. at 190 (debtor sent letters and made telephone calls to the trustee and her counsel, filed papers in the bankruptcy case and in other courts, filed disciplinary complaints with The Florida Bar, placed advertisements in The Florida Bar News, as well as initiated and prosecuted actions in Pennsylvania in order to intimidate the trustee which the court characterized as "a unique and particularly egregious pattern of conduct that may not be applicable in other circumstances"); *In re DeLay*, 2018 WL 1596883, at *18–19 (debtor failed to inform creditor of the bankruptcy filing, and sent notices to the creditor addressed to his own attorney's office, was "defiant and angry" and "took no responsibility for the problems that have arisen in his case due to his lack of candor").

²⁹ See, e.g., *Ohio Land Mgmt. LLC v. Chesapeake Expl., LLC*, No. 15 CV 1754, 2018 WL 4680485, at *1 (N.D. Ohio Sept. 28, 2018) (holding debtor's post-petition attempt to transfer his interest in mineral rights violated section 362(a)(3)); *Redmond v. Hassan*, 523 B.R. 729, 745 (D. Kan. 2014) (concluding debtor's sale of his business and retention of proceeds violated section 362(a)(3)); *In re Hardy*, No. 16-00280, 2017 WL 2491497, at *2 (Bankr. D.D.C. June 8, 2017) (holding debtor's post-petition attempt to sell his property violated section 362(a)(3)); *In re Sayeh*, 445 B.R. 19, 28 (Bankr. D. Mass. 2011) (finding debtor's post-petition removal of personal property and fixtures from the hotel premises violated section 362(a)(3)); cf. *In re Brizinova*, 592 B.R. 442, 466 (Bankr. E.D.N.Y. 2018) (finding post-petition transfers of assets of subsidiary of debtor by that subsidiary did not violate section 362(a)(3)).

³⁰ See *infra* discussion at notes 232–239.

³¹ See *Ohio Land Mgmt.*, 2018 WL 4680485, at *4; *In re Hardy*, 2017 WL 2491497, at *2.

debtor, the debtor generally had engaged in other acts that the court determined warranted punishment.³²

A third fact pattern for cases involving violations of section 362(a)(3) by the debtor is when the debtor files a *lis pendens* in an attempt to cloud title to real property sought to be sold by the trustee,³³ sometimes in connection with filing an action seeking to impose a constructive trust on estate assets to prevent their transfer.³⁴ Again, when the court not only found the *lis pendens* or estate constructive trust action void, but also sanctioned the debtor, the debtor had taken actions in addition to the filing of the *lis pendens* that triggered the sanctions.³⁵

A final act by the debtor that has been found in a few cases to violate section 362(a)(3) is the filing of a second bankruptcy case while the first one is still

³² See, e.g., *Redmond*, 523 B.R. at 733–34 (determining debtor misrepresented business as having no value, failed to disclose bankruptcy to parties involved in sale of business, and attempted to restructure acquisition to avoid bankruptcy law). But see *In Re Sayeh*, 445 B.R. at 28 (awarding trustee compensatory damages for contempt based solely on intentional transfer of estate assets).

³³ See, e.g., *In re Skandis*, No. 19-05319, 2022 WL 4587357, at *3 (Bankr. W.D. Mich. Sept. 29, 2022); *In re Lane*, No. 11-20398, 2015 WL 80026, at *4 (Bankr. D. Wyo. Jan. 6, 2015); *In re Brooks-Hamilton*, 348 B.R. 512, 525 (Bankr. N.D. Cal. 2006); *In re Andresen*, No. 01-253790, 2006 WL 4481984, at *2 (Bankr. D. Md. Nov. 1, 2006); cf. *Tex. Extrusion Corp. v. Lockheed Corp.* (*In re Tex. Extrusion Corp.*), 844 F.2d 1142, 1152 (5th Cir. 1988) (declining to decide whether filing *lis pendens* by debtors was violation of automatic stay because filing was not authorized by Texas statute and was therefore ineffective); *In re Byrd*, Nos. 04-35620 & 01-25006, 2007 WL 1485441 at *8 (Bankr. D. Md. May 18, 2007), *aff'd sub nom.* *Byrd v. Hoffman*, 417 B.R. 320 (D. Md. 2008), *aff'd*, 331 F. App'x. 212 (4th Cir. 2009) (declining to decide whether filing *lis pendens* was violation of automatic stay because filing complaint to impose constructive trust over property of estate violated stay). But see *Savers Fed. Sav. & Loan Ass'n v. McCarthy Constr. Co.* (*In re Knightsbridge Dev. Co.*), 884 F.2d 145, 147–48 (4th Cir. 1989) (holding creditor's *lis pendens* did not violate stay); *In re McKoy*, 161 B.R. 941, 943 (Bankr. E.D. Va. 1993) (holding the filing of a *lis pendens* does not violate the automatic stay). Cf. *In re Badea*, No. 18-1038, 2018 WL 4441731, at *4–5 (B.A.P. 9th Cir. July 27, 2018) (remanding for consideration of whether filing of mechanics' lien debtor was excepted from automatic stay by section 362(b)(3)).

³⁴ See *In re Byrd*, 2007 WL 1485441 at *9.

³⁵ See Order Finding Christine Skandis in Civil Contempt of Court and Sanctioning Her Through Issuance of Permanent Injunction, *In re Skandis*, No. 19-05319, 2022 WL 4587357 (No. 893) (court found debtor in civil contempt for her "dilatatory, abusive, willful, vexatious and egregious conduct" throughout the case); *In re Lane*, 2015 WL 80026 at *3 (debtor violated settlement agreement by sending emails intended to intimidate party retained by trustee to sell trust assets and filed *lis pendens* to prevent trustee from selling real property pursuant to sale order entered by court demonstrating "bad faith, reckless, abusive and grossly disobedient" behavior; the trustee was awarded costs); Memorandum Opinion Finding the Respondents in Contempt and Awarding Sanctions for Violations of the Automatic Stay, the Barton Doctrine, and the Injunction Order, *In re Byrd*, 2007 WL 1485441 (No. 549, 595) (debtors failed to comply with several orders of court; repeatedly and continually filed meritless motions for reconsideration, motions to stay pending appeals and appeals of bankruptcy rulings; refused to cooperate with the trustee on virtually all administrative matters; allowed the property to deteriorate in value and kept it in deplorable condition such that debtors "have abused the bankruptcy process and are acting in bad faith;" court awarded damages and held debtors in contempt); *In re Andresen*, 2006 WL 4481984, at *8 (entering preliminary injunction against disbarred attorney/debtor who had continued to pursue pre-petition action, filed a second bankruptcy case in another jurisdiction under a different name, filed a suit against the trustee in state court to interfere with proposed sale of property, filed a *lis pendens*, and "at every single turn, attempted to prevent [the trustee] from exercising his duties," including omitting assets and creditors from his schedules).

pending.³⁶ Most cases disapproving simultaneous bankruptcy filings never suggest that the second filing is barred by section 362.³⁷

II. HISTORY OF THE AUTOMATIC STAY AND SECTION 362(A)(3)

The automatic stay was not created out of whole cloth by the Bankruptcy Code. In his seminal article on the automatic stay,³⁸ Professor Frank R. Kennedy traces the origins of the stay to the amendments to the Bankruptcy Act made to assist farmer-debtors during the Great Depression.³⁹ The statute specified that certain proceedings "shall not be instituted or . . . maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section."⁴⁰ As amended, this provision was stated to be applicable "to all judicial or official proceedings in any court or under the direction of any official, and shall *apply to all creditors*, public or private, and to all of the debtor's property, wherever located."⁴¹ A subsequent addition by the Frazier-Lemke Act in 1935⁴² imposed a stay of all proceedings by a secured creditor against a farmer-debtor for three years, subject to earlier termination in the discretion of the court.⁴³ These provisions were explicitly aimed at creditors and secured creditors, respectively.

Congress subsequently enacted statutory provisions imposing automatic stays in chapter X (applicable to corporate bankruptcies) and chapter XII (applicable to real property arrangements for non-corporations) in the amendments to the Bankruptcy Act included in the Chandler Act of 1938.⁴⁴ Section 148 provided that an order approving a petition for reorganization of a corporation under chapter X "shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property."⁴⁵ The statutory provision did not state whose actions were being stayed, but as to the first clause, focused on the nature of the proceeding.⁴⁶ Both mortgage foreclosure and equity receivership proceedings could be initiated only at

³⁶ See *In re Benitez*, 611 B.R. 106, 109 (B.A.P. 8th Cir. 2020); *In re Wood*, 649 B.R. 27, 29 (Bankr. E.D. Mich. 2023); *In re Munroe*, 568 B.R. 631, 633 (Bankr. E.D. Mich. 2017) (holding second bankruptcy filing triggered the automatic stay); cf. *Amelio v. Piazza*, Nos. 19-5944 & 19-70091, 2020 WL 5535241, at *1–2 (S.D.N.Y. Sept. 15, 2020) (pro se debtor filed multiple bankruptcy petitions and a federal lawsuit against the trustee and trustee's counsel, the bankruptcy judge and the clerk of the bankruptcy court).

³⁷ See, e.g., *In re Sidebottom*, 430 F.3d 893, 898 (7th Cir. 2005); *In re Turner*, 207 B.R. 373, 378 (B.A.P. 2d Cir. 1997); *In re Szanto*, No. 23-01172, 2024 WL 776591, at *1 (C.D. Cal. Feb. 26, 2024); *In re Robinson*, 649 B.R. 851, 851 (Bankr. E.D. Mich. 2023); *In re Scruggs*, 320 B.R. 94, 96 (Bankr. D.S.C. 2004); *In re Jackson*, 108 B.R. 251, 252 (Bankr. E.D. Cal. 1989).

³⁸ See Frank R. Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REFORM 175 (1978).

³⁹ See *id.* at 179; see also Smaha, *supra* note 9, at 1117.

⁴⁰ Kennedy, *supra* note 38, at 179 (quoting Hoover Depression-era bill, 47 Stat. 1473, § 75(o) (1933)).

⁴¹ Act of August 28, 1935, Pub. L. No. 384, § 5, 49 Stat. 942, 943 (1935) (emphasis added) (abrogated 1973).

⁴² See *id.* § 6, 49 Stat. at 944.

⁴³ See *id.*

⁴⁴ See Chandler Act of June 22, 1938, Pub. L. No. 75-696, § 11, 52 Stat. 840, 849 (1938) (abrogated 1973).

⁴⁵ *Id.* § 148, 52 Stat. at 888.

⁴⁶ See *id.*

the instance of a secured creditor.⁴⁷ Presumably, the bankruptcy proceeding referred to in the same clause would be one also initiated by the creditor rather than the debtor.⁴⁸ Although the stay under section 148 was automatic and applied to both voluntary and involuntary petitions, approval of the petition would occur very early in the case, so the section had limited application.⁴⁹

The stay provision in chapter XII, section 428, provided that "the filing of a petition under this chapter shall operate as a stay of any act or proceeding to enforce any lien upon the real property or chattel real of a debtor."⁵⁰ The stay applied only to voluntary petitions. Another provision enacted by the Chandler Act stayed any "prior mortgage foreclosure, equity, or other proceeding . . . in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made."⁵¹ Like section 428, it applied only to voluntary petitions.⁵² Under section 414, the court had the power to "enjoin or stay until final decree the commencement or continuation of suits against a debtor . . . and any act or the commencement or continuation of any proceeding to enforce any lien upon any property of a debtor."⁵³ None of those provisions could be construed to limit acts by a debtor.

Another limited automatic stay was imposed by section 11a, which stayed "[a] suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him."⁵⁴ But the stay lasted only "until an adjudication or the dismissal of the petition"⁵⁵ (an adjudication that occurred upon the filing of a voluntary petition) and could continue thereafter only by court order.⁵⁶ It also had no impact on post-petition suits, even if they sought collection of pre-petition dischargeable claims, which could be enjoined only if the court acted to do so.⁵⁷ A suit "founded upon a [dischargeable] claim" could be initiated only by a creditor.⁵⁸

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ Under section 141, the judge could approve a voluntary petition under chapter X if "satisfied that it complies with the requirements of this chapter and has been filed in good faith." Bankruptcy Act, § 141, 52 Stat. 887, 887 (1938) (abrogated 1978). An involuntary petition could be approved "[i]f an answer is not filed by a debtor" or "if the answer filed does not controvert any material allegation of the petition[.]" *Id.* § 142, 52 Stat. at 887. The debtor was given ten days after service of the subpoena and of a copy of the petition (subject to extension by the court) to answer the involuntary petition. *Id.* § 136. The judge also had statutory authority to impose a stay under section 2a(15) and section 113 prior to approval of the petition. *Id.* §§ 2a(15) & 113, 52 Stat. at 843, 884.

⁵⁰ *Id.* § 428, 52 Stat. at 918.

⁵¹ *Id.* § 506, 52 Stat. at 927.

⁵² See *id.* §§ 506, 52 Stat. at 927, 428, 52 Stat. at 918.

⁵³ *Id.* § 414, 52 Stat. at 917-18.

⁵⁴ *Id.* § 11a, 52 Stat. at 849.

⁵⁵ *Id.*

⁵⁶ See *id.*

⁵⁷ See H.R. REP. NO. 95-595, at 343-44 (1977).

⁵⁸ Bankruptcy Act § 11a, 52 Stat. 840, 849 (1938) (abrogated 1978); see also S. REP. NO. 95-989, at 80 (1978) (explaining that a creditor must initiate a proceeding in the bankruptcy court to except a debt from discharge, and if the creditor does not do so, the debt is discharged).

In 1960, the Supreme Court established an Advisory Committee on Bankruptcy Rules,⁵⁹ and in 1964, Congress granted to the Supreme Court the authority to prescribe rules with respect to "practice and procedure under the Bankruptcy Act."⁶⁰ Rules governing the automatic stay became effective between 1973 and 1976, and ultimately there were eight such rules.⁶¹ The first to be promulgated were Rules 401, 601, and 13-401.⁶² Rule 11-44 became effective less than a year later, Rules 10-601 and 12-43 a year after that, and Rules 8-501 and 9-4 a year later.⁶³

Rule 401 provided that the filing of the petition stayed the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment was based on an unsecured provable debt other than certain nondischargeable debts.⁶⁴ The language cannot be construed to bar actions by the debtor, and there is no reported case in which the debtor was accused of violating Rule 401.

Rule 601 provided for an automatic stay on court proceedings to enforce liens against estate property or property of the debtor.⁶⁵ Only a creditor could seek to

⁵⁹ The first advisory committee on federal rules was established in 1935, pursuant to the Rules Enabling Act of 1934 which gave the Supreme Court the authority to promulgate uniform rules of procedure for the federal judiciary. 28 U.S.C. § 2072 (2018). *See generally* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982). That advisory committee was tasked with drafting the Federal Rules of Civil Procedure, which became effective in 1938. *Id.* at 1028. Subsequently appointed advisory committees drafted the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence. *Id.* at 1020 n.10.

⁶⁰ *See* Pub. L. No. 88-623, 78 Stat. 1001, 1001 (1964). Prior to that time the Supreme Court was empowered to prescribe "all necessary rules, forms, and orders as to procedure and for carrying this Act into force and effect" under Bankruptcy Act § 30, 30 Stat. 544, 554 (1898) (abrogated 1978).

⁶¹ *See* Kennedy, *supra* note 38, at 177.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ FED. R. BANKR. P. 401(a) (superseded 1983). The rule stated:

"Rule 401: Petition as Automatic Stay of Certain Actions on Unsecured Debts. (a) Stay of Actions. The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act."

Id. The rule did not stay actions on nondischargeable claims for taxes (section 17a(1)), wages or commissions (section 17a(5)), refund of security deposits made by employees (section 17a(6)), or alimony, maintenance or support (section 17a(7)). *Id.*

⁶⁵ *See* FED. R. BANKR. P. 601(a) (superseded 1983), which stated:

"Rule 601: Petition as Automatic Stay Against Lien Enforcement. (a) Stay Against Lien Enforcement. The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings."

Id.

enforce a lien against property of the estate or property of the debtor.⁶⁶ This rule had no applicability to actions by the debtor.

The other rules dealing with the stay applied, as their caption indicates, only to cases under a particular chapter of the Bankruptcy Act. Rules 8-501,⁶⁷ 9-4,⁶⁸ 10-

⁶⁶ *See id.*

⁶⁷ FED. R. BANKR. P. 8-501 (1982) (superseded 1983). The rule read as follows:

"Rule 8-501. Petition as Automatic Stay of Actions against Debtor, Lien Enforcement, and Setoff. (a) Stay of Actions and Lien Enforcement. A petition filed under Rule 8-102 or 8-103 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against it, or of any act or the commencement or continuation of any court proceeding to enforce any lien against its property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of its estate, or of the setoff of any obligation to the debtor against any claim owing by the debtor, except that this rule shall not operate (1) to stay the commencement or prosecution to judgment of any claim or action for damages caused by the operation of trains, buses, or other means of transportation, or (2) to prevent an owner, as trustee, lessor, or otherwise, from taking possession of rolling stock equipment leased or conditionally sold to the debtor when authorized under the lease or conditional sale contract."

Id.

⁶⁸ FED. R. BANKR. P. 9-4 (superseded 1983). The rule read as follows:

"Rule 9-4. Stay of Actions against Petitioner and Lien Enforcement. (a) Automatic Stay of Actions and Lien Enforcement. A petition filed under Rule 9-3 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the petitioner or any officer or inhabitant thereof, which seeks to enforce any claim against the petitioner, or of any act or the commencement or continuation of any court or other proceeding to enforce a lien on the property of the petitioner or a lien on or arising out of taxes or assessments due the petitioner, and shall operate as a stay of the enforcement of any setoff or counterclaim relating to a contract, debt, or obligation of the petitioner."

Id.

601,⁶⁹ 11-44,⁷⁰ 12-43,⁷¹ and 13-401⁷² all provided that the filing of a petition under the relevant chapter automatically stays proceedings "against the debtor" in chapter VIII, chapter IX, chapter X, chapter XI, chapter XII, and chapter XIII cases, respectively. Rule 8-501 and Rule 9-4 also barred the enforcement of any setoffs.⁷³ Unlike Rule 401, the proceedings that were barred under these rules did not need to be based on a dischargeable claim.⁷⁴ There are no examples of the rules being used to preclude debtor action.

⁶⁹ FED. R. BANKR. P. 10-601 (superseded 1983). The rule read as follows:

"Rule 10-601. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement. (a) Stay of Actions and Lien Enforcement. A petition filed under Rule 10-104 or 10-105 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against it, or of any act or the commencement or continuation of any court proceeding to enforce any lien against its property, or of any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of its estate."

Id.

⁷⁰ FED. R. BANKR. P. 11-44 (superseded 1983). The rule read as follows:

"Rule 11-44. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement. (a) Stay of Actions and Lien Enforcement. A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter X of the Act, for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

Id.

⁷¹ FED. R. BANKR. P. 12-43 (superseded 1983). The rule read as follows:

"Rule 12-43. Petition as Automatic Stay of Actions Against Debtor and Lien Enforcement. (a) Stay of Actions and Lien Enforcement. A petition filed under Rule 12-6 or 12-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or any court proceeding for the purpose of the rehabilitation of the debtor or the liquidation of his estate."

Id.

⁷² FED. R. BANKR. P. 13-401 (superseded 1983). The rule read as follows:

"Rule 13-401. Petition as Automatic Stay of Actions Against Debtor and of Lien Enforcement. (a) Stay of Actions and Lien Enforcement. A petition filed under Rule 13-103 or Rule 13-104 shall operate as a stay of the commencement or continuation of any action against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding for the purpose of rehabilitation of the debtor or the liquidation of his estate."

Id.

⁷³ See FED. R. BANKR. P. 9-4(a); 8-501(a).

⁷⁴ Compare FED. R. BANKR. P. 401(a), with FED. R. BANKR. P. 9-4(a) (superseded 1983); 8-501(a) (superseded 1983).

In 1970, Congress created a Commission on the Bankruptcy Laws of the United States to consider changes to the Bankruptcy Act.⁷⁵ The Commission issued its report in July 1973, and recommended a comprehensive automatic stay provision that would read as follows:

Section 4-501. Automatic Stay.

(a) *Stay of Actions and Lien Enforcement; Notice of Stay.*

(1) *Scope of Stay.* A petition filed by or against a debtor under this Act shall operate as a stay of (A) the commencement or continuation of any civil action by or against the debtor seeking recovery of money or affecting property of the estate . . . ; (B) the enforcement of any judgment against him, except for the collection of alimony, maintenance, or support out of property not belonging to the estate; and (C) any act to create or enforce any lien against the property of the estate.⁷⁶

The identical language was included in H.R. 10792, introduced in October 1973,⁷⁷ and its companion bill introduced in the Senate.⁷⁸ The only provision that would be applicable to debtor action would be clause (A) involving civil actions by the debtor; the remaining clauses barred creditor action.⁷⁹

The early attempt at codifying the recommendations of the Commission did not advance. By 1977, when Rep. Edwards of California introduced a bill in the House to amend the Bankruptcy Act, the language in the automatic stay provision—now designated as section 362—that previously barred civil actions by the debtor had been eliminated.⁸⁰ Instead, the original bill, H.R. 6, introduced in January 1977, had the following language:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay of—

(1) the commencement or continuation of a judicial, administrative, or other action or proceeding against the debtor, or that affects property of the estate;

⁷⁵ See Act of July 24, 1970, Pub. L. No. 91-354, § 1(b), 84 Stat. 468, 468–69 (1970) (to "study, analyze, evaluate, and recommend changes" to the Bankruptcy Act "to reflect and adequately meet the demands of present technical, financial, and commercial activities").

⁷⁶ H.R. DOC. NO. 93-137, at 117–18 (1973).

⁷⁷ See H.R. 10792, 93d Cong. § 4-501(a)(1) (1973).

⁷⁸ See S. 2565, 93d Cong. § 4-501(a)(1) (1973); see also H.R. 16643, 93d Cong. § 4-501(a) (1974); S. 4046, 93d Cong. § 4-501(a)(1) (1974); S. 236, 94th Cong. § 4-501(a) (1975); S. 235, 94th Cong. § 4-501(a) (1975); H.R. 31, 94th Cong. § 4-501(a) (1975); H.R. 32, 94th Cong. § 4-501(a) (1975) (all including language to stay civil actions "by or against the debtor . . .").

⁷⁹ See H.R. DOC. NO. 93-137 at 117–18.

⁸⁰ See H.R. 6, 95th Cong. § 362(a) (1977).

- (2) the enforcement, against the debtor or against property of the estate, of a judgment;
- (3) any act to create or enforce any lien against property of the estate; and
- (4) the setoff of any debt owing to the debtor against any claim against the debtor.⁸¹

By May 1977, Rep. Edwards introduced an amended bill, H.R. 7330, which for the first time included language that made the stay imposed by section 362 "applicable to all entities" and expanded the description of the acts that would be stayed.⁸² The new bill included the following language:

- (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of –
 - (1) the commencement or continuation, including the issuance of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title;
 - (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
 - (3) any act to obtain possession of property of the estate or of property from the estate;
 - (4) any act to create or enforce any lien against property of the estate;
 - (5) any act to create 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; and
 - (6) 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 that arose before the commencement of the case under this title.⁸³

Although there is no explanation for the inclusion of the phrase "applicable to all entities,"⁸⁴ it is likely that the intention was to make it clear that the stay applies not

⁸¹ *Id.* § 362.

⁸² H.R. 7330, 95th Cong. § 362 (1977).

⁸³ *Id.*

⁸⁴ "Entity" is defined in section 101(15) to "include[] person, estate, trust, governmental unit, and United States trustee." The definition was added "for convenience." See S. 989, 95th Cong. § 101 (1978), *reprinted in* (1978) U.S.C.C.A.N. 5787, 5809.

only to creditors, but also to courts and other adjudicative bodies before whom the stayed proceedings described in section 362(a)(1) are pending, any officer who might be acting pursuant to a writ of execution under section 362(a)(2), and any third party without a claim who might take action affecting the estate.⁸⁵ These third parties may in fact be closely connected to the debtor.⁸⁶

The amended bills that were ultimately passed by the House and Senate and became the Bankruptcy Code of 1978 had minor changes to the version of section 362 previously proposed.⁸⁷ Both included seven clauses, adding to the six included in the earliest bill submitted by Rep. Edwards a clause barring "any act to collect or recover a claim against the debtor that arose before the commencement of the case under this title."⁸⁸

Clause (8) (current section 362(a)(8)) was not included in either bill and was not mentioned in the Senate Report⁸⁹ or the House Report.⁹⁰ It was added by amendment in the House during reconciliation of the two passed bills.⁹¹ In a statement by Rep. Edwards introducing the House amendment to the Senate amendment to the House bill, he merely stated that "Section 362(a)(8) is new. The provision stays the commencement or continuation of any proceeding concerning the debtor before the U.S. Tax Court."⁹² Professor Frank Kennedy, in his comprehensive article on the automatic stay provisions of the Bankruptcy Code,⁹³ said that the subdivision was included at the recommendation of William T. Plumb, a D.C. lawyer and consultant to the Commission on Bankruptcy Laws of the United States.⁹⁴

⁸⁵ See Kennedy, *supra* note 9, at 11 (noting "[t]he automatic stay operates in the same way against all entities, including governmental units").

⁸⁶ See, e.g., *In re Nicole Gas Prod., Ltd.*, 581 B.R. 843, 853 (B.A.P. 6th Cir. 2018) (founder of debtor and his two attorneys violated automatic stay); *In re McConathy*, No. 90-13449, 2022 WL 1612447, at *1 (Bankr. W.D. La. May 20, 2022) (debtor's counsel violated automatic stay); *In re Miszko*, 627 B.R. 809, 820 (Bankr. S.D.N.Y. 2021) (debtor's counsel violated the automatic stay); *In re Essex Constr., LLC*, 624 B.R. 103, 132–33 (Bankr. D. Md. 2020) (finding debtor's chairman, debtor's treasurer/secretary and others violated the automatic stay); *In re Patriot Nat'l Inc.*, 592 B.R. 560, 572 (Bankr. D. Del. 2018) (refusing to dismiss claim for violation of automatic stay against former chief operations officer and her new employer); *In re Int'l Forex of Cal., Inc.*, 247 B.R. 284, 289 (Bankr. S.D. Cal. 2000) (debtor's chief executive officer and his attorney willfully violated stay).

⁸⁷ See S. REP. NO. 95-989, at 1 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5787. The House bill was passed in lieu of the Senate bill after amending the language to contain much of the text of the Senate bill. *See id.*

⁸⁸ H.R. 8200, 95th Cong. § 362(a)(6) (1977); S. 2266, 95th Cong. § 362(a)(6) (1977).

⁸⁹ See S. REP. NO. 95-989, at 51–52 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5797, 5837–38 (discussing paragraphs (1)–(7) of section 362(a)).

⁹⁰ See H.R. REP. NO. 95-595, at 341–42 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6297–98 (discussing only paragraphs (1)–(7) of section 362(a)).

⁹¹ See 124 CONG. REC. 32391–95 (1978) (statement of Hon. Don Edwards, Chairman of the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary).

⁹² 124 CONG. REC. 11089 (1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6444 (statement of Rep. Edwards).

⁹³ See Kennedy, *supra* note 9, at 23.

⁹⁴ See William T. Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws: Tax Procedures*, 88 HARV. L. REV. 1360, 1399–1422 (1975).

Neither of those reports, nor the statement by Rep. Edwards, provided any indication that the automatic stay of section 362 was aimed at actions by the debtor. Rather, all the language in the reports discussing the stay emphasizes its impact on creditors. The Senate Report included the following language:

The filing of a bankruptcy petition or any other petition commencing a case under this title automatically stays the enforcement of any lien against the debtor's property or to recover any claim owed by the debtor. The automatic stay, by its nature, seriously affects the rights of all of *the debtor's creditors*. As a result, certain limitations are placed upon the continuance of the stay[.] Adequate protection in the form of either cash payments or a replacement lien must be provided *the creditor* whose collateral is decreasing in value or is being consumed during the stay. Moreover, *any creditor* may request the court for relief from such stay⁹⁵

The Senate Report further described the provisions of section 362 in detail, stating that "[t]he automatic stay also provides creditor protection. Without it, *certain creditors* would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors."⁹⁶

The House Report noted that the stay provisions in the previous Bankruptcy Act were "inadequate, both from the standpoint of the *debtor, who needs the protection that the automatic stay provides*, and of the *creditor against whom the stay is applied*."⁹⁷

In discussing section 362(d) (dealing with relief from the stay upon motion by a party in interest), the Senate Report addressed the issue of cause, noting that "[g]enerally, proceedings in which the debtor is a fiduciary, or involving post[-]petition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is *protection of the debtor and his estate from his creditors*."⁹⁸ The House Report stated that:

[c]reditors may obtain relief from the stay if their interests would be harmed by continuance of the stay If relief is granted, *a creditor* may foreclose on property on which he has a lien, may continue a State court suit, or may enforce any judgment he might have obtained before the bankruptcy case, whatever is appropriate in the particular case.⁹⁹

⁹⁵ S. REP. NO. 95-989, at 4–5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5790–91 (emphasis added).

⁹⁶ *Id.* at 49 (emphasis added).

⁹⁷ H.R. REP. NO. 95-595, at 174 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6135 (emphasis added).

⁹⁸ S. REP. NO. 95-989, at 52, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838 (emphasis added).

⁹⁹ H.R. REP. NO. 95-595, at 175, *reprinted in* 1978 U.S.C.C.A.N. at 6136 (emphasis added).

The Senate Report labels the automatic stay as:

one of the fundamental *debtor protections* provided by the bankruptcy laws. It *gives the debtor* a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.¹⁰⁰

Section 362(a) was amended in 1982,¹⁰¹ 1984,¹⁰² 1994,¹⁰³ 2005,¹⁰⁴ and 2010.¹⁰⁵ The 1984 amendments to section 362(a) included in the Bankruptcy Amendments and Federal Judgeship Act¹⁰⁶ were notable because they added the phrase "or to exercise control over property of the estate" in section 362(a)(3).¹⁰⁷ This amendment was included in a section of the act headed "Miscellaneous Amendments to Title 11",¹⁰⁸ and there is nothing in the legislative history of the act suggesting the phrase was intended to make any substantive change in the identity of those to whom the automatic stay applied.¹⁰⁹ The Supreme Court speculated in *City of Chicago v. Fulton*¹¹⁰ that the new language "simply extended the stay to acts that would change

¹⁰⁰ S. REP. NO. 95-989, at 54-55, *reprinted in* 1978 U.S.C.C.A.N. at 5840-41 (emphasis added).

¹⁰¹ Act of July 27, 1982, Pub. L. No. 97-222, § 3(b), 96 Stat. 235 triggered the automatic stay upon an application under section 5(a)(3) of the Securities Investor Protection Act of 1970. Other changes were made to section 362(b) with respect to commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity future contracts or securities or options to purchase or sell commodities or securities.

¹⁰² Act of July 10, 1984, Pub. L. No. 98-353, § 441, 98 Stat. 333.

¹⁰³ Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 501(d)(7)(A) (striking out "(15 U.S.C. 78ee(a)(3))" in the introduction to section 362(a)).

¹⁰⁴ Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 709, 119 Stat. 23 (amending the language of section 362(a)(8) to change "the debtor" to "a corporate debtor's tax liability for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title").

¹⁰⁵ Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, § 2(a)(12)(A), 124 Stat. 3557, 3558 (changing section 362(a)(8) to replace "corporate debtor's tax liability" with "tax liability of a debtor that is a corporation").

¹⁰⁶ The Act was the Congressional response to *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 50-51 (1982), in which the Supreme Court declared the jurisdictional scheme created by the 1978 Bankruptcy Code to be unconstitutional. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 441(a)(2), 98 Stat. 371.

¹⁰⁷ § 441(a)(2), 98 Stat. 371.

¹⁰⁸ § 441(a)(2), 98 Stat. 371.

¹⁰⁹ The amendment was first proposed in 1980 as amendments to a Senate Bill entitled "An Act to correct technical errors, clarify and make minor substantive changes to Public Law 95-598." S. 658, 96th Cong. § 116(a)-(b) (1980). The accompanying House Report suggested that "[e]very effort has been made to . . . maintain existing policy intact" rather than make substantive changes to the relatively new bankruptcy statute. *See* H.R. REP. NO. 1195, at 2 (1980).

¹¹⁰ 592 U.S. 154, 154 (2021).

the status quo with respect to intangible property and acts that would change the status quo with respect to tangible property without 'obtain[ing]' such property."¹¹¹

Indeed, at the same time as this change to section 362(a)(3) was adopted, Congress approved many amendments to what they called "consumer credit provisions"¹¹² including an amended section 521 imposing a new duty on individual debtors to file a statement of intention with respect to retention or surrender of property securing consumer debts within a specified time, and to perform that intention within forty-five days after filing that statement.¹¹³ The goal of that amendment was to "streamline certain procedures that apply to creditors seeking to preserve their rights and interests in a bankruptcy case," that is, allowing secured creditors to move promptly for relief from the stay with respect to secured debts if the debtor sought to retain the collateral.¹¹⁴ Another amendment added a new subsection to section 362 allowing an individual injured by a willful violation of the stay to recover damages.¹¹⁵

If Congress wanted to state that debtors would henceforth be subject to the automatic stay under section 362(a)(3), this would have been the time and place to do so. Instead, there was nothing to suggest that any of the 1984 amendments were intended to do that.

In sum, there is nothing in the legislative history of the Bankruptcy Code that provides any indication that the provisions of section 362(a)(3) were intended to constrain debtor action as opposed to action by entities other than the debtor taken against property of the estate. The legislative history focuses on the stay as a protection for the debtor and limiting action by others against the debtor, the debtor's property, and property of the estate.

III. STATUTORY STAY PROVISIONS IN THE BANKRUPTCY CODE

As discussed above, the legislative history consistently indicates that Congress intended section 362(a) to stay action by persons other than the debtor, in particular, creditors. Yet the introductory language to section 362(a) makes its operation

¹¹¹ *Id.* at 161. The Court rejected any suggestion that the new language was transforming the automatic stay into an affirmative turnover requirement, especially as Congress made no reference to section 542 in the amendment. *Id.*

¹¹² Rep. Rodino described these amendments as reflecting "a compromise worked out with the consumer credit industry on pending legislation relating to consumer bankruptcies." *House Agreement to H. RES. 465, Consideration and Passage of H.R. 5174*, 98th Cong., 130 CONG. REC. H 1795, 1807 (1984) (statement of Rep. Peter Rodino, Sponsor).

¹¹³ See Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 305, 98 Stat. 333, 352-53 (1984).

¹¹⁴ *Amendments to Substantive Bankruptcy Law Contained in H.R. 5174*, 98th Cong. 6504 (1984) (statement of Rep. Peter Rodino, Sponsor).

¹¹⁵ See Bankruptcy Amendments and Federal Judgeship Act of 1984 § 304. The section was originally designated as section 362(h) and subsequently redesignated as section 362(k). See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 305, 119 Stat. 23, 79 (2005).

"applicable to all entities."¹¹⁶ The Supreme Court has cautioned that "[t]he plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"¹¹⁷ But giving effect to the phrase "applicable to all entities" does not mean that the word "entities" means the same thing in all contexts. If one looks at how the term "entity" or "entities" is used in the Bankruptcy Code, it becomes apparent that it rarely is intended to refer to the debtor, and when it is used in that context, Congress generally makes its intention quite clear.

Many of the usages of the term "entity" or "entities" are in the definitions section of the Bankruptcy Code.¹¹⁸ Apart from the definition of "entity" in section 101(15), the term is used seven times in the definition of "affiliate,"¹¹⁹ three times each in the definitions of "creditor,"¹²⁰ "financial institution,"¹²¹ "financial participant,"¹²² and "health care business,"¹²³ twice in the definition of "farmout agreement,"¹²⁴ and once in the definitions of "current monthly income,"¹²⁵ "domestic support obligation,"¹²⁶ "forward contract merchant,"¹²⁷ "insolvent,"¹²⁸ "master netting agreement

¹¹⁶ 11 U.S.C. § 362(a) (2018).

¹¹⁷ *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989).

¹¹⁸ *See generally* 11 U.S.C. § 101.

¹¹⁹ *See id.* § 101(2) (defining affiliate based on the entity's relation to the debtor).

¹²⁰ *See id.* § 101(10) (describing entities that have claims against the debtor or the estate).

¹²¹ *See id.* § 101(22) (describing entities that are commercial or savings banks or related organizations for purposes of the exclusion from the stay under section 362(b)(6), for setoffs of claims against the debtor for certain payments and limitations on the trustee's avoidance powers under sections 546(e), 548(d)(2)(B), and 555, and damage measurement for rejection of certain contracts under section 562). The term is also used in connection with the provisions of the Code dealing with stockbroker and commodity broker liquidations. *See id.* §§ 753, 767. In none of these provisions is the financial institution the debtor. *See id.*

¹²² *See id.* § 101(22A) (defining a "financial participant" which is a term used to define "forward contract" in section 101(25)(E), "repurchase agreement" in section 101(47)(A)(v), "swap agreement" in section 101(53B)(A)(v), as well as in exclusions from the automatic stay in section 362(b)(6), (7) & (17); limitations on the trustee's avoiding powers under sections 546(e), (f) & (g), 548(d)(2), 555, 556, 559, and 560; and damage measurement for rejection of certain contracts under section 562). As was true for the term "financial institution," the term is also used in sections of the Bankruptcy Code dealing with liquidations of stockbrokers and commodity brokers, and the financial participant is not the debtor in any of these sections. *See id.* §§ 753, 761(4), 767.

¹²³ *See id.* § 101(27A).

¹²⁴ *See id.* § 101(21A) (describing agreements under which debtor may have transferred interest in liquid or gaseous hydrocarbons to someone else such that the interest is excluded from property of the estate under section 541(b)(4)(A)).

¹²⁵ *See id.* § 101(10A)(B) (including amounts paid by any entity other than the debtor).

¹²⁶ *See id.* § 101(14A) (referring to a "nongovernmental entity" to whom a debt might have been assigned).

¹²⁷ *See id.* § 101(26) (defining a "forward contract merchant," which is a term used in the definition of "forward contract" in section 101(25)(E) as well as many of the same sections as those in which the term "financial participant" is used). The debtor is not a "forward contract merchant." *See id.*

¹²⁸ *See id.* § 101(32).

participant,"¹²⁹ "repo participant,"¹³⁰ and "swap participant."¹³¹ Of those definitions, the only ones in which the "entity" referred to would be the debtor are "health care business"¹³² and "insolvent."¹³³

Of the remaining sections of the Bankruptcy Code other than section 362 that use the term "entity" or "entities," when they intend the entity discussed to be the debtor, that intent is generally quite clear. For example, section 109(c) sets out the requirements for an "entity" to be a debtor under chapter 9, and all five times the term "entity" is used in that provision, it refers to a prospective debtor.¹³⁴ Similarly, section 301(a) allows a voluntary case to be commenced by an "entity" that may be a debtor under the applicable chapter.¹³⁵ In section 346(c), the Bankruptcy Code includes special provisions dealing with the tax treatment of gains or losses from the distribution of property from a partnership or "any entity treated as a partnership under a State or local law imposing a tax on or measure by income that is a debtor."¹³⁶ Section 349(b)(3) provides that upon dismissal of a case, property of the estate "revests . . . in the entity in which such property was vested immediately before the commencement of the case," which would certainly include the debtor.¹³⁷

Section 542(a) requires "an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease" or of exempt property to deliver the property or its value to the trustee "unless such property is of inconsequential value or benefit to the estate."¹³⁸ The debtor is certainly subject to the turnover requirements.¹³⁹

¹²⁹ See *id.* § 101(38B) (defined as an entity that is a party to a master netting agreement with the debtor and is therefore not the debtor).

¹³⁰ See *id.* § 101(46) (defined as an entity that has an outstanding repurchase agreement with the debtor and is therefore not the debtor).

¹³¹ See *id.* § 101(53C) (defined as an entity that has an outstanding swap agreement with the debtor and is therefore not the debtor).

¹³² The operative provisions using that definition are in sections 333, 351, 503(b)(8), and 704(a)(12). All apply to a debtor who qualifies as a "health care business." See *id.* §§ 333, 351, 503(b)(8).

¹³³ The term is used only when applied to the debtor under sections 109(c)(3) (municipal debtor); 525 (discrimination against debtor); 543(d) (turnover of property by a custodian); 545 (avoidance of statutory liens); 546(c)(1) (reclamation of goods); 546(d) (reclamation of grain or fish); 547(b) (preferences); 548 (fraudulent transfers and obligations); 553 (setoffs); and 1114(l) (reinstatement of retiree benefits). See *id.* §§ 109(c)(3); 525; 543(d); 545; 546(c)(1); 546(d); 547(b); 548; 553; and 1114(l)(2) (2018).

¹³⁴ *Id.* § 109(c).

¹³⁵ *Id.* § 301(a).

¹³⁶ *Id.* § 346(c). In section 346(a) there is also a provision for the creation of a separate taxable estate or "entity" that may be created in a bankruptcy case by operation of the Internal Revenue Code, and a reference in section 346(g) requiring taxes imposed under section 346(a) or (b) to be imposed at rates generally applicable to the "same types of entities" under State or local law. See *id.* §§ 346(a), (b), (g).

¹³⁷ *Id.* § 349(b)(3).

¹³⁸ *Id.* § 542(a).

¹³⁹ See, e.g., *Brown v. Pyatt* (*In re Pyatt*), 486 F.3d 423, 427 (8th Cir. 2007); *In re Snodgrass*, No. 09-01148, 2010 WL 6259885, at *5 (B.A.P. 9th Cir. July 12, 2010); *In re Johnson*, 371 B.R. 380, 387–88 (Bankr. E.D. Ark. 2007).

The definition of "foreign futures commission merchant" in section 761(12) uses the term "entity" and refers to a debtor who meets that definition.¹⁴⁰ An attorney or accountant retained by an official committee in chapter 11 may not "represent any other entity having an adverse interest in connection with the case," and that would certainly include representing the debtor.¹⁴¹

Chapter 15 often uses "entity" to refer to the debtor. In section 1501, the purposes of chapter 15 are stated to include "fair and efficient administration of cross-border insolvencies that protects the interest of all creditors, and other interested entities, including the debtor."¹⁴² Certain "entit[ies]" who might otherwise be debtors are excluded from chapter 15 under section 1501(c).¹⁴³ The definition of "debtor," for purposes of chapter 15, uses the term "entity."¹⁴⁴ Section 1520(c) states that the recognition of a foreign main proceeding "does not affect the right of a foreign representative or an entity to file a petition commencing" a chapter 15 case.¹⁴⁵ And section 1522 provides for the court to grant relief or modify or terminate relief "only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."¹⁴⁶

Other sections that use the terms "entity" or "entities" are clearly inapplicable to the debtor, and there are far more of them than those that could be interpreted to refer to the debtor.¹⁴⁷

¹⁴⁰ 11 U.S.C. § 761(12). Surprisingly, the definitions of "commodity options dealer," *id.* § 761(6), and "leverage transaction merchant," *id.* § 761(14), who could also be the debtor, use the term "person" rather than "entity."

¹⁴¹ *Id.* § 1103(b); *see also* Comm. of Equity Sec. Holders v. Off. Comm. of Unsecured Creditors (*In re* Fed. Mogul-Glob., Inc.), 348 F.3d 390, 404–05 (3d Cir. 2003) (concluding that accountant for equity committee who received financial information from debtor's professionals was not representing of debtor in violation of section 1103(b)).

¹⁴² 11 U.S.C. § 1501(a)(3).

¹⁴³ *Id.* § 1501(c). Chapter 15 does not apply to "a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b)," or to "an entity subject to a proceeding under the Securities Investor Protection Act of 1970, a stockbroker subject to subchapter III of chapter 7 of this title, or a commodity broker subject to subchapter IV of chapter 7 of this title." *Id.* § 1501(c)(1)–(3).

¹⁴⁴ *Id.* § 1502(1). Debtor is defined as an "entity that is the subject of a foreign proceeding." *Id.*

¹⁴⁵ *Id.* § 1520(c).

¹⁴⁶ *Id.* § 1522(a).

¹⁴⁷ *See id.* §§ 107 (describing who can get access to papers filed in a bankruptcy case, protecting trade secrets or confidential information and allowing access to entities "acting pursuant to the police or regulatory power of a domestic governmental unit"); 303(b)(1) (identifying the entities who can join in an involuntary petition against the debtor); 329(b)(2) (allowing return of unreasonable pre-petition compensation paid to an attorney representing a debtor to the "entity that made such payment"); 341(b) (allowing entity representatives of creditors to appear at the meeting of creditors); 342(f) (allowing entities to file with the bankruptcy court a notice of address to be used for notices); 345(b)–(c) (discussing entities with whom trustees make deposit of money of the estate); 347(b) (dealing with property of "the entity acquiring the assets of the debtor under the plan"); 361 (describing adequate protection of an interest of an entity in property harmed by the stay under section 362, use, sale or lease of property under section 363 or approving post-petition financing under section 364); 363 (referring to entities other than the debtor that have interests in property of the estate, including cash collateral, and entities that purchase or lease property from the estate); 364(e) (protecting entities that extend credit to the trustee upon reversal or modification on appeal); 364(f) (referring to entities that are underwriters in immunizing sales of non-equity securities from securities laws); 365 (using the above-referenced term(s) to refer to someone other than the debtor who is party to an executory contract or unexpired lease or to whom an

assignment is made); 501(b) (allowing entity liable to creditor with debtor to file proof of claim); 502(d)–(e) (directing disallowance of claims of certain entities); 503 (dealing with administrative expenses of certain entities and reduction of amounts based on sums received from entity other than the debtor); 506(d)(2) (dealing with liens securing disallowed claims); 507(d) (dealing with entities subrogated to claims of creditors); 509 (discussing entities liable with the debtor on claims); 521(a)(7) (entity designated by debtor may serve as administrator of employee benefit plan); 523(a)(6) (excepting from discharge claims for willful and malicious injury by the debtor to another entity or its property); 524(e) (discharge does not affect liability of another entity); 524(g)(1)(B) (permitting injunction to enjoin entities from seeking to recover claims to be paid from trust); 524(g)(3) (protecting successors to or lenders to debtor or successor); 524(g)(4) (making injunction applicable to all entities and protecting entities involved in financial transaction involving the debtor or a related party); 524(k)(3)(E) (disclosure by entity in connection with reaffirmation of debt); 541(b)(1) (excluding from estate power exercisable by debtor for benefit for entity other than debtor); 541(b)(4)(B) (excluding from the estate certain interests of debtor in liquid or gaseous hydrocarbons transferred to an entity); 541(b)(5)(B) (excluding from the estate funds in education individual retirement accounts that are not pledged to any entity); 541(f) (allowing property of a debtor who is a tax exempt corporation to be transferred to an entity that is not a tax exempt corporation); 542(b) (referring to an entity that owes a debt that is property of the estate); 542(c) (allowing good faith transfers of property of the estate by an entity without knowledge of the case); 543(c)(1) ("protect[ing] all entities to which a custodian has become obligated with respect to . . . property" of the debtor); 545(1)(F) (referring to an entity causing execution against property of the debtor); 546(b)(1) (making avoiding powers subject to generally applicable law permitting perfection—or action to maintain perfection—to be effective against entity acquiring rights in property before perfection or act to maintain it); 547(i) (referring to transfers made by the debtor to an entity that is not an insider); 548(a)(1)(A), (e)(1)(D) (actual intent to hinder, delay or defraud an entity to whom debtor was indebted); 548(a)(2), (a)(4) (referring to charitable entity to whom charitable contribution was made); 550(a)(1) (recovery from entity for whose benefit a transfer was made); 552(b)(1), (b)(2) (referring to entities that entered into security agreement with the debtor); 553(a)(2) (referring to claims against the debtor that were "transferred, by an entity other than the debtor, to such creditor"); 557 (referencing entities engaged in growing grain or claiming an interest in grain); 558 (referring to defenses available to the debtor as against any entity); 561(b)(3)(B) (allowing offsets of claims under netting agreements between a clearing organization and another entity that was approved by the Commodity Future Trading Commission); 704(a)(11) (referring to an entity designated by debtor serving as administrator of employee benefit plan); 707(b)(1) (excluding contributions to a charitable entity in deciding if filing chapter 7 case was an abuse); 725 (requiring trustee to "dispose of any property in which an entity other than the estate has an interest"); 741(2) (defining "customer" of debtor); 746 (discussing entities that qualify as customers or having customer claims); 747(4) (providing for subordination of claim of customer who was an entity controlling "management or policies of the debtor"); 761(7)–(9) (defining "contract market," "registered entity," and "customer"); 922(a) (describing automatic stay in municipal bankruptcy); 944(c)(2) (stating no discharge for debt owed to entity without notice of case); 1106(a)(4)(B) (specifying the entities to whom statements of investigation must be transmitted); 1114(a) (defining "retiree benefits" as payments to any entity for purposes of providing employee benefits); 1123(a)(5)(B), (a)(5)(J) (illustrating adequate means for a plan's implementation, including transfers of property of the estate to entities or issuance of securities of such entities); 1123(c) (disallowing use, sale or lease of exempt property in plan for individual debtor proposed by an entity other than debtor); 1126(c)–(e) (discussing designation of claims or interests held by certain entities and treatment in voting); 1129(b)(2)(A)(i) (defining "fair and equitable" with respect to secured claims permitting property subject to the liens to be transferred by the debtor to another entity); 1141(a) (stating that a plan binds the debtor as well as any entity issuing securities under the plan or acquiring property under the plan); 1142(a) (stating "the debtor and any entity organized or to be organized for the purpose of carrying out the plan" shall carry out the plan); 1143 (denying entities right to participate in distributions under the plan if they do not surrender security or take other required action); 1144(1) (stating revocation of confirmation must protect "any entity acquiring rights in good faith reliance on the order of confirmation"); 1145(a) (referring to entities that are underwriters in immunizing sales securities from securities laws); 1145(b) (defining who qualifies as an underwriter for dealing in claims or securities of debtor); 1170(c)–(d) (describing who gets notice of certain actions involving abandonment or railroad lines or appeals of an order authorizing abandonment); 1172(b) (referring to operation of railroad lines "by an entity other than the debtor or a successor to the debtor"); 1205(b) (dealing with adequate protection of an interest

This analysis simply supports the proposition that the use of the words "applicable to all entities" in section 362(a) does not necessarily mean that the "entities" to which the stay applies under every subsection of section 362(a) should be interpreted to include the debtor. Indeed, if we look at each subsection in turn, it is clear that the language could not possibly be interpreted in most of those subsections to include the debtor.

Section 362(a)(1) bars "the commencement or continuation . . . of [certain] judicial, administrative, or other action[s] or proceeding[s] against the debtor . . ."¹⁴⁸ The language is phrased in the passive voice and stays commencement or continuation of the action or proceeding itself (which must be against the debtor) without regard to who is seeking to commence or continue it.¹⁴⁹ Obviously the debtor cannot commence an action against itself, but the stay does prevent the debtor from taking any act to continue an action brought against the debtor after the bankruptcy filing, including taking an appeal.¹⁵⁰ But the clause is aimed at preventing creditors from pursuing actions that, if successful, would negatively impact the debtor and the debtor's property or property of the estate.¹⁵¹ The provision does not stay actions by the debtor against another party because there is no bankruptcy policy reason to do so.¹⁵²

This is not to suggest that debtors may commence actions during bankruptcy cases whenever they wish. Any pre-petition cause of action held by the debtor at the moment of the bankruptcy filing becomes property of the estate under section

of an entity in property in a chapter 12 case); 1206 (allowing trustee to sell property free and clear of interest of entity other than the estate); 1222(b)(10) (allowing plan to provide for vesting of property of the estate in the debtor or any other entity); 1226(c) (court may order entity from whom debtor receives income to pay income to trustee after confirmation); 1305(a) (allowing entity that holds certain post-petition claims to file proof of claim); 1322(b)(9) (providing for vesting of property on confirmation in debtor or any other entity); 1325(b)(2)(A) (dealing with charitable contributions to charitable entity); 1325(c) (court may order "entity from whom the debtor receives income to pay" income to trustee after confirmation); 1505 (allowing a trustee or another entity to be authorized to act in a foreign country); 1522(c) (allowing court to modify or terminate relief at the request of the foreign representative "or an entity affected by [the] relief granted").

¹⁴⁸ *Id.* § 362(a)(1).

¹⁴⁹ *See id.*

¹⁵⁰ *See, e.g.,* TW Telecom Holdings Inc. v. Carolina Internet Ltd., 661 F.3d 495, 496–97 (10th Cir. 2011); Parker v. Bain, 68 F.2d 1131, 1135–37 (9th Cir. 1995); Ass'n. of St. Croix Condo. Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448–49 (3d Cir. 1982); *In re Ayoub*, 643 B.R. 518, 519–20 (Bankr. M.D. Fla. 2022). Courts reached that conclusion because it would be nonsensical to stay an appeal if the debtor were the appellee but not when the debtor was the appellant. *See* Ingersoll-Rand Fin. Corp. v. Miller Mining Co., 817 F.2d 1424, 1426 (9th Cir. 1987) (quoting *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60, 62 (6th Cir. 1983)).

¹⁵¹ *See* 11 U.S.C. § 362(a).

¹⁵² *See, e.g.,* Palmdale Hills Prop., LLC v. Lehman Com. Paper, Inc. (*In re* Palmdale Hills Prop., LLC), 654 F.3d 868, 875 (9th Cir. 2011); Thomas v. Blue Cross & Blue Shield Ass'n, 333 F. App'x 414, 420 (11th Cir. 2009); Koolik v. Markowitz, 40 F.3d 567, 568 (2d Cir. 1994); Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n, 892 F.2d 575, 577 (7th Cir. 1989); Ass'n of St. Croix Condo. Owners, 682 F.2d at 448–49; *In re Merrick*, 175 B.R. 333, 337–38 (B.A.P. 9th Cir. 1994); *Lanasa v. Stiene*, No. 22-5686, 2023 WL 4677070, at *1 (E.D.N.Y. July 21, 2023); *In re Rogers*, 21 B.R. 626, 629 (Bankr. N.D. Fla. 2000); *In re Reichenbach*, 219 B.R. 247, 250 n.3 (Bankr. E.D. Ark. 1998).

541(a)(1), and only the trustee has standing to pursue it.¹⁵³ But that is a matter of determining the real party in interest to prosecute an action, not the automatic stay.¹⁵⁴ If the debtor seeks to pursue such an action, it should be dismissed.¹⁵⁵

Section 362(a)(2) prevents "the enforcement, against the debtor or against property of the estate, of a [pre-petition] judgment."¹⁵⁶ The debtor could not obtain a pre-petition judgment against itself that could be enforced after the petition is filed, so the provision is not aimed at the debtor.¹⁵⁷

Section 362(a)(3) enjoins "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."¹⁵⁸ This is the sole provision that has been invoked in cases finding the debtor's actions violated the automatic stay, and it will be discussed further below.¹⁵⁹

Section 362(a)(4) deals with "any act to create, perfect, or enforce any lien against property of the estate."¹⁶⁰ As liens can be created, perfected, or enforced only by creditors, and the debtor cannot be a creditor of the estate, this provision is also inapplicable to the debtor.¹⁶¹

Section 362(a)(5), like section 362(a)(4), precludes acts "to create, perfect, or enforce" liens, in this case against property of the debtor or securing a pre-petition claim.¹⁶² The debtor can neither have a lien against its own property nor have a pre-petition claim.

Section 362(a)(6) stays acts "to collect, assess, or recover a [pre-petition] claim against the debtor."¹⁶³ The debtor can have no claims against itself, so this provision does not apply to it.

Section 362(a)(7) bars setoffs of pre-petition debts "owing to the debtor . . . against any claim against the debtor."¹⁶⁴ The debtor can neither owe a debt to itself nor have a claim against itself so it could not possibly setoff one against the other.

¹⁵³ See *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) (citing *Barger v. City of Cartersville*, 348 F.3d 1289, 1292 (11th Cir. 2003)); *Wieburg v. GTE Sw. Inc.*, 272 F.3d 302, 306 (5th Cir. 2001); *Nat'l Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999); *BioConvergence LLC v. Attariwala*, No. 19-01745, 2020 WL 1915269, at *4 n.8 (S.D. Ind. Apr. 20, 2020); *Compton v. Home Depot U.S.A. Inc.*, No. 17-2283, 2018 WL 2986104, at *2 (D. Kan. June 13, 2018); *In re Nicole Gas Prod., Ltd.*, 581 B.R. 843, 853 (B.A.P. 6th Cir. 2018); *In re DeLay*, No. 14-71512, 2018 WL 1596883, at *17 (Bankr. C.D. Ill. Mar. 29, 2018).

¹⁵⁴ See FED. R. CIV. P. 17(a) (requiring that an action be "prosecuted in the name of the real party in interest").

¹⁵⁵ See, e.g., *Jones v. Clayton Cnty.*, 184 F. App'x 840, 2006 WL 1627117, at *842 (11th Cir. June 7, 2006); *Yelverton v. District of Columbia*, 529 B.R. 1, 4 (D.D.C. 2014); *Marshall v. Honeywell Tech. Sols., Inc.*, 675 F. Supp. 2d 22, 26 (D.D.C. 2009); *Correll v. Equifax Check Servs., Inc.*, 234 B.R. 8, 10 (D. Conn. 1997); *In re Malloch*, 613 B.R. 252, 253–54 (E.D. Mich. 2020); *In re Smith*, 501 B.R. 325, 325–26 (Bankr. E.D. Mich. 2013); *In re Bailey*, 306 B.R. 391, 396 (Bankr. D.D.C. 2004) (dismissing action).

¹⁵⁶ 11 U.S.C. § 362(a)(2) (2018).

¹⁵⁷ See *Kennedy*, *supra* note 9, at 14–15.

¹⁵⁸ 11 U.S.C. § 362(a)(3).

¹⁵⁹ See, e.g., *In re Beery*, 452 B.R. 825, 833 (Bankr. D.N.M. 2011); see also *infra* Part IV.

¹⁶⁰ 11 U.S.C. § 362(a)(4).

¹⁶¹ See *id.* §§ 101(10)(A), 541(a)(1).

¹⁶² *Id.* § 362(a)(5).

¹⁶³ 11 U.S.C. § 362(a)(6).

¹⁶⁴ 11 U.S.C. § 362(a)(7).

Section 362(a)(8) precludes "the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor" ¹⁶⁵ Because a taxpayer is the entity that would file a petition with the U.S. Tax Court in response to a Notice of Deficiency issued by the Internal Revenue Service, one could assume that the language of this clause is in fact aimed at the debtor and prevents the debtor from commencing an action in the Tax Court after an order for relief. ¹⁶⁶

But one cannot point to the existence of section 362(a)(8) as evidence that the "entities" referred to in the introductory language in section 362 was intended to include the debtor because that subsection did not exist when the language referring to "all entities" was inserted in the proposed bills. ¹⁶⁷ Section 362(a)(8) has been described by one commentator as "a very peculiar provision" in that "it is the only provision that stays both the [creditor] and the debtor." ¹⁶⁸ As early as the Revenue Act of 1926, the tax laws had expressly barred a taxpayer in a bankruptcy proceeding from filing a petition for redetermination of taxes with the Tax Court. ¹⁶⁹ The justification for this provision was that the Commissioner of Internal Revenue:

would, despite a favorable decision for the Government, be unable to assess and distrain upon the assets under the control of the bankruptcy or equity court. The section therefore provides, in case of determination of deficiency, that if petition for redetermination therefor has not been presented to the board, the deficiency shall be assessed and the claim presented to the bankruptcy or equity court. ¹⁷⁰

When Congress enacted the Bankruptcy Code, it included the same prohibition in

¹⁶⁵ 11 U.S.C. § 362(a)(8). The provision applies only to tax liabilities of a corporate debtor for a taxable period the bankruptcy court may determine or concerning the tax liability of an individual debtor for a taxable period ending pre-petition. *See id.*

¹⁶⁶ *See* 124 CONG. REC. 32413, reprinted in 1978 U.S.C.C.A.N. 6436, 6489 (Statement by the Hon. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Upon Introducing the House Amendment to the Senate Amendment to H.R. 8200) (in commenting on what was then section 362(a)(6) noting that "[s]tay of the assessment and the permission to issue a statutory notice of a tax deficiency will permit the debtor to take his personal tax case to the Tax Court, if the bankruptcy judge authorizes him to do so"). One bankruptcy court concluded that section 362(a)(8) does not apply to the debtor because section 362(a) as a whole is intended to protect the debtor "from the pressure and harassment of creditors seeking to collect their claims" and "prevent[] the dismemberment of debtor's assets by individual creditors levying on property" *In re Thompson*, 241 B.R. 920, 921 (Bankr. S.D. Ga. 1999). Because "[t]he fundamental grounds for the § 362 stay are not furthered by applying the stay to the debtor and the debtor's choice of forum for determining his tax liability," the court concluded that the phrase "all entities" to which section 362(a) refers does not include the debtor because the debtor is not seeking to collect a debt against himself or his estate. *Id.* Other courts have disagreed. *See, e.g., Sicari v. Comm'r*, 136 F.3d 925, 928 (2d Cir. 1998); *In re Yerushalmi*, No. 8-07-72816, 2019 WL 2385188, at *3 (Bankr. E.D.N.Y. June 5, 2019); *In re Wood*, 328 B.R. 880, 889–90 (Bankr. S.D. Fla. 2005).

¹⁶⁷ *See supra* notes 53–59.

¹⁶⁸ C. Richard McQueen & Jack F. Williams, *TAX ASPECTS OF BANKRUPTCY LAW* § 5.16 (3rd ed. 2024).

¹⁶⁹ Revenue Act of 1926, § 282(a), 44 Stat. 9, 62 (1926) (codified as amended at 26 U.S.C. § 6871(b)).

¹⁷⁰ S. REP. NO. 52, at 31, 69th Cong. (1926).

section 362(a)(8).¹⁷¹ The provision was unnecessary to bar the filing of a petition with the Tax Court when the taxpayer had filed for bankruptcy protection because that was already precluded by the tax laws.¹⁷² But it was necessary to stay pending proceedings before the Tax Court, which was consistent with the general principle—also embodied in section 362(a)(1)—that any litigation against the debtor should be stayed.¹⁷³

Tax cases are not covered by section 362(a)(1) only because of the unique procedural posture of such cases—they are commenced by the taxpayer rather than by the government against the taxpayer.¹⁷⁴ Section 362(a)(1) does not apply to proceedings that are initiated by the debtor.¹⁷⁵

Even though section 362(a)(8) incorporates the tax law prohibition on the filing of a petition by the debtor,¹⁷⁶ its existence should not have any bearing on whether a debtor's actions are stayed under section 362(a)(3). Its history and purpose are entirely different, and it was incorporated into the Bankruptcy Code at a later time.¹⁷⁷

The assertion that the "entities" to which section 362(a) applies were generally not intended to include the debtor is also supported by examining the remaining provisions of section 362. Those provisions are also aimed at parties other than the

¹⁷¹ See 11 U.S.C. § 362(a)(8) (2018).

¹⁷² See *id.*

¹⁷³ See *id.* § 362(a)(1).

¹⁷⁴ See *id.*

¹⁷⁵ See, e.g., *Brown v. Armstrong*, 949 F.2d 1007, 1009–12 (8th Cir. 1991) ("[A]s the plain language of the statute suggests . . . the Code's automatic stay does not apply to judicial proceedings . . . that were initiated by the debtor."); *Mar. Elec. Co., Inc., v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991) ("The statute does not address actions brought by the debtor . . ."); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989); *Carley Cap. Grp. v. Fireman's Fund Ins. Co.*, 889 F.2d 1126, 1127 (D.C. Cir. 1989); *Freeman v. Comm'r.*, 799 F.2d 1091, 1093 (5th Cir. 1986).

¹⁷⁶ See 11 U.S.C. § 362(a)(8). Congress did not intend for the automatic stay to prevent the debtor from obtaining a determination of the debtor's tax liabilities in a bankruptcy case. Rather section 362(a)(8) is the mechanism Congress employed to provide the taxpayer a choice of forum for determination of the tax liabilities. See *id.* Under section 362(b)(9)(B) a governmental unit may issue a notice of tax deficiency despite the automatic stay. See *id.* § 362(b)(9)(B). Congress then provided the debtor/taxpayer a means of resolving disputes over tax liability in the bankruptcy court in section 505, which empowers the bankruptcy court to make tax determinations. See *id.* § 505(a)(1). Under 11 U.S.C. § 505(a)(1), the court may determine "the amount or legality of any tax" but may not do so if the amount or legality was "contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction" before the petition was filed. See *id.* § 505(a)(1)–(2).

Alternatively, the debtor may seek relief from the stay and file a petition with the Tax Court, and the time for doing so is tolled until the automatic stay terminates. See 26 U.S.C. § 6213(f). The debtor may also object to a claim filed by the Internal Revenue Service in the bankruptcy case and allow the bankruptcy court to determine the validity of the claim. See 11 U.S.C. § 502(b).

If the debtor files a petition with the Tax Court after a bankruptcy filing without seeking relief from the stay, the Tax Court must dismiss the proceeding because it lacks jurisdiction. See, e.g., *Lawler v. Comm'r.*, 717 F. App'x 902, 904 (11th Cir. 2017); *Richmond v. United States*, 234 B.R. 787, 788–89 (S.D. Cal. 1997). See generally Bryan E. Gates, 4A Internal Revenue Manual – Abridged, & Annotated § 8.7.6.5.5.2(1) (Feb. 26, 2013). If the Tax Court renders a post-petition decision on a petition filed before the bankruptcy filing, it is void. See, e.g., *Marcinek v. Comm'r.*, 422 F. App'x 132, 134 (3d Cir. 2011).

¹⁷⁷ See 11 U.S.C. § 362(a)(8).

debtor.¹⁷⁸ For example, the acts excluded from the operation of the automatic stay in section 362(b) are almost exclusively acts that would be undertaken by someone other than the debtor, such as a governmental entity pursuing criminal proceedings (section 362(b)(1)) or enforcing police and regulatory powers (section 362(b)(4)) or dealing with the debtor's tax liabilities (sections 362(b)(9), 362(b)(18), 362(b)(26)) or foreclosing on insured mortgages (section 362(b)(8)) or foreclosing on a ship mortgage (section 362(b)(13)) or licensing a debtor educational institution (section 362(b)(15)) or excluding the debtor from federal health care programs (section 362(b)(28)); certain actions taken by secured creditors (sections 362(b)(3), 362(b)(20), 362(b)(21)); landlords seeking eviction (sections 362(b)(22) and 362(b)(23)); actions by counterparties to certain financial instruments (sections 362(b)(6), 362(b)(7), 362(b)(17) and 362(b)(27)); employers withholding amounts from debtor's wages to pay loans from retirement plans (section 362(b)(19)); and parties dealing with the debtor on family law matters (section 362(b)(2)).¹⁷⁹

The only exclusion from the automatic stay that applies to an act taken by the debtor is in section 362(b)(24), which states that the bankruptcy petition does not stay "any transfer that is not avoidable under section 544 and that is not avoidable under section 549."¹⁸⁰ The meaning of this exclusion is rather opaque.¹⁸¹

Transfers under section 544 occur prior to the bankruptcy filing and could not possibly be subject to the automatic stay.¹⁸² Looking at post-petition transfers, it would be a strange reading of the Bankruptcy Code to interpret section 362(a) to prevent any post-petition transfer that is permitted under section 549. It is equally strange to suggest that a post-petition transfer that is avoidable under section 549 is also void under section 362(a).¹⁸³ But the exclusion (which was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005)¹⁸⁴ may be intended to make explicit that the automatic stay does *not* apply to *any* transfer by the debtor, either before or after the bankruptcy filing. Rather, sections 544 and 549 are the exclusive means of attacking those transfers.¹⁸⁵ The existence of

¹⁷⁸ See generally *id.* § 362(b) (listing actions that can be brought despite the filing of a petition); cf. *id.* § 362(a) (listing actions *against the debtor* that are automatically stayed by the filing of a bankruptcy petition).

¹⁷⁹ See generally *id.* § 362(b).

¹⁸⁰ *Id.* § 362(b)(24).

¹⁸¹ See Jeannine R. Lesperance, *Bankruptcy Abuse Prevention Consumer Protection Act of 2005 and the "Automatic" Stay*, U.S. ATTY'S BULL. 12, 14 (2006) (suggesting that "it is difficult to read the provision in a manner which makes sense").

¹⁸² See *id.* (explaining that 11 U.S.C. § 544 applies only to pre-petition events unaffected by the stay).

¹⁸³ See text at notes 234–248 *infra*.

¹⁸⁴ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 311(b), 119 Stat. 84 (2005).

¹⁸⁵ See, e.g., *In re Signature Apparel Grp. LLC*, 577 B.R. 54, 86 (Bankr. S.D.N.Y. 2017). The amendment is also likely intended to resolve the conflict that had arisen as to whether the safe harbor in section 549(c) was applicable to a transfer that was void because it violated the automatic stay. Compare, e.g., *In re Ford*, 296 B.R. 537, 546 (Bankr. N.D. Ga. 2003) (concluding that section 549(c) was not applicable to transfers violating automatic stay), with *Tsafaroff v. Taylor* (*In re Taylor*), 884 F.2d 478, 483 (9th Cir. 1989) (finding section 549(c) applicable to transfers violating automatic stay). Because of the new section 362(b)(24), a transfer of real property to a good faith purchaser without knowledge of the bankruptcy case and for present fair

section 362(b)(24) therefore supports the assertion that section 362(a) is not aimed at actions by the debtor.

The provisions describing when the stay terminates (or does not go into effect) under section 362(c)(3) and (4) as to serial filers also support the understanding that section 362(a) is not aimed at actions by the debtor.¹⁸⁶ Section 362(c)(3) applies when a single or joint case was pending against an individual debtor within the preceding one-year period but was dismissed.¹⁸⁷ Under section 362(c)(3)(A), the stay of "any action taken with respect to a debt or property securing such debt or with respect to any lease" terminates on the thirtieth day after filing.¹⁸⁸

The operative phrase applies to a creditor with a debt, a secured creditor with a security interest or mortgage in property of the debtor, or a lessor with a lease to the debtor.¹⁸⁹ The language does not apply to any action by the debtor.¹⁹⁰ This interpretation is buttressed by the language of section 362(c)(3)(B), which allows a party in interest to seek continuation of the stay under section 362(c)(3)(B) "as to any or all creditors" upon a showing that the filing of the current case was in good faith "as to the creditors to be stayed;" the language clearly implies that creditors are the ones subject to the stay, not the debtor.¹⁹¹ Moreover, the language in section 362(c)(3)(C) creates a presumption that the current case is not filed in good faith "as to all creditors" under some circumstances and "as to any creditor" in others.¹⁹² There is no presumption with respect to the debtor.

Similarly, in section 362(c)(4), if two or more single or joint cases were pending against an individual debtor within the previous year but were dismissed, the stay "shall not go into effect upon the filing of the later case."¹⁹³ The provision goes on to allow a party in interest to request that the court "order the stay to take effect in the case as to any or all creditors" upon a showing that the filing of the current case was in good faith "as to the creditors to be stayed;" there is no suggestion that the stay could be imposed as to the debtor upon motion.¹⁹⁴ The presumption that the present case was not filed in good faith, like that for section 362(c)(3)(C), applies "as to all creditors" and "as to any creditor" under certain circumstances.¹⁹⁵

equivalent value that could not be avoided under section 549(c) is also protected from being challenged as a stay violation. *See* 11 U.S.C. § 362(b)(24).

¹⁸⁶ *See* 11 U.S.C. § 362(c)(3)–(4). The provisions have been criticized not only for their drafting but for the philosophy of punishing the debtor for bad acts (repeated filings) by denying the debtor the benefit of the automatic stay. *See* Ponoroff, *supra* note 9 at 243–44. The fact that Congress chose to do so supports the assertion that the automatic stay is not aimed at preventing bad acts by the debtor, because then its elimination would help the debtor.

¹⁸⁷ *See* 11 U.S.C. § 362(c)(3). The provision does not apply to a case refiled under a chapter other than chapter 7 after the first case was dismissed under section 707(b). *Id.*

¹⁸⁸ *Id.* § 362(c)(3)(A).

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *See id.* § 362(c)(3)(B).

¹⁹² *Id.* § 362(c)(3)(C)(i)–(ii).

¹⁹³ *Id.* § 362(c)(4)(A)(i).

¹⁹⁴ *See id.* § 362(c)(4)(B).

¹⁹⁵ *Id.* § 362(c)(4)(D).

The structure of section 362(d) providing for relief from the stay also suggests that the party seeking such relief is generally not the debtor. Section 362(d)(1) illustrates "cause" for seeking relief as "the lack of adequate protection of an interest in property of such party in interest."¹⁹⁶ Only a person in interest other than the debtor could need adequate protection of its interest in property.

This is not to suggest that the debtor may not seek relief from the stay under section 362(d)(1). The debtor may find it beneficial to permit continuation of pending litigation against the debtor in a non-bankruptcy setting.¹⁹⁷ But the substantive provision of section 362(a) from which the debtor seeks relief from the stay in those circumstances is section 362(a)(1), which stays actions and proceedings "against the debtor."¹⁹⁸

Section 362(d)(2) relates to acts against property and requires a showing that the "debtor does not have an equity in such property."¹⁹⁹ The debtor would never be seeking relief from the stay with respect to property in which the debtor has no equity. Section 362(d)(3) involves acts against single asset real estate "by a creditor whose claim is secured by an interest in such real estate" if the debtor has not timely filed a feasible plan of reorganization or begun monthly payments.²⁰⁰ Although debtors may file motions seeking to extend the deadline to file a plan or commence payments under section 362(d)(3),²⁰¹ only a creditor with an interest in the single asset real estate can file a motion for relief from the stay under this provision.²⁰² Finally, section 362(d)(4) explicitly limits its operation to "a creditor whose claim is secured by an interest in . . . real property."²⁰³ The debtor cannot seek relief from the stay under this provision.

Because the debtor cannot seek relief from the stay under section 362(d) with respect to an act "against property of the estate," the timing rules for decisions on such motions under section 362(e) are also inapplicable to the debtor.²⁰⁴ Indeed, section 362(e) was characterized in the House Report as "a protection for secured creditors that is not available under present law."²⁰⁵ Section 362(f) permits relief from

¹⁹⁶ *Id.* § 362(d)(1).

¹⁹⁷ *See, e.g., In re Highway Truck Drivers & Helpers Loc. Union #107*, 888 F.2d 293, 298 (3d Cir. 1989); *Randhava v. Peterson*, 364 B.R. 301, 303 (N.D. Ill. 2006); *In re Soliman*, 539 B.R. 692, 695, 697–98 (Bankr. S.D.N.Y. 2015); *In re Biolitec, Inc.*, No. 13-11157, 2014 WL 6756644 at *2, *6 (Bankr. D.N.J. Dec. 1, 2014); *In re Sletteland*, 260 B.R. 657, 670–71 (Bankr. S.D.N.Y. 2001).

¹⁹⁸ 11 U.S.C. § 362(a)(1).

¹⁹⁹ *Id.* § 362(d)(2)(A).

²⁰⁰ *Id.* § 362(d)(3).

²⁰¹ *See, e.g., In re SW Bos. Hotel Venture LLC*, 449 B.R. 156, 162 (Bankr. D. Mass. 2011); *In re Kiley Ranch Cmty.*, No. 10-53393, 2010 WL 11826049, at *1 (Bankr. D. Nev. Jan. 11, 2010).

²⁰² *See* 11 U.S.C. § 362(d)(3).

²⁰³ *Id.* § 362(d)(4).

²⁰⁴ *Id.* § 362(e)(1). The section provides that 30 days after a request for relief from the stay under section 362(d) "of any act against property of the estate" the stay is terminated with respect to the requesting party unless the court orders the stay continued pending a final hearing and determination. *Id.* If the debtor is an individual, the stay terminates 60 days after the motion is made unless a final decision is rendered before that time or all parties agree to an extension. *Id.* § 362(e)(2).

²⁰⁵ H.R. REP. NO. 95-595, at 1 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6300.

the stay to "prevent irreparable damage to the interest of an entity in property."²⁰⁶ This cannot refer to the debtor's interest in estate property, which cannot be damaged by the stay.

The allocation of burdens of proof in section 362(g) refers to the "party requesting . . . relief [from the stay]" and "the party opposing such relief,"²⁰⁷ but that section was described by Rep. Edwards as placing "the burden of proof on the issue of the debtor's equity in collateral on the party requesting relief from the automatic stay and the burden on other issues *on the debtor*."²⁰⁸ One must read that section as indicating that the party seeking relief from the stay is a party other than the debtor.

Under section 362(h)(1), the stay is terminated with respect to "personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease" if the individual debtor fails to file a statement of intention with respect to that personal property or take the action specified in that statement of intention when required.²⁰⁹ This provision negates a stay on actions by a party with a claim secured by the personal property of the debtor (which cannot be the debtor) or a party (other than the debtor) to the unexpired lease.²¹⁰ The provision has no applicability to a stay of the debtor's actions.²¹¹ This is further emphasized by the language of section 362(k)(2) which immunizes an entity from damages for a willful violation of the stay if the action by the entity was taken "in the good faith belief that subsection (h) applies to the debtor"²¹² This means that the entity taking the action was not the debtor.

This brings us to the remedies provision included in section 362(k) which allows "an individual injured by any willful violation of a stay provided by this section" to recover damages.²¹³ As mentioned above, the savings clause of section 362(k)(2) suggests that the entity taking the action resulting in a violation of the stay is not the debtor.²¹⁴ In almost all cases,²¹⁵ a motion for sanctions under section 362(k) is brought

²⁰⁶ 11 U.S.C. § 362(f).

²⁰⁷ *Id.* § 362(g)(1)–(2).

²⁰⁸ 124 CONG. REC. 32413, *reprinted in* 1978 U.S.C.C.A.N. 6436, 6445 (Statement by the Hon. Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, Upon Introducing the House Amendment to the Senate Amendment to H.R. 8200) (emphasis added). The same comment was made by Sen. Dennis DeConcini in the Senate. *See* CONG. REC.—SENATE, S17409 (Oct. 6, 1978). *See also* Smaha, *supra* note 9, at 1123 (suggesting that "[t]he shift to the creditor of the burden of proof on the issue of whether the debtor has equity in the property is one of the features of the Code most favorable to the debtor").

²⁰⁹ *See* 11 U.S.C. § 362(h)(1).

²¹⁰ *See id.*

²¹¹ *See id.*

²¹² *Id.* § 362(k)(2).

²¹³ *Id.* § 362(k)(1).

²¹⁴ *See supra* text at note 176.

²¹⁵ In *St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.2d 533 (5th Cir. 2009), the court allowed individual creditors/owners of debtor to obtain damages from another creditor under section 362(k) where the other creditor took action that caused the debtor's reorganization to fail and resulted in judgments being entered against the creditor/owners.

by an individual debtor against a creditor.²¹⁶ Some courts have allowed the trustee to seek damages from a creditor under section 362(k),²¹⁷ but in no reported case has an individual non-debtor successfully obtained damages *from a debtor* under section 362(k).²¹⁸ This suggests that Congress intended individual debtors to be the parties harmed by violations of the automatic stay, not the perpetrators of such violations.

Moving beyond section 362 itself, if the language "applicable to all entities" in section 362(a) was intended in all cases to apply to the debtor, it is difficult to explain why Congress used the same language in section 922(a) in a section that clearly does not.²¹⁹ The only actions barred by the automatic stay applicable to municipal debtors under section 922(a) are "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor"²²⁰ and "the enforcement of a lien on or arising out of taxes or assessments owed to the debtor."²²¹ Obviously neither of those actions could be taken by the debtor because the debtor cannot seek to enforce a claim against itself or a lien on taxes or assessments owing to itself. We should be reluctant to interpret the same phrase used in section 362(a) differently from that used in section 922(a) when both deal with the automatic stay and relate simply to different types of debtors.

²¹⁶ See, e.g., *In re Dougherty-Kelsay*, 636 B.R. 889, 893 (B.A.P. 6th Cir. 2022); *In re Withington*, 654 B.R. 173, 177 (Bankr. S.D. Fla. 2023); *In re Hamby*, 646 B.R. 865, 877 (Bankr. N.D. Ga. 2022); *In re Valentine*, 611 B.R. 622, 634 (Bankr. E.D. Mo. 2020); *In re Garza*, 605 B.R. 817, 829 (Bankr. S.D. Tex. 2019); *In re Petralia*, 559 B.R. 275, 280 (Bankr. D. Mass. 2016); *In re Campbell*, 553 B.R. 448, 456 (Bankr. M.D. Ala. 2016); *In re Rivera*, 511 B.R. 6, 16 (D.P.R. 2014).

²¹⁷ See, e.g., *In re Garofalo's Finer Foods*, 186 B.R. 414, 439 (N.D. Ill. 1995); *In re Mullican*, 417 B.R. 389, 403–04 (Bankr. E.D. Tex. 2008); *In re Fas Mart Convenience Stores, Inc.*, 318 B.R. 370, 375 (Bankr. E.D. Va. 2004).

²¹⁸ See *In re McKeever*, 550 B.R. 623, 642–43 (Bankr. N.D. Ga. 2016) (suggesting that "[i]t is certainly possible for a debtor to violate his own automatic stay by disposing of property of the estate" but the trustee lacks standing to recover damages under section 362(k)). See also *In re Sofer*, 507 B.R. 444, 452 (Bankr. E.D.N.Y. 2014), *aff'd sub nom.* *Adar 980 Realty, LLC v. Sofer*, No. 14-3031, 2014 WL 3890110 (E.D.N.Y. Aug. 5, 2014), *aff'd*, 613 F. App'x 92 (2d Cir. 2015) (lessor did not have standing under either section 105 or section 362(k) to seek damages for debtor's violation of automatic stay).

The court in *In re Badea*, No. BK-S-10638-GS, 2018 Bankr. LEXIS 3279 (Bankr. D. Nev. Jan. 30, 2018), concluded that the debtor violated the automatic stay by filing a notice of purported mechanic's lien against property of the bankruptcy estate, but awarded sanctions under 11 U.S.C. § 105 and not under section 362(k). On appeal, the Bankruptcy Appellate Panel vacated the lower court's order expunging the mechanic's lien, together with the sanction, concluding that the court had not identified and applied the correct law to determine that the debtor had willfully violated the automatic stay. See *In re Badea*, No. 15-bk-10638, 2018 WL 4441731, at *4–5 (B.A.P. 9th Cir. Sept. 17, 2018).

²¹⁹ Compare 11 U.S.C. § 922(a) ("A petition filed under this chapter operates as a stay, . . . applicable to all entities, of —") (emphasis added), with *id.* § 362 ("a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of —") (emphasis added).

²²⁰ *Id.* § 922(a)(1).

²²¹ *Id.* § 922(a)(2).

IV. SECTION 362(A)(3) DOES NOT APPLY TO ACTS BY THE DEBTOR

As discussed in Part II, the historical development of the automatic stay under the Bankruptcy Act and the Federal Rules of Bankruptcy Procedure demonstrates that it was intended to apply to entities other than the debtor.²²² Every statute and rule preceding the enactment of the Bankruptcy Code referred to proceedings "against the debtor" or enforcement of liens on property of the estate or property of the debtor which would be held by secured creditors of the debtor.²²³ No case prior to 1978 ever suggested that a debtor could violate the applicable automatic stay.²²⁴ The question is whether the enactment of the Bankruptcy Code and section 362(a)(3) changed the analysis.

Section 362(a)(3) was originally intended to protect the property of the estate from an act that would dispossess the debtor or the trustee.²²⁵ Professor Kennedy noted that the literal language of the section "appears to preclude any act by the debtor or trustee to obtain property of the estate from any adverse claimant, whether rightfully or wrongfully in possession" and characterized this interpretation as a "stultifying construction[] of the language" that "will presumably be avoided by the courts by looking to the purpose to protect the estate."²²⁶ He suggested that the language barring an act to obtain possession of property "from the estate" was "perhaps included to forestall a lienor or other adverse claimant from asserting as a justification for an exercise of self-help that the property taken from the debtor did not belong to the estate."²²⁷

Given the absence of express language referring to the debtor, section 362(a)(3) should not be interpreted to prevent the debtor itself from taking an act to dispossess itself or the trustee.²²⁸ The Bankruptcy Code has another provision specifically limiting the ability of the debtor to make post-petition transfers, section 549.²²⁹ If the debtor transfers property of the estate without authorization, the transfer can be avoided by the trustee.²³⁰ Section 549 allows the trustee to "avoid a [post-petition] transfer of property of the estate" that is not authorized by the Bankruptcy Code or by the court,²³¹ subject to certain exceptions.²³² Because of the enactment of section 362(b)(24), the automatic stay cannot be used to avoid a post-petition transfer that is

²²² See *supra* discussion in Part II.

²²³ See Kennedy, *supra* note 9, at 4.

²²⁴ See *id.*

²²⁵ See *id.* at 11.

²²⁶ *Id.* at 15.

²²⁷ *Id.* at 15–16.

²²⁸ See 11 U.S.C. § 362(a)(3) (2018).

²²⁹ See generally *id.* § 549.

²³⁰ See *id.* § 549(a)(2)(B). The term "transfer" is defined in section 101(54) to include "each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with . . . property; or . . . an interest in property." *Id.* § 101(54)(D).

²³¹ *Id.* § 549(a)(2)(B).

²³² The exceptions apply to certain transfers in an involuntary case and transfers to good faith purchasers without knowledge of the commencement of the case. *Id.* § 549(b)–(c).

not avoidable under section 549 (presumably because one of the exceptions is applicable).²³³ If a debtor's post-petition transfer of property of the estate that is avoidable under section 549 was also a violation of the stay under section 362(a)(3), that transfer would be void (like all other acts taken in violation of the stay)²³⁴. If all such transfers were void, there would be no need for section 549, which allows the trustee to avoid an unauthorized transfer of property of the estate.²³⁵

In interpreting the interplay between sections 362(a)(3) and 549, most courts have recognized that the former applies to "creditor-initiated" (or involuntary) action and the latter to "debtor-initiated" (or voluntary) action.²³⁶ Because "[s]ection 362's automatic stay does not apply to sales or transfers or property initiated by the debtor,"²³⁷ section 549 retains a purpose to protect creditors "against unauthorized debtor transfers of estate property."²³⁸

Some courts have disagreed, concluding that a debtor's voluntary transfer of estate property is a violation of section 362(a)(3) and is therefore void.²³⁹ But this interpretation minimizes the application of section 549 to insignificance.²⁴⁰ In fact, in

²³³ See *supra* notes 142–44.

²³⁴ See, e.g., *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 976 (1st Cir. 1997); *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992); *Ellis v. Consol. Diesel Elec. Corp.*, 894 F.2d 371, 372 (10th Cir. 1990); *In re Sklar*, 626 B.R. 750, 762 (Bankr. S.D.N.Y. 2021); *In re Garcia*, 109 B.R. 335, 340 (N.D. Ill. 1989). See generally 3 COLLIER ON BANKRUPTCY ¶ 362 (Richard Levin & Henry J. Sommer eds., 16th ed. 2024).

Some courts consider actions taken in violation of the stay to be "voidable" rather than "void" because the stay is subject to retroactive annulment (or the grant of relief from the stay given retroactive effect), validating those actions. See, e.g., *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993); *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 179 (5th Cir. 1989); *Const. Bank v. Tubbs*, 68 F.3d 685, 692 n.6 (3d Cir. 1995). It is not clear whether the Supreme Court's decision in *Roman Cath. Archdiocese of San Juan v. Feliciano*, which limited the ability of courts to enter orders *nunc pro tunc*, will undercut this position. See 140 S. Ct. 696, 700–01 (2020).

²³⁵ Cf. *In re HH Tech. Corp.*, 649 B.R. 365, 380 (Bankr. D. Mass. 2023) (holding that a creditor who receives a transfer in violation of the automatic stay is not the recipient of a voidable transfer under section 549 because the transfer was void).

²³⁶ See, e.g., *40235 Washington St. Corp. v. Lusardi*, 329 F.3d 1076, 1080 (9th Cir. 2003); *In re Schwartz*, 954 F.2d at 574; *In re Vierkant*, 240 B.R. 317, 325 (B.A.P. 8th Cir. 1999); *In re Roth*, 595 B.R. 572, 577–78 (S.D. Cal. 2018); *Ellison v. Comm'r.*, 385 B.R. 158, 164 (S.D. W. Va. 2008); *Spears v. U.S.* 143 B.R. 950, 952 (N.D. Okla. 2002); *In re Anderson*, 511 B.R. 481, 495 (Bankr. S.D. Ohio 2013); *In re Zeman*, No. 09-52559, 2011 WL 1042568, at *4 (Bankr. W.D. Tex. Mar. 16, 2011); *In re Clarkson*, 168 B.R. 93, 94 (Bankr. D.S.C. 1994); *In re Consol. Partners Inv. Co.*, 156 B.R. 982, 984–85 (Bankr. N.D. Ohio 1993).

²³⁷ *In re Schwartz*, 954 F.2d at 574. See also *In re Garcia*, 109 B.R. at 339 (N.D. Ill. 1989) ("Targeted at the activities of creditors, the automatic stay itself does not specifically prohibit the debtor from willingly transferring an interest in property of the estate post-petition.").

²³⁸ *In re Schwartz*, 954 F.2d at 574. See also *In re Tippet*, 338 B.R. 82, 86 (B.A.P. 9th Cir. 2006) ("The proposition is that since Congress provided a mechanism to undo (or avoid) a transfer of estate property, it obviously contemplated that there could be an unauthorized transfer of estate property post-petition.").

²³⁹ See *In re Beery*, 452 B.R. 825, 833 (Bankr. D.N.M. 2011). In *Beery*, the deadline for filing a motion to avoid the post-petition transfer under section 549 had passed, so the transfer could not have been avoided by the trustee other than by declaring it void under section 362(a)(3). See *id.*

²⁴⁰ The only example the court in *Beery* could posit for a situation in which section 549 would operate to allow avoidance of a transfer by a debtor that did not violate section 362 was a transfer by a debtor in possession of cash collateral without court authorization under section 363(c). See *id.* at 833. But given that

almost all cases in which the trustee seeks avoidance of a post-petition transfer under section 549, the transfer is made by the debtor and there is no suggestion that the debtor violated the automatic stay in making the transfer.²⁴¹

The Supreme Court analyzed the analogous interplay between sections 362(a)(3) and 542(a) in *Fulton*.²⁴² The respondents in that case had argued that section 362(a)(3) implicitly imposed an affirmative obligation on creditors to turn over to the trustee property of the estate even though section 542(a) explicitly imposed that obligation.²⁴³ The Supreme Court declined to interpret section 362(a)(3) in a way that "would render the central command of section 542 largely superfluous," noting that "[t]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."²⁴⁴

In addition, the Supreme Court noted that nothing in the language of section 362(a)(3) suggests that it was to be used to enforce the obligation to turn over property to the trustee.²⁴⁵ "Had Congress wanted to make section 362(a)(3) an enforcement arm of sorts for section 542(a), the least one would expect would be a cross-reference to the latter provision, but Congress did not include such a cross-reference or provide any other indication that it was transforming section 362(a)(3)."²⁴⁶

Exactly the same points can be made when looking at section 549.²⁴⁷ In light of the Supreme Court's analysis in *Fulton* of the distinct roles of sections 362(a)(3) and 542, it is difficult to maintain the position that section 362(a)(3) can be used to attack post-petition transfers of property that are avoidable under section 549.

Nor is section 362(a)(3) needed to prevent other bad behavior by a debtor. First, if a trustee has been appointed in the case, the debtor has an obligation under section

section 549(c) explicitly refers to a transfer of an interest in real property that would otherwise be avoidable under section 549(a), the section clearly applies to a broader array of transactions. *See id.*

²⁴¹ *See, e.g., In re Zargarán*, 216 F. Supp. 3d 1340, 1343 (S.D. Fla. 2016); *Redmond v. Hassan*, 523 B.R. 729, 742 (D. Kan. 2014); *In re Jenkins*, 642 B.R. 754, 766 (Bankr. N.D. Miss. 2022); *In re Abell*, 549 B.R. 631, 668 (Bankr. D. Md. 2016); *In re Harman*, 512 B.R. 321, 342–43 (Bankr. N.D. Ga. 2014); *In re Ellis*, 441 B.R. 656, 663 (Bankr. D. Idaho 2010); *In re J & A Excavation*, No. 07-70583, 2010 WL 3123132, at *2 (Bankr. E.D. Ky. Aug. 6, 2010); *In re Icenhower*, 398 B.R. 902, 907 (Bankr. S.D. Cal. 2008); *In re Brooks-Hamilton*, 348 B.R. 512, 522 (Bankr. N.D. Cal. 2006); *In re Fadili*, 365 B.R. 7, 17 (Bankr. D. Mass. 2007); *In re Blair*, 330 B.R. 206, 214 (Bankr. N.D. Ill. 2005); *In re Allegheny Health, Educ. and Rsch. Found.*, 313 B.R. 673, 675 (Bankr. W.D. Pa. 2004). *But see In re Walker*, 405 B.R. 300, 308 (Bankr. E.D. Wis. 2009) (suggesting that the transfer of deeds to the debtor's properties were both a violation of the automatic stay and recoverable under section 549(a) when debtor was deceived by transferee and unaware of the nature of the transaction).

²⁴² 11 U.S.C. § 542(a). That provision requires any entity (including the debtor) "[I]n possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title" to deliver the property or its value to the trustee "unless such property is of inconsequential value or benefit to the estate." *Id.* There are exceptions to the turnover obligation, none of which apply to the debtor. *Id.* § 542(c)–(d). The turnover obligation is mandatory, and arises upon the filing of the bankruptcy petition. *See generally* 5 COLLIER ON BANKRUPTCY § 542.01 (Richard Levin & Henry J. Sommer eds., 16th ed. 2023).

²⁴³ *See Chi. v. Fulton*, 592 U.S. 154, 155 (2021).

²⁴⁴ *Id.* at 157 (quoting *Yates v. United States*, 574 U.S. 528, 543 (2015)).

²⁴⁵ *See Fulton*, 592 U.S. at 159.

²⁴⁶ *Id.*; *see also In re McCaffrey*, No. 21-30891, 2023 WL 5612742, at *8 (Bankr. N.D.N.Y. Aug. 30, 2023).

²⁴⁷ *See* 11 U.S.C. § 549.

521(1) to "surrender to the trustee all property of the estate" and all associated records.²⁴⁸ Further, the debtor is required by Bankruptcy Rule 4002(a)(4) to "cooperate with the trustee in the . . . administration of the estate."²⁴⁹ The court has inherent power to sanction a debtor who fails to comply with these duties under section 105(a).²⁵⁰ There is no need to characterize the debtor's actions as a violation of the automatic stay.

Second, if the debtor possesses estate property that should be turned over to a trustee, the trustee may bring a motion under section 542(a), and the court may enter a turnover order and impose contempt sanctions for failure to comply with that order.²⁵¹ There are many reported cases in which such motions are brought against the debtor.²⁵² Although there have been cases in which the trustee asserted that the debtor was violating the automatic stay by exercising control over estate property,²⁵³

²⁴⁸ *Id.* § 521(a)(4).

²⁴⁹ FED. R. BANKR. P. 4002(a)(4).

²⁵⁰ *See* 11 U.S.C. § 105(a). Section 105(a) recognizes the power of the court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." *See, e.g., In re R2D2, LLC*, No. 13-3799, 2014 WL 12589668, at *11 (C.D. Cal. Jan. 9, 2014); *In re Reeves*, 509 B.R. 35, 60 (Bankr. S.D. Tex. 2014).

²⁵¹ A proceeding to compel the debtor to deliver property to the trustee is a contested matter rather than an adversary proceeding. *See* FED. R. BANKR. P. 7001(1). As of Dec. 1, 2024, Rule 7001 was amended to delete from the list of adversary proceedings "a proceeding by an individual debtor to recover tangible personal property under section 542(a)," a change that was made in response to the suggestion of Justice Sotomayor in her concurring opinion in *Fulton*. *See* Letter from Chief Justice John Roberts to Speaker of the House Mike Johnson (Apr. 2, 2024) (on Supreme Court official website); *City of Chicago v. Fulton*, 592 U.S. 154, 166 (2021) (Sotomayor, J., concurring) ("[A]ny gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges."). Courts differ on whether section 542(a) is self-executing or whether the turnover obligation is created only when the court so orders. *Compare* *Weber v. SEFCU* (*In re Weber*), 719 F.3d 72, 79 (2d Cir. 2013) (citing COLLIER ON BANKRUPTCY § 542.02 (16th ed. 2012)) (stating that section 542 is self-executing); *In re Cordova*, 635 B.R. 321, 338 (Bankr. N.D. Ill. 2021) (concluding that section 542 is self-executing), with *In re Denby-Peterson*, 941 F.3d 115, 128 (3d Cir. 2019) (finding that turnover obligation is triggered by court order after adversary proceeding).

²⁵² *See, e.g., In re Shore*, 193 B.R. 598, 600–01 (S.D. Fla. 1996); *In re Abell*, 549 B.R. 631, 654 (Bankr. D. Md. 2016); *Shapiro v. Henson*, 739 F.3d 1198, 1199 (9th Cir. 2014); *In re Young*, 578 B.R. 312, 324 (Bankr. M.D.N.C. 2017); *In re Harman*, 512 B.R. 321, 342 (Bankr. N.D. Ga. 2014); *In re Ostendorf*, No. 10-40072, 2011 WL 1060992, at *1 (Bankr. D. Neb. Mar. 23, 2011); *In re MD Promenade*, No. 08-34113, 2009 WL 80203, at *15 (Bankr. N.D. Tex. Jan. 8, 2009); *In re Haraughty*, 403 B.R. 607, 608 (Bankr. S.D. Ind. 2009); *In re Gabriel*, 390 B.R. 816, 821 (Bankr. D.S.C. 2008); *In re Cantor*, No. 06-24812, 2008 WL 4561504, at *3 (Bankr. W.D. Pa. June 25, 2008); *In re Blagg*, 372 B.R. 502, 504 (Bankr. D. Kan. 2007); *In re Kill*, No. 01-20418, 2004 WL 2980738, at *3 (Bankr. W.D. Mo. Dec. 14, 2004); *In re Magnuson*, 113 B.R. 555, 560 (Bankr. D.N.D. 1989).

²⁵³ *See, e.g., In re Hardy*, No. 16-00280, 2017 WL 2491497, at *3 (Bankr. D.D.C. June 8, 2017) (finding debtor in contempt for failure to comply with turnover order and section 362(a)(3)); *In re Abell*, 549 B.R. at 676 (declining to dismiss claim for damages for violation of automatic stay due to failure to turn over estate assets); *In re MD Promenade, Inc.*, 2009 WL 80203, at *14 (awarding damages to the estate for violation of or automatic stay and damages to creditor for violation of turnover order under section 105).

Most cases in which the courts have invoked section 362(a)(3) to support a holding that the debtor failed to turn over estate property have involved an unauthorized post-petition settlement by the debtor of a pre-petition claim. *See, e.g., In re Stinson*, 221 B.R. 726, 728 (Bankr. E.D. Mich. 1998). In *In re Stinson*, the debtor claimed an exemption in a pre-petition personal injury claim as to which the debtor entered into a settlement agreement post-petition without court approval. The court concluded that the settlement not only violated section 362(a)(3), but also violated the debtor's duty to cooperate with the trustee under 11 U.S.C. §

those arguments are now precluded by *Fulton*.²⁵⁴ In fact, one court presciently distinguished the purposes of section 542 from that of section 362, stating that "the automatic stay section was intended to prevent creditor abuses, and sections 541 and 542 were designed to protect against debtors (or other creditors) improperly and unfairly depleting estate assets."²⁵⁵

If section 362(a)(3) were read to prevent any act *by a debtor* "to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate," every debtor in every bankruptcy case would violate the automatic stay from the moment the petition is filed.²⁵⁶ Property of the estate is defined in section 541 to include (with certain exclusions) "all legal or equitable interests of the debtor in property as of the commencement of the case."²⁵⁷ As soon as the debtor files a bankruptcy petition, the debtor will have possession of property of the estate and if the debtor actually uses that property (even if that property is exempt), the debtor would be violating the automatic stay.²⁵⁸

If the debtor is obligated to turn over property to a trustee under section 542(a) (as in a chapter 7 case), the stay violation would continue until the debtor relinquishes the property.²⁵⁹ But just as the Supreme Court held in *Fulton*²⁶⁰ that section 362(a)(3) is not the enforcement arm for the turnover obligation of section 542(a) when it is applied to creditor action, it cannot be the enforcement arm for the turnover obligation when applied to the debtor.

521(3) and interfered with the trustee's opportunity to object to the claimed exemption and the court's authority to determine whether the claim was exempt. *See id.* at 730–31. The settlement also interfered with the trustee's standing to prosecute the action and the rights of parties to be heard on the reasonableness of the settlement. *See id.* But the remedy for the misconduct provided by the court was denial of the debtor's exemption for the personal injury claim (and its proceeds) and ordering turnover. *See id.* If the action of settling the claim was a violation of the automatic stay, it should have been legally ineffective because all actions taken in violation of the automatic stay have no legal force and effect. *See, e.g.,* Agrawal v. Courts. of Oklahoma, 764 F. App'x. 809, 811 (10th Cir. 2019); Gruntz v. County. of Los Angeles (*In re Gruntz*), 202 F.3d 1074, 1082 (9th Cir. 2000) (en banc); FDIC v. Hirsch (*In re Colonial Realty Co.*), 980 F.2d 125, 137 (2d Cir. 1992). Therefore, the court was not treating the action as a stay violation, despite its language. *See also In re Cooper*, 263 B.R. 835, 838 (Bankr. S.D. Ohio 2001) (ordering turnover of the proceeds of the unlawful post-petition settlement of the pre-petition personal injury claim, denying exemption and revoking discharge while characterizing the settlement as a violation of the stay by the debtor and debtor's attorney).

²⁵⁴ *See Fulton*, 592 U.S. at 161–162.

²⁵⁵ *In re Flynn*, 143 B.R. 798, 802 (Bankr. D.R.I. 1992).

²⁵⁶ 11 U.S.C. § 362(a)(3) (2018).

²⁵⁷ *Id.* § 541(a)(1).

²⁵⁸ For example, although the Supreme Court in *Fulton* has indicated that passive retention of an automobile of an individual debtor does not violate the provisions of section 362(a)(3)—that is, the stay is violated only when there is an "act" to exercise control over property of the debtor—if an individual debtor actually drives his or her automobile after filing for bankruptcy protection, that would be an act to exercise control over property of the estate and presumably would constitute a stay violation if the debtor is subject to section 362(a)(3). *See* 592 U.S. at 158. The same analysis would apply to any other estate property that the debtor uses after filing.

²⁵⁹ *See* 11 U.S.C. § 362(c)(1).

²⁶⁰ *See Fulton*, 592 U.S. at 161.

If the debtor is not obligated to turn over property to a trustee, either because the debtor files under chapter 13²⁶¹ or becomes the debtor in possession²⁶² in a chapter 11 case,²⁶³ the debtor's continued control over assets of the estate as contemplated by the Bankruptcy Code would constitute a stay violation under section 362(a)(3) if that provision were intended to apply to actions by a debtor. It cannot be so interpreted.

Third, a chapter 7 bankruptcy case can be dismissed for cause,²⁶⁴ and a chapter 11²⁶⁵ or chapter 13²⁶⁶ case may be converted or dismissed for cause. "Good faith" is, of course, also an explicit requirement for confirmation of a chapter 11²⁶⁷ or chapter 13²⁶⁸ plan.

²⁶¹ The debtor is expressly given the right to use, sell, or lease property of the estate other than in the ordinary course of business pursuant to section 1303. *See* 11 U.S.C. § 1303. It would be absurd to interpret section 362(a)(3) to bar the debtor from exercising control over property of the estate that another provision of the Code allows the debtor to use, sell or lease. *See id.* § 362(a)(3).

²⁶² 11 U.S.C. § 1101(1). A "debtor in possession" is defined to mean the debtor when no duly-appointed trustee is serving in the case. *Id.*

²⁶³ A debtor in possession has all the rights and powers and performs all the functions of a trustee (subject to certain limitations), which include the right to operate the debtor's business. *Id.* §§ 1107(a), 1108.

²⁶⁴ *Id.* § 707(a). Cause explicitly includes "unreasonable delay by the debtor that is prejudicial to creditors" and failure of the debtor in a voluntary case to file on a timely basis the information required by section 521(a)(1), but other conduct by the debtor that interferes with the administration of the bankruptcy case would also be grounds for dismissal. *Id.* § 707(a)(1), (3). *See also* *Krueger v. Torres (In re Krueger)*, 812 F.3d 365, 366–67 (5th Cir. 2016) (debtor "flagrantly and repeatedly abused bankruptcy and court processes,"); *In re Riddle*, No. 19-8022, 2020 WL 3498438, at *9–10 (B.A.P. 6th Cir. 2020) (debtor failed to provide documents to trustee, failed to attend section 341 meeting, failed to disclose all assets and liabilities, undervalued assets); *In re Dunn*, Nos. CC-09-1176-MkMoPa, CC-09-1249-MkMoPa & RS 08-28660-MJ, 2010 WL 6451888, at *5 (B.A.P. 9th Cir. Feb. 4, 2010) (failure to attend section 341 meeting); *In re Semco Mfg. Co., Inc.*, 649 B.R. 155, 167 (Bankr. S.D. Tex. 2023) (failure to comply with bankruptcy rules and local bankruptcy rules); *In re Jakovljevic-Ostojic*, 517 B.R. 119, 128–31 (Bankr. N.D. Ill. 2014) (debtor failed to verify initial schedules, provided false testimony at section 341 meeting, failed to amend schedules that were inaccurate).

²⁶⁵ 11 U.S.C. § 1112(b)(1). The court may, on request of a party in interest and after notice and a hearing convert a case to chapter 7 or dismiss a chapter 11 case, "whichever is in the best interest[] of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate." *Id.* A nonexclusive list of actions that constitute "cause" are included in section 1112(b)(4), which includes "gross mismanagement of the estate," and "failure to comply with an order of the court," among other post-petition malfeasance. *Id.* § 1112(b)(4)(B)(e). *See, e.g., In re M.A.R. Designs & Constr., Inc.*, 653 B.R. 843, 864–70 (Bankr. S.D. Tex. 2023) (finding cause to convert in bad faith of debtor); *In re Hao*, 644 B.R. 339, 346–47 (Bankr. E.D. Va. 2022) (finding bad faith conduct of debtor warranted conversion of case).

²⁶⁶ 11 U.S.C. § 1307(c) (on request of a party in interest or the United States Trustee and after notice and a hearing, the court may convert a chapter 13 case to chapter 7 or dismiss it, "whichever is in the best interests of creditors and the estate, for cause"). Section 1307(c) lists eleven nonexclusive illustrations of "cause," including "unreasonable delay by the debtor that is prejudicial to creditors," but courts have uniformly found that the debtor's bad faith in the conduct of the bankruptcy case also constitutes "cause" for conversion or dismissal. *Id.* § 1307(e)(1). *See, e.g., In re Crawford*, No. 3:23-bk-02263BAJ, 2024 WL 1773425, at *5 (Bankr. M.D. Fla. Apr. 24, 2024); *In re Feldman*, 597 B.R. 448, 460–61 (Bankr. E.D.N.Y. 2019); *In re Campora*, No. 14-70330-AST, 2014 WL 4980027, at *11 (Bankr. E.D.N.Y. Oct. 6, 2014); *In re Binnion*, No. 13-30234, 2014 WL 1047858, at *9 (Bankr. S.D. Tex. Mar. 18, 2014).

²⁶⁷ Section 1129(a)(3) requires that the plan of reorganization "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Further, the plan may not be confirmed unless "[t]he proponent of the plan complies with the applicable provisions of [title 11]." *Id.* at § 1129(a)(2).

²⁶⁸ *See id.* § 1325(a)(3) (requiring that "the plan has been proposed in good faith and not by any means forbidden by law").

Fourth, any act by a chapter 7 debtor to transfer, remove, destroy, mutilate, or conceal property of the estate is grounds for denial of the debtor's discharge under section 727(a)(2) if undertaken with "intent to hinder, delay, or defraud."²⁶⁹ There are many examples of debtors whose discharge has been denied under this provision,²⁷⁰ but in none of them did the court also award damages for violation of the automatic stay.²⁷¹

Fifth, a debtor who "knowingly and fraudulently conceals" property of the estate from creditors or the trustee is guilty of a bankruptcy crime²⁷² and can be criminally prosecuted.²⁷³

Sixth, the trustee may assert that the debtor's actions in exercising rights of ownership over assets belonging to the estate constituted conversion, a common law tort.²⁷⁴

Seventh, if the action by the debtor that allegedly violated section 362(a)(3) is the filing of another bankruptcy case, the subsequent case can be dismissed for cause,²⁷⁵ or (if the second case is filed under chapter 11 or 13) the court may deny confirmation of the plan.²⁷⁶ Bad faith filings may also serve as a basis for granting

²⁶⁹ See *id.* § 727(a)(2).

²⁷⁰ See, e.g., *In re Young*, 578 B.R. 312, 324 (Bankr. M.D.N.C. 2017); *In re McKeever*, 550 B.R. 623, 640 (Bankr. N.D. Ga. 2016); *In re Magnuson*, 113 B.R. 555, 560 (Bankr. D.N.D. 1989); *In re Abell*, 549 B.R. 631, 673–677 (Bankr. D. Md. 2016) (denying motion to dismiss claim for denial of discharge based on section 727(a)(2)).

²⁷¹ See *In re McKeever*, 550 B.R. at 643 (holding trustee had no standing to seek damages for violation of automatic stay, and was not injured by transfer of estate property). *But see* *Redmond v. Hassan*, 523 B.R. 729, 747–48 (D. Kan. 2014) (revoking debtor's discharge and awarding damages for post-petition transfers, conversion, and violation of automatic stay).

²⁷² See 18 U.S.C. § 152(1).

²⁷³ See, e.g., *United States v. Reichel*, 911 F.3d 910, 914 (8th Cir. 2018); *United States v. Rayner*, 495 Fed. Appx. 102, 2013 WL 203590, at *1 (1st Cir. 2013); *United States v. Hardy*, 421 F. App'x. 450, 453 (5th Cir. 2011); *United States v. Maasen*, No. 16-01357, 2018 WL 6198478, at *1 (D. Ariz. Nov. 28, 2018); *Hill v. United States*, Nos. 15-CV-23 and 13-CR-51, 2016 WL 11260876, at *1 (N.D. Ga. June 29, 2016); *United States v. Hale*, No. 06-871, 2014 WL 1255339, at *5 (D. Utah Mar. 26, 2014); *United States v. Perryman*, No. 11-CR-0100, 2012 WL 1536745, at *3 (N.D. Okla. May 1, 2012).

²⁷⁴ See, e.g., *In re Mastro*, No. 09-16841, 2017 WL 2889659, at *17 (Bankr. W.D. Wash. July 6, 2017); *Redmond*, 523 B.R. at 742; *In re Potter*, No. 12-20632, 2012 WL 3867424, at *2 (Bankr. D. Utah Sept. 6, 2012); *cf. In re Brizinova*, 592 B.R. 442, 467 (Bankr. E.D.N.Y. 2018) (declining to find conversion when property involved belonged to debtor's subsidiary, not debtor); *In re Sholdra*, 270 B.R. 64, 72 (Bankr. N.D. Tex. 2001) (declining to find a debtor liable for conversion when there was no showing that the property of the estate was at issue); *In re Parsell*, 172 B.R. 226, 230 (Bankr. N.D. Ohio 1994) (declining to deny discharge for conversion of estate assets because of absence of proof that debtor acted with "intent to hinder, delay, or defraud a creditor or an officer of the estate").

²⁷⁵ 11 U.S.C. §§ 707(a), 1112(b), 1307(c). See, e.g., *In re Robinson*, 649 B.R. 851, 851 (Bankr. E.D. Mich. 2023); *In re Layman*, 611 B.R. 596, 619 (Bankr. E.D. Tenn. 2019); *In re Brown*, 399 B.R. 162, 170 (Bankr., W.D. Va. 2009); *In re Brandford*, 386 B.R. 742, 751 (Bankr. N.D. Ind. 2008).

²⁷⁶ 11 U.S.C. §§ 1129(a)(3), 1325(a)(3).

relief from the automatic stay under section 362(d)(1)²⁷⁷ or 362(d)(4).²⁷⁸ The bankruptcy court also has the inherent authority to bar the debtor from filing another bankruptcy case for a period of time after dismissal.²⁷⁹

In sum, there are many alternative means of deterring behavior by the debtor that interferes with the bankruptcy process. Use of section 362(a)(3) was never intended to be one of them.

CONCLUSION

The purpose of the automatic stay has been described repeatedly as protecting the debtor from action by others and protecting the debtor's estate from action by individual creditors of the debtor seeking an advantage over other creditors.²⁸⁰ There is nothing in the history of the stay, under the Bankruptcy Act or the Bankruptcy Code, to suggest that the drafters were intending to protect the estate from actions by the debtor under section 362(a)(3). Instead, as discussed above, Congress drafted several other provisions precluding actions by the debtor that would harm the estate, including the prohibition in section 549 on post-petition transfers of estate property which can be enforced by judicial order.²⁸¹ The bankruptcy judge also retains considerable authority to sanction debtors who disrupt the bankruptcy process by dismissing the case, denying discharge, denying confirmation of a plan, referring the debtor for criminal prosecution, or holding the debtor in contempt or awarding damages under section 105(a).²⁸²

²⁷⁷ *Id.* § 362(d)(1) (allowing relief from the stay "for cause"). *See, e.g., In re Sternitzky*, 635 B.R. 353, 358 (Bankr. W.D. Wis. 2021); *In re JCP Properties, Ltd.*, 540 B.R. 596, 614 (Bankr. S.D. Tex. 2015); *In re Martin*, 97 B.R. 1013, 1017 (Bankr. N.D. Ga. 1989).

²⁷⁸ 11 U.S.C. § 362(d)(4) (permitting relief from the stay of an act against real property "if the court finds that the filing of the petition was part of a scheme to delay, hinder or defraud creditors that involved . . . (B) multiple bankruptcy filings affecting such real property"). *See, e.g., Holt v. JP Morgan Chase Bank, N.A.*, No. 17-07901, 2019 WL 192298, at *2 (S.D.N.Y. Jan. 15, 2019); *In re Caires*, 611 B.R. 1, 7–8 (Bankr. D. Conn. 2020); *In re Marques*, 547 B.R. 841, 845 (Bankr. C.D. Cal. 2016).

²⁷⁹ *See* 11 U.S.C. §§ 105(a), 109(g). Congress enacted a statutory bar on refiling in section 109(g) for an individual debtor or family farmer who had a case pending in the preceding 180 days that was dismissed under certain circumstances. *See id.* § 109(a). But bankruptcy courts have also found authority to bar refiling in their inherent powers under section 105(a) and their ability to dismiss a case "with prejudice" under section 349(a). *See, e.g., In re Kearns*, 616 B.R. 458, 470 (Bankr. W.D.N.Y. 2020); *Wenegieme v. Macco*, 580 B.R. 17, 24 (E.D.N.Y. 2018); *In re Via*, No. 19-33999, 2020 WL 1015264, at *4 (Bankr. E.D. Tenn. Feb. 27, 2020); *In re Price*, 304 B.R. 769, 772 (Bankr. N.D. Ohio 2004). *See generally* Kimberly L. Nelson, Comment, *Abusive Filings: Can Courts Stop the Abuse Within the Confines of the Bankruptcy Code?*, 17 BANKR. DEV. J. 331, 339–44 (2000).

²⁸⁰ *See, supra* text accompanying notes 1–9.

²⁸¹ *See Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 574 (9th Cir. 1992) ("Section 549 exists as a protection for creditors against unauthorized debtor transfers of estate property.").

²⁸² *See In re Jones*, 41 B.R. 263, 267 (Bankr. C.D. Cal. 1984) ("[T]he power of this Court to correct abusive practices is found in 11 U.S.C. § 105(a) which provides: 'The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.'").

The provisions of section 362(a)(3) have an important role to play in a bankruptcy case.²⁸³ But they are the wrong tool for use in deterring actions by the debtor that harm the estate. The Supreme Court has made it clear in *Fulton* that acts that are expressly addressed by another provision of the Bankruptcy Code should not be recharacterized as violations of the automatic stay.²⁸⁴ The debtor's acts to exercise control over estate property are that square peg being improperly forced into the round hole of section 362(a)(3). Courts should use the right tool for the job and leave the automatic stay alone.

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²⁸³ See Kennedy, *supra* note 9, at 61.

²⁸⁴ See *City of Chicago v. Fulton*, 592 U.S. 156, 159 (2021).