court retains ultimate authority to set the terms of adequate protection (should the parties themselves fail to agree on adequate protection).

According to the majority courts, though, "allowing the creditor to maintain possession of the asset until it subjectively feels that adequate protection is in place, or until the debtor moves for the asset's return, unfairly tips the bargaining power in favor of the creditor." [52] The problem, though, is that the majority interpretation tips the balance to the opposite extreme, virtually assuring that there will *never* be a negotiated turnover with agreed adequate protection because *no* adequate protection whatsoever is necessary to obtain immediate turnover (under pain of contempt sanctions) under the majority interpretation. A well-advised debtor, therefore, would *never* offer *any* adequate protection in demanding turnover and would *always* put the secured creditor to the burden of moving for stay relief/adequate protection before the bankruptcy court, or use the prospective burden of doing so as leverage in adequate protection negotiations, but only *after* securing turnover *without* providing *any* adequate protection, which (as we've seen) holds the (not unrealistic) prospect of entirely eviscerating the secured creditor's right to receive adequate protection.

That "practical" implication of the majority interpretation is extremely troubling because, as Judge Spector perceptively pointed out, "we are dealing here with a property interest —the creditor's right of possession. The contention that a creditor loses that interest on the strength of nothing more than the trustee's [or DIP's] say-so may well be at odds with the Fifth Amendment" [53] and, at a minimum, seems inconsistent with the statutory allocation of the burden of proof regarding adequate protection to the trustee or DIP, *not* the secured creditor. [54] As Judge Teel has correctly noted, prepetition repossession itself "is often undertaken to assure adequate protection (such as when a car is uninsured or a lack of interest payments has increased the liability above the car's liquidation value)." [55]

The majority courts' willingness to provide such an extreme (to the point of potentially unconstitutional) advantage to the estate in adequate protection negotiations undoubtedly flows from the fact that this issue recurs most frequently in Chapter 13 cases, where the entire reason for the bankruptcy filing may well be so that the debtor can regain possession and use of a vehicle necessary for work-related transportation. Indeed, being without a vehicle for any extended period of time may jeopardize the debtor's job or business, an understandable concern that the majority interpretation addresses quite effectively.

If the debtor must initiate proceedings in the bankruptcy court to obtain turnover of the repossessed vehicle (under the minority interpretation of § 362(a)(3)), Bankruptcy Rule 7001(1) mandates an adversary proceeding with formal summons and complaint, and all of the normal timetables for full-blown all-out litigation, such as 30 days to answer the

complaint, etc., which obviously is *not* conducive to an expedited resolution of the adequate protection issue, which is essentially the only contested issue to be litigated. If the secured creditor must initiate proceedings in the bankruptcy court, however (under the majority interpretation of § 362(a)(3)), the secured creditor *can* proceed by motion requesting relief from the automatic stay/adequate protection under Bankruptcy Rule 4001(a), and under that scenario, the Bankruptcy Code itself directs expedited resolution of the adequate protection issue under the hearing timetable mandated by Code § 362(e).

Expeditious resolution of a turnover order (and corollary adequate protection determination) is indeed appropriate as a matter of course. The Bankruptcy Rules, however, do *not* provide an appropriate process therefor if the minority interpretation of § 362(a)(3) prevails—thus, the compelling impetus for the majority interpretation and the pervasive instinct that the negotiating leverage the minority interpretation affords the secured creditor is legitimately regarded as "unfair."

The majority courts' highly questionable interpretation of § 362(a)(3), therefore, may well be attributable principally to the curious decision of the drafters of the 1973 Bankruptcy Rules to require that turnover be sought via an adversary proceeding. That decision effected a marked departure from the "summary" nature of turnover proceedings under the 1898 Act, pursuant to which "[t]he procedure for exercising summary turnover jurisdiction was by written petition ... with notice to the respondent by an order to show cause." [56]

The 1973 Bankruptcy Rules and then the 1978 Bankruptcy Code initiated an (as yet unsuccessful [57]) effort to "relegate[] the differences between summary proceedings and plenary suits" inherited from English bankruptcy practice "to a place of minor historical significance." [58] In the process, though, some of the accumulated wisdom embodied in that distinction may have been discarded and now forgotten, and a "summary" process for obtaining turnover relief (and corollary adequate protection determinations) appears to be one such casualty. Indeed, in 1983 the Advisory Committee reversed the 1973 decision to require an adversary proceeding for stay relief (and corollary adequate protection) requests, [59] and in 1987, they did the same with respect to a trustee's turnover proceedings against a debtor. [60] The 1973 decision to require an adversary proceeding for all other turnover requests, however, remains unchanged, but perhaps warrants renewed attention from the Bankruptcy Rules Advisory Committee. If nothing else, the way in which the competing procedural regimes seem to be distorting the interpretation of § 362(a)(3) is cause for concern.

Footnotes

1 In re Weber, 719 F.3d 72 (2d Cir. 2013).

2 See Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); In re Knaus, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989); In re Yates, 332 B.R. 1, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005); In re Sharon, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999); In re Abrams, 127 B.R. 239, 21 Bankr. Ct. Dec. (CRR) 1283, 25 Collier Bankr. Cas. 2d (MB) 15, Bankr. L. Rep. (CCH) P 74023 (B.A.P. 9th Cir. 1991).

3 Judges Teel, Spector, and Stosberg have written particularly thoughtful opinions challenging the majority approach. See In re Sharon, 234 B.R. 676, 688, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (Stosberg, J., dissenting); In re Bernstein, 252 B.R. 846, 36 Bankr. Ct. Dec. (CRR) 211, 45 Collier Bankr. Cas. 2d (MB) 297 (Bankr. D. D.C. 2000) (Teel, B.J.); In re Burringer, 244 B.R. 402, 43 Collier Bankr. Cas. 2d (MB) 1615 (Bankr. E.D. Mich. 1999) (Spector, B.J.); In re Young, 193 B.R. 620 (Bankr. D. D.C. 1996) (Teel, B.J.). Accord Charles J. Tabb, The Law of Bankruptcy § 3.6, at 262-64 & § 5.13, at 442 n.4, 444 (2d ed. 2009); Ralph Brubaker, Which Comes First: the Turnover or the Adequate Protection?, 20 Bankr. L. Letter No. 12, at 1 (Dec. 2000); Thomas E. Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1194, 1267-71 (1998).
The Eleventh Circuit's case law on the subject, while also departing from the majority approach, is badly misguided, as this contributing author has argued in a previous issue of *Bankruptcy Law Letter*. Ralph Brubaker, Turnover Rights Revisited (or Repudiated *Sub Silentio*?): Who "Owns" Collateral Repossessed by a Secured Creditor?, 22 Bankr. L. Letter No. 8, at 1 (Aug. 2002). See also Stephen J. Ware, Security Interests, Repossessed Collateral, and Turnover of Property to the Bankruptcy Estate, 2002 Utah L. Rev. 775.

4 Young, 193 B.R. at 626 (quoting In re R. Purbeck & Assocs., 12 B.R. 406, 408 (Bankr. D. Conn. 1981)).

5 Sharon, 234 B.R. at 682.

6 Knaus, 889 F.2d at 775.

7 Sharon, 234 B.R. at 684.

8 Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (citations omitted).

9 See Thompson, 566 F.3d at 705-06.

10 The contention that, "at a minimum, it appears that bankruptcy courts approved of differing practices concerning adequate protection" pre-1984, relies upon two entirely inapt bankruptcy court decisions. Thompson, 566 F.3d at 706 (quoting In re Sharon, 200 B.R. 181, 190, Bankr. L. Rep. (CCH) P 77101 (Bankr. S.D. Ohio 1996), aff'd, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999)). In one, the bankruptcy court ordered turnover without any provision for adequate protection because the repossessing creditor's security interest was unperfected and thus *invalid* in bankruptcy! See In re R. Purbeck & Associates, Ltd., 12 B.R. 406 (Bankr. D. Conn. 1981). In the other, the creditor refusing return of the collateral had repossessed *postpetition* in violation of the automatic stay! See Matter of Endres, 12 B.R. 404 (Bankr. E.D. Wis. 1981).

11 United States v. Inslaw, 932 F.2d 1467, 1473 (D.C. Cir. 1996) (citation omitted).

12 In explaining the clause prohibiting any "act to obtain possession ... of property from the estate," both the House and Senate Reports described this provision as designed to protect "property over which the estate has control *or* possession." S. Rep. No. 95-989, at 50 (1978) (emphasis added); H.R. Rep. No. 95-595, at 341 (1977) (emphasis added).

13 Inslaw, 932 F.2d at 1474.

14 Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 21, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995).

15 See, e.g., In re Computer Communications, Inc., 824 F.2d 725, 16 Bankr. Ct. Dec. (CRR) 615, 17 Collier Bankr. Cas. 2d (MB) 556, Bankr. L. Rep. (CCH) P 71933 (9th Cir. 1987).

16 See generally Ralph Brubaker, Piercing the Corporate Veil of a Bankruptcy Debtor: Distinguishing the Bankruptcy Estate's Distinctive Roles as Successor to the Debtor and as "Super Creditor," 25 Bankr. L. Letter No. 9, at 1, 3 (Sept. 2005).

17 Inslaw, 932 F.2d at 1473.

18 U.S. v. Whiting Pools, Inc., 1983-2 C.B. 239, 462 U.S. 198, 206, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983).

19 See 11 U.S.C.A. § 554(a)-(b) (providing for court-ordered abandonment, "after notice and a hearing," of "any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate").

20 Weber, 719 F.3d at 79 (emphasis added).

21 Tabb, Bankruptcy § 3.6, at 263.

22 Plank, 47 Emory L.J. at 1194, 1209, 1213.

23 Plank, 47 Emory L.J. at 1221.

24 "Interests in the seized property that could have been exercised by the debtor ... are already part of the estate by virtue of § 541(a)(1)." U.S. v. Whiting Pools, Inc., 462 U.S. 198, 207 n. 15, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). Section 542(a), though, "grants to the estate a possessory interest ... that was *not* held by the debtor at the commencement of" the bankruptcy case. 462 U.S. at 207.

25 Whiting Pools, 462 U.S. at 206 & n.12.

26 11 U.S.C.A. § 363(e) (emphasis added).

27 Whiting Pools, 462 U.S. at 205.

28 See Whiting Pools, 462 U.S. at 207 & n.15.

29 Whiting Pools, 462 U.S. at 205.

30 In re Colonial Realty Co., 980 F.2d 125, 131, 23 Bankr. Ct. Dec. (CRR) 1143, 28 Collier Bankr. Cas. 2d (MB) 28, Bankr. L. Rep. (CCH) P 75283 (2d Cir. 1992) (emphasis added). Accord Rajala v. Gardner, 709 F.3d 1031, 1037-39, 57 Bankr. Ct. Dec. (CRR) 188, 69 Collier Bankr. Cas. 2d (MB) 403, Bankr. L. Rep. (CCH) P 82441 (10th Cir. 2013), petition for cert. filed, 81 U.S.L.W. 3704 (U.S. June 10, 2013). But see In re MortgageAmerica Corp., 714 F.2d 1266, 1275-76, 12 Bankr. Ct. Dec. (CRR) 151, 9 Collier Bankr. Cas. 2d (MB) 603 (5th Cir. 1983) (relying upon the *Whiting Pools* statement to the contrary).

31 Thompson, 566 F.3d at 703 (quoting Sharon, 243 B.R. at 682) (emphasis added).

32 Weber, 719 F.3d at 79. See also Sharon, 234 B.R. at 682 (under "*Whiting Pools*, possession of the Debtor's car was part of the bundle of rights that became 'property of the estate' at the Chapter 13 petition").

33 Weber, 719 F.3d at 79.

34 See also Thompson, 566 F.3d at 703 ("GMAC exercised control over Thompson's vehicle when it refused to return it to the bankruptcy estate upon request").

35 Whiting Pools, 462 U.S. at 206.

36 Whiting Pools, 462 U.S. at 206.

37 Whiting Pools, 462 U.S. at 207.

38 See, e.g., In re Colortran, Inc., 210 B.R. 823, 38 Collier Bankr. Cas. 2d (MB) 862 (B.A.P. 9th Cir. 1997), aff'd in part, vacated in part, 165 F.3d 35 (9th Cir. 1998) (table decision).

39 See, e.g., In re Bernstein, 252 B.R. 846, 36 Bankr. Ct. Dec. (CRR) 211, 45 Collier Bankr. Cas. 2d (MB) 297 (Bankr. D. D.C. 2000).

40 See, e.g., In re WEB2B Payment Solutions, Inc., 488 B.R. 387, 57 Bankr. Ct. Dec. (CRR) 202, Bankr. L. Rep. (CCH) P 82449 (B.A.P. 8th Cir. 2013).

41 Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995).

42 Bernstein, 252 B.R. at 851.

43 In re WEB2B Payment Solutions, Inc., 488 B.R. 387, 57 Bankr. Ct. Dec. (CRR) 202, Bankr. L. Rep. (CCH) P 82449 (B.A.P. 8th Cir. 2013).

44 In re Knaus, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989).

45 WEB2B, 488 B.R. at 393.

46 Weber, 719 F.3d at 79.

47 Sharon, 234 B.R. at 683 (emphasis added).

48 Thompson, 566 F.3d at 707 (quoting Colortran, 210 B.R. at 827-28).

49 Bernstein, 252 B.R. at 851.

50 Thompson, 566 F.3d at 703, 706.

51 Weber, 719 F.3d at 80.

52 Thompson, 566 F.3d at 707.

53 Barringer, 244 B.R. at 409.

54 See 11 U.S.C.A. §§ 362(g)(2), 363(p)(1).

55 Young, 193 B.R. at 627.

56 In re Riding, 44 B.R. 846, 850, 12 Bankr. Ct. Dec. (CRR) 635, 11 Collier Bankr. Cas. 2d (MB) 859, Bankr. L. Rep. (CCH) P 70173 (Bankr. D. Utah 1984). Judge Allen's *Riding* opinion contains a very useful and extremely exhaustive history of the evolution of procedural requirements for turnover relief. See id. at 849-57.

57 "[S]ubtle influence[s] of the more limited English concept of [summary in rem] bankruptcy jurisdiction continue[] to linger" in unexpected places, and perhaps always will. Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm. & Mary L. Rev. 743, 939 (2000).

58 Riding, 44 B.R. at 854.

59 "The formalities of the adversary proceeding process and the time for serving pleadings are not well suited to the expedited schedule" necessary for stay relief/adequate protection determinations. 1983 Advisory Committee Note to Bankruptcy Rule 7001.

60 See Advisory Committee Note to the 1987 Amendment to Bankruptcy Rule 7001.

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TURNOVER, ADEQUATE PROTECTION, AND THE AUTOMATIC STAY (PART I): ORIGINS AND EVOLUTION OF THE TURNOVER POWER

By Ralph Brubaker

In the recent decision of *In re Weber*,[1] the Second Circuit joins a growing majority of appellate courts holding that a secured creditor who has lawfully repossessed collateral prepetition must, once the debtor files bankruptcy, immediately and unconditionally surrender that collateral to the appropriate estate representative (usually a Chapter 13 debtor) on pain of contempt for a willful violation of the automatic stay.[2] This issue of *Bankruptcy Law Letter* is the first of a two-part analysis and critique of that majority position. This month's issue will trace the origins and evolution of the turnover power through the 1984 amendments to the Bankruptcy Code, which amended the automatic stay provision of § 362(a)(3) in a manner that the majority courts believe effects a dramatic change in prior turnover practice—to wit, that a secured creditor can no longer retain collateral repossessed prepetition pending provision of court-ordered adequate protection. Next month's issue will critically examine the courts' interpretation of that amendment to § 362(a)(3).

As we shall see, the majority position is highly dubious[3] and seems driven more by certain "practical considerations" (as the courts themselves have put it) than a sound, principled interpretation of the meaning of the relevant Code provisions. Admittedly, the governing law is nuanced and opaque—thus, the appeal of a more "pragmatic" response. The facts of *Weber* are straightforward and typical, though, so that is a good place to begin.

Prepetition Repossession of Collateral and the Post-Petition Stand-Off

In 2006, the State Employees Federal Credit Union (SEFCU) obtained a security interest in Chris Weber's pickup truck to secure four loans from SEFCU to Weber. In 2009, Weber defaulted on those loans, and on January 10, 2010, SEFCU lawfully repossessed Weber's pickup truck, which he evidently used in his construction business. Unable to fully redeem the pickup truck under applicable New York

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law (which would require payment of all amounts owing SEFCU if those debts had been accelerated upon default, plus reasonable costs of repossession), Weber filed a Chapter 13 petition on January 14. Weber's counsel immediately notified SEFCU of the bankruptcy filing and demanded return of Weber's pickup. SEFCU did not return the vehicle, apparently taking the position that it could retain possession pending a turnover order from the bankruptcy court that afforded SEFCU adequate protection of its lien. So on January 22, Weber filed an adversary proceeding against SEFCU seeking turnover of the pickup under Code § 542(a) and alleging a willful violation of the § 362(a)(3) automatic stay provision.

On March 1, the Bankruptcy Court entered an order to show cause why (1) the vehicle should not be returned and (2) SEFCU should not be sanctioned for a stay violation. After a hearing on the show-cause order, SEFCU evidently voluntarily surrendered the vehicle to Weber on March 5. Weber's adversary proceeding continued as to the alleged stay violation, however, for which Weber sought actual damages from inability to use the vehicle between the January 14 petition and the March 5 return date, as well as attorney's fees and punitive damages under Code § 362(k)(1).

The bankruptcy court ultimately granted SEFCU summary judgment on the authority of *In re Alberto*,[4] which held that mere retention of possession already lawfully acquired prepetition is *not* an "act to . . . exercise control over property of the estate" within the meaning of Code § 362(a)(3). The district court reversed, however, and the Second Circuit affirmed the district court, holding that "by failing to deliver the repossessed vehicle to the debtor-in-possession promptly after receiving notice of the pending petition, SEFCU willfully violated section 362(a)."[5]

The History of Secured Creditor Turnover

Full understanding of the automatic stay question at issue in cases such as *Weber* requires appreciation of the proper relationship between the automatic stay provision of § 362(a)(3) and the § 542(a) turnover provision. As the Supreme Court has stated in the context of the corollary § 542(b) turnover provision, "we will not give § 362(a)(3) . . . an interpretation that would proscribe what § 542(b)'s" turnover provision was "plainly intended to permit."[6]

The Supreme Court's *Whiting Pools* decision[7] is, of course, the seminal case on secured creditor turnover under the Bankruptcy Code. As the *Weber* court correctly recognized, though (and unlike many other courts), *Whiting Pools* does *not* resolve the stay violation question. And as the *Whiting Pools* Court acknowledged, § 542(a) was simply a codification of turnover powers that had developed under "judicial precedent predating the Bankruptcy Code," and "[n]othing in the legislative history evinces a congressional intent to depart from that [pre-Code] practice."[8] That pre-Code practice, therefore, remains highly relevant for interpreting the turnover power as codified in § 542(a).

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Historical Common-Law Principles of In Rem Jurisdiction

Many aspects of now-codified federal bankruptcy law have their origins in common law principles of in rem jurisdiction, and turnover powers are yet another example. As Justice Jackson explained:

> The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity.[9]

The express statutory provisions of federal bankruptcy law vesting title to a bankrupt's property in a representative of the bankruptcy estate, to be administered for the benefit of the bankrupt's creditors, under the supervision and control of a federal bankruptcy court, have always been considered to give that federal court in rem jurisdiction over that property. "By operation of law, the filing of the petition in bankruptcy cause[s] all property of the debtor to pass into the custody of the bankruptcy court, under the control of a trustee or receiver, an officer of the court."[10] As Justice Fuller famously stated in *Mueller v. Nugent*, "the filing of the petition is a caveat to all the world, and in effect an attachment and injunction" pursuant to which "title to the bankrupt's property became vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court."[11]

"Such . . . in rem jurisdiction is closely linked to the power to enjoin interferences with property within the control of a federal court."[12] "In fact, the essence of such . . . in rem jurisdiction is in the power to enjoin collateral interference with that property and its administration."[13] As Justice Brandeis put it:

> All property in the possession of a bankrupt of which he claims the ownership passes, upon the filing of a petition in bankruptcy, into the custody of the court of bankruptcy. To protect its jurisdiction from interference, that court may issue an injunction. The power is not peculiar to bankruptcy or to the federal courts. It is an application of the general principle that, where a court of competent jurisdiction has, through its officers, taken property into its possession, . . . the court may not only issue all writs necessary to protect its possession from physical interference, but is entitled to determine all questions respecting the same.[14]

Of course, "[d]etermining exactly what property is within the exclusive possession and control of a federal bankruptcy court can be a nettlesome problem, especially with respect to property in the possession of a third party," and "[t]raditionally, such property has been considered within the 'constructive' possession of a federal bankruptcy court only to the extent the third party raises no substantial defenses to turnover of the property."[15]

A turnover order, then, was conceived as an incident to a bankruptcy court's in rem jurisdiction over a debtor's bankruptcy estate. It was considered in the nature of an injunctive order, the violation of which was punishable by contempt.[16] Moreover, this injunctive turnover power directly implicated the historical summary-plenary distinction that pervaded multiple dimensions of federal bankruptcy jurisdiction and procedure.[17]

> Of course, a debtor's property often included things not within the possession of the court, such as a disputed cause of action against a third party or tangible property held under a substantial claim of right by a third party, a so-called adverse claimant. A court of bankruptcy had no summary jurisdiction to adjudicate disputes with adverse claimants. Such a dispute could be resolved only by an ordinary civil action (a plenary suit) . . ..[18]

All other bankruptcy proceedings, however, were resolved through summary proceedings in the federal bankruptcy court, and this "procedural divide established under the early American bankruptcy statutes . . . simply adopted the English practice requiring a formal plenary suit in assignee [now trustee] actions to recover money or property from an adverse claimant."[19]

To the extent a debtor's property was in the possession of a third party raising no adverse claim to retain possession, though, a federal bankruptcy court could summarily issue an injunctive turnover order against that party. Indeed, that was the holding of *Mueller v. Nugent*:

> In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, [in summary proceedings] on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to

> resort to a plenary suit in the [former trial-level] circuit court or a state court, as the case may be?
>
> If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and in many respects rendered practically inefficient.
>
> The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law.
>
> * * * *
>
> [W]here property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has [the] power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.[20]

Turnover by a Secured Creditor in Possession of Repossessed Collateral

Within the context of this framework of general principles governing common-law turnover powers, a secured creditor who had, in the enforcement of its lien rights, lawfully taken possession of its collateral before the bankruptcy filing, was (as Judge Friendly put it) "the archetypal 'adverse claimant' "[21] who was *not* subject to a turnover order.[22] Indeed, "[g]enerally, a creditor in possession of collateral could liquidate the collateral without interference" from the bankruptcy court.[23]

The Supreme Court's *Continental Illinois* decision[24] authorized a more expansive conception of bankruptcy courts' general injunctive powers in reorganization proceedings.[25] Relying upon *Continental Illinois'* generous construction of the scope of bankruptcy courts' injunctive powers under 1898 Act § 2a(15) (the predecessor to present Code § 105(a)), as well as express codification in the statutory reorganization provisions of bankruptcy courts' in rem "jurisdiction of the debtor and its property, wherever located" (the predecessors to 28 U.S.C.A. § 1334(e)(1)),[26] the lower courts held that bankruptcy courts also had a more expansive turnover power in reorganization proceedings as well.

Thus, in reorganization proceedings "a bankruptcy court had broad power to order secured creditors in possession following the debtor's default to turn over the collateral,"[27] with the leading case being the First Circuit's decision in *Reconstruction Finance Corp. v. Kaplan*.[28] In any such turnover proceeding, though, "the bankruptcy court was required to protect the secured creditor from harm before ordering return of the property items."[29]

Code § 542(a)'s Codification of Pre-Code Turnover Powers

The legislative history of the Code § 542(a) turnover provision has been the subject of careful scholarly study, including by Judge Friendly in his Second Circuit opinion in *Whiting Pools*.[30] Indeed, the Supreme Court commented that "we find Judge Friendly's careful analysis of this history for the Court of Appeals to be unassailable,"[31] and Judge Friendly's analysis ultimately concluded that the most "natural reading of § 542 is that it was intended to codify *RFC v. Kaplan*,"[32] which was representative of the pre-Code practice pursuant to which "the bankruptcy court could order the turnover of collateral in the hands of a secured creditor."[33]

Indeed, more generally, Code § 542(a) "gives an explicit statutory basis for the traditional turnover order against persons other than the debtor."[34] As the Supreme Court explained the traditional turnover power in *Maggio v. Zeitz*, it was a use of the bankruptcy court's general equitable powers under the statutory predecessor to Code § 105(a) to enforce the debtor's statutory turnover obligation under the predecessor to Code § 521(4).[35] With codification of a correlative turnover obligation for third parties in possession of property of the estate in § 542(a), then, bankruptcy courts can use their § 105(a) equitable powers to enter an injunctive turnover order against third parties as "necessary or appropriate to carry out the provisions of" § 542(a).[36]

The most noteworthy implication of this historical perspective on the intended function of § 542(a)—the perspective that the Supreme Court itself promulgated in *Whiting Pools*—is that "§ 542(a) is *not* self-executing."[37] It simply provides an express statutory basis for a bankruptcy court to enter an injunctive order compelling turnover of identified property in the possession of a third party.

Consistent with the pre-Code turnover practice that § 542(a) was intended to codify, then, a third party's mere possession of that property, in and of itself (before entry of any turnover order), does not contravene any injunctive orders of the court; only a knowing violation of a duly entered turnover order is contemptuous conduct. Indeed, if § 542(a) were itself a self-executing injunctive order, a subsequent turnover order would be entirely unnecessary. "Injunctions . . . are *not* enforced by further injunctions; injunctions are enforced by contempt citations."[38]

Whiting Pools, Code § 542(a), and Secured Creditor Turnover

While *Whiting Pools* is often considered a decision construing the scope of property of the estate under the Bankruptcy Code, in actuality, its holding only addressed the extent of a bankruptcy court's turnover powers under Code § 542(a). Its discussion of property of the estate, while largely dicta, was confusing (and somewhat confused) and is a central obstacle to properly resolving the turnover conundrum presented by cases like *Weber*.

The debtor in that case was Whiting Pools, Inc., which ran a swimming pool sales and service business, and Whiting Pools had fallen behind on its employment tax payments to the IRS. IRS assessments resulted in a tax lien attaching to all of Whiting Pools' property, and in January 1981, the IRS seized a bunch of Whiting Pools' property pursuant to the tax lien, with the intention of selling that property at a public auction and using the proceeds to pay the taxes owing. The day after the IRS seized the property, though, Whiting Pools filed Chapter 11.

Even though the IRS had a lien on and possession of the seized property on the petition date, Whiting Pools still owned the property. Whiting Pools' Chapter 11 estate, therefore, succeeded to that ownership interest under Code § 541(a)(1). Consequently, any attempt by the IRS to proceed with the tax sale postpetition would be an act to enforce a lien against property of the estate, in violation of the § 362(a)(4) automatic stay provision.

The IRS, therefore, moved for relief from stay to proceed with the tax sale, and Whiting Pools counterclaimed, seeking turnover of the seized property under Code § 542(a). The bankruptcy court denied the IRS relief from stay and ordered turnover of possession of the seized property, on the condition that Whiting Pools provide adequate protection of the value of the IRS's lien rights through retention of the lien, specified cash payments to the IRS, and lifting of the stay upon any payment default. The IRS contested the turnover order in the Supreme Court, contending that it could not be forced to turn over the property that it had seized prepetition.

The § 542(a) Turnover Power Enhances Property of the Estate

Although the Supreme Court sent conflicting signals on this point, it is abundantly clear that Whiting Pools, as DIP representative of the bankruptcy estate, had no right to regain possession of the seized property under Code § 541(a)(1) as mere successor to "all legal or equitable interests of the debtor in property as of the commencement of the case." Of course, the "interests of the debtor in property" referenced in § 541(a)(1) are those "[p]roperty interests . . . created and defined by state law."[39] On the petition date, the debtor did *not* have possession of the seized property—the relevant state-law "interest in property" at stake; the IRS had possession of the seized property. Moreover, on the petition date, Whiting Pools did not have any right to regain possession of the seized property by simply promising a bunch of future cash payments to the IRS. And Code § 541(a)(1) manifestly (in the words of the legislative history) "is not intended to expand the debtor's rights against others more than they exist at the commencement of the case."[40]

So the bankruptcy estate automatically succeeds to no greater property rights on the petition date than those of the debtor, and thus, to the extent the debtor has no state-law right to possession of the property on the petition date, the estate acquires no possessory rights under Code § 541(a)(1). In *Whiting Pools*, nonbankruptcy law clearly gave the IRS rightful possession of the seized property on the petition date, so the debtor's Chapter 11 estate did *not* (and could not) succeed to possession or a right of possession under Code § 541(a)(1).

The IRS argued that the same limitation applied

to turnover of property of the estate under Code § 542(a):

> The Government concludes that, at the commencement of the case, the debtor's only interests in the property seized by the IRS were those explicitly set forth in § 6331 *et seq*. of the IRC [a right to notice of the seizure and sale, a right to redemption prior to sale, and a right to any surplus proceeds from the sale], that therefore only those interests became part of the "property of the estate", and that turnover of these interests would be inappropriate since the debtor cannot "use, sell, or lease" them.[41]

The Supreme Court, however, rejected this argument as an inapt limitation on the scope of the § 542(a) turnover power, which provides, by its express terms, for the estate to obtain "possession" of property from a third party.[42] The Court thus construed the turnover provision of Code § 542(a) as augmenting property of the estate with a right of possession the debtor did *not* have on the petition date, in the same way that a trustee's avoiding powers enhance property of the estate beyond the debtor's petition-date property interests.

In the words of the Court: "In effect, § 542(a) grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the reorganization proceedings."[43] "Indeed, if this were not the effect, § 542(a) would be largely superfluous in light of § 541(a)(1)" because "[i]nterests in the seized property that could have been exercised by the debtor . . . are already part of the estate by virtue of § 541(a)(1)."[44] "The fact that § 542(a) grants the trustee greater rights than those held by the debtor prior to the filing of the petition is consistent with [avoiding power] provisions of the Bankruptcy Code that address the scope of the estate."[45] "Several of these provisions bring into the estate property in which the debtor did not have a possessory [or other] interest at the time the bankruptcy proceedings commenced. Section 542(a) is such a provision."[46] And when the estate successfully obtains possession of property pursuant to § 542(a), possession itself also becomes property of the estate under the express terms of § 541(a)(7) as an "interest in property that the estate acquires after the commencement of the case."

The Right to Adequate Protection Replaces the Right of Possession

By its express terms, though, Code § 542(a) only compels turnover of "property that the trustee [or DIP] may use, sell, or lease under section 363." Thus, the *Whiting Pools* Court also held that the secured creditor subjected to turnover, "under section 363(e), remains entitled to adequate protection for its interests."[47] Because "the right to adequate protection . . . replace[s] the protection afforded by possession,"[48] then "[a]t the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor."[49] Indeed, Code § 363(e) even expressly provides that the bankruptcy "court ... shall *prohibit*" a "*proposed* . . . use, sale, or lease" to the extent "necessary to provide adequate protection" of a secured creditor's lien rights.

Adequate Protection Precedes Turnover

Given the pre-Code turnover practice that § 542(a) was intended to codify (as the *Whiting Pools* Court noted), it seems clear that Congress contemplated that such adequate protection determinations would be made in the context of proceedings on a trustee's request for a turnover order, as was the case under pre-Code practice. Indeed, the legislative history notes that § 542(a) "is not intended to require an entity to deliver property to the trustee if such entity has obtained an order of the court authorizing the entity to retain possession, custody, or control of the property."[50]

Moreover, the automatic stay provision as originally enacted (and extant when *Whiting Pools* was decided) was also fully consistent with the pre-Code turnover practice, pursuant to which a repossessing secured creditor's mere possession of the repossessed collateral, in and of itself (before entry of any turnover order), does not contravene any injunctive orders of the court; only a knowing violation of a duly entered turnover order is contemptuous conduct. The only possessory conduct (as such) enjoined by the originally enacted version of the § 362(a)(3) automatic stay provision was "any *act to obtain possession* of property of the estate or of property from the estate," and a secured creditor's mere

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retention of possession already obtained before the bankruptcy filing (and its imposition of the automatic stay) clearly did *not* violate this stay provision.

Extension of *Whiting Pools* to Chapter 13 Cases

Whiting Pools was decided in the context of a Chapter 11 reorganization proceeding, and the Supreme Court's reasoning expressly relied upon "the congressional goal of encouraging reorganizations" and the fact that a "reorganization effort would have small chance of success . . . if property essential to running the business were excluded from the estate."[51] Thus, the *Whiting Pools* Court was careful to confine its holding to turnover of repossessed collateral in a Chapter 11 case.[52] In fact, there is some textual support for the position that a Chapter 13 debtor has no turnover rights at all under Code § 542(a), as that provision is conspicuously absent from the list of "rights and powers of a trustee" that Code § 1303 confers upon a Chapter 13 debtor.[53]

Code § 1303, however, does expressly afford a Chapter 13 debtor a trustee's right to use, sell, or lease property of the estate under Code § 363, and it is precisely such "property that the trustee may use, sell, or lease under section 363" that is subject to turnover under Code § 542(a). Moreover, while § 542(a) provides that any party in possession of such property "shall deliver *to the trustee*, and account for, such property," Code § 1306(b) provides that in a Chapter 13 case, "the debtor shall remain in possession of all property of the estate." Thus, the text of the Code can be fairly read to afford a Chapter 13 debtor turnover rights under Code § 542(a), as an incident to the debtor's right to possess and use property of the estate. And likewise, just as Chapter 11's general policy objective of encouraging reorganization over liquidation is promoted through turnover of repossessed collateral, so too is Chapter 13's general policy objective of encouraging debt repayment plans by allowing a debtor to keep all of his/her property.[54]

In both Chapter 11 and Chapter 13 cases, then, the § 542(a) turnover power works in tandem with the § 362(a)(4) automatic stay provision preventing the repossessing secured creditor from selling the collateral. The DIP is given full use of repossessed collateral in order to facilitate confirmation and consummation of a successful reorganization/repayment plan, provided that the secured creditor's lien rights are adequately protected. Consequently, most courts have concluded that *Whiting Pools*' construction of the scope of the § 542(a) turnover power is equally applicable in Chapter 13, and the Second Circuit in *Weber* reached the same conclusion.

The 1984 Amendment to § 362(a)(3) Enjoining any Act to Exercise Control over Property of the Estate

If the above history of the § 542(a) turnover power were the end of the story, then cases like *Weber* would be easily resolved. The secured creditor clearly could retain possession of collateral repossessed prepetition pending a determination of necessary adequate protection, made by the bankruptcy court in the context of a trustee or DIP's request for turnover of the repossessed collateral.

The only thing, then, that makes these cases at all difficult is the 1984 amendment to Code § 362(a)(3), which added the following italicized language:

> (a) … a [bankruptcy] petition … operates as a stay, applicable to all entities, of—
>
> * * * *
>
> (3) any act to obtain possession of property of the estate or of property from the estate *or to exercise control over property of the estate;*

Indeed, the determinative nature of this amendment is revealed by the fact that,

> under the Code, prior to the § 362(a)(3) amendment, the common [pre-Code] practice of conditioning turnover orders on proof of adequate protection continued. Courts uniformly supported the practice that "[a] secured creditor may insist upon adequate protection *as a condition precedent* to the turnover of property since the property may not be used, sold, or leased under section 363 without it."[55]

Next month's issue of *Bankruptcy Law Letter* will analyze and critique the courts' varying interpretations of the effect of the "exercise control" amendment to § 362(a)(3) as applied to a secured creditor's retention of collateral repossessed prepetition.

ENDNOTES:

[1]In re Weber, 2013 WL 1891371 (2d Cir. 2013).

[2]See Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); In re Knaus, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989); In re Yates, 332 B.R. 1, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005); In re Sharon, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999); In re Abrams, 127 B.R. 239, 21 Bankr. Ct. Dec. (CRR) 1283, 25 Collier Bankr. Cas. 2d (MB) 15, Bankr. L. Rep. (CCH) P 74023 (B.A.P. 9th Cir. 1991).

[3]Judges Teel, Spector, and Stosberg have written particularly thoughtful opinions challenging the majority approach. See In re Sharon, 234 B.R. 676, 688, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (Stosberg, J., dissenting); In re Bernstein, 252 B.R. 846, 36 Bankr. Ct. Dec. (CRR) 211, 45 Collier Bankr. Cas. 2d (MB) 297 (Bankr. D. D.C. 2000) (Teel, B.J.); In re Barringer, 244 B.R. 402, 43 Collier Bankr. Cas. 2d (MB) 1615 (Bankr. E.D. Mich. 1999) (Spector, B.J.); In re Young, 193 B.R. 620 (Bankr. D. D.C. 1996) (Teel, B.J.). Accord Charles J. Tabb, The Law of Bankruptcy § 3.6, at 262-64 & § 5.13, at 442 n.4, 444 (2d ed. 2009); Ralph Brubaker, Which Comes First: the Turnover or the Adequate Protection?, 20 Bankr. L. Letter No. 12, at 1 (Dec. 2000); Thomas E. Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1194, 1267-71 (1998).

The Eleventh Circuit's case law on the subject, while also departing from the majority approach, is badly misguided, as this contributing author has argued in a previous issue of Bankruptcy Law Letter. Ralph Brubaker, Turnover Rights Revisited (or Repudiated Sub Silentio?): Who "Owns" Collateral Repossessed by a Secured Creditor?, 22 Bankr. L. Letter No. 8, at 1 (Aug. 2002). See also Stephen J. Ware, Security Interests, Repossessed Collateral, and Turnover of Property to the Bankruptcy Estate, 2002 Utah L. Rev. 775.

[4]In re Alberto, 271 B.R. 223 (N.D. N.Y. 2001).

[5]Weber, 2013 WL 1891371, at *10.

[6]Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995).

[7]U.S. v. Whiting Pools, Inc., 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983).

[8]Whiting Pools, 462 U.S. at 208.

[9]Maggio v. Zeitz, 333 U.S. 56, 61 (1948).

[10]Ralph Brubaker, Bankruptcy Injunctions and Complex Litigation: A Critical Reappraisal of Non-Debtor Releases in Chapter 11, 1997 U. Ill. L. Rev. 959, 1043 n.314.

[11]Mueller v. Nugent, 184 U.S. 1, 14, 22 S. Ct. 269, 46 L. Ed. 405 (1902). See also International Bank v. Sherman, 101 U.S. 403, 406, 25 L. Ed. 866, 1879 WL 16671 (1879) ("The filing of the petition was a caveat to all the world. It was in effect an attachment and injunction.").

[12]Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm. & Mary L. Rev. 743, 839 n.357 (2000).

[13]Ralph Brubaker, Money Judgments, Governmental Police and Regulatory Powers, and the Automatic Stay, 21 Bankr. L. Letter No. 2, at 1, 5 (Feb. 2001).

[14]Ex parte Baldwin, 291 U.S. 610, 615 (1934).

[15]Brubaker, 21 Bankr. L. Letter No. 2, at 5. See Brubaker, 41 Wm. & Mary L. Rev. at 792.

[16]See Maggio v. Zeitz, 333 U.S. 56, 68 S. Ct. 401, 92 L. Ed. 476 (1948); Oriel v. Russell, 278 U.S. 358, 363-67, 49 S. Ct. 173, 73 L. Ed. 419 (1929) (there is "no doubt that a motion to commit the bankrupt for failure to obey an order of the court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt," and "this sort of an order of 'turnover' finds its analogy in the inquiry in contempt proceedings for violating an injunction issued by a court of general jurisdiction"); Mueller v. Nugent, 184 U.S. at 13 ("if the [turnover] order . . . was in itself a lawful order, the power of the district court to commit" the person in possession of the bankrupt's money "until he surrendered the money to the trustee, or otherwise satisfied the trustee with respect thereto, was unquestionable under . . . the general jurisdiction of the court to enforce its orders in the collection of assets").

[17]See generally Ralph Brubaker, A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After *Stern v. Marshall*, 86 Am. Bankr. L.J. 121, 122-30 (2012).

[18]Ralph Brubaker, Nondebtor Releases and Injunctions in Chapter 11: Revisiting Jurisdictional Precepts and the Forgotten *Callaway v. Benton* Case, 72 Am. Bankr. L.J. 1, 23-24 (1998).

[19]Brubaker, 86 Am. Bankr. L.J. at 126.

[20]Mueller v. Nugent, 184 U.S. at 14.

[21]U.S. v. Whiting Pools, Inc., 674 F.2d 144, 148, 8 Bankr. Ct. Dec. (CRR) 1138, 5 Collier Bankr. Cas. 2d (MB) 1584, 82-1 U.S. Tax Cas. (CCH) P 9269, 50 A.F.T.R.2d 82-6080 (2d Cir. 1982), judgment aff'd, 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983).

[22]See Phelps v. U. S., 1975-1 C.B. 372, 421 U.S.

330, 95 S. Ct. 1728, 44 L. Ed. 2d 201, 75-1 U.S. Tax Cas. (CCH) P 9467, 35 A.F.T.R.2d 75-1505 (1975).

[23]Thomas E. Plank, The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy, 59 Md. L. Rev. 253, 266 (2000).

[24]Continental Illinois Nat. Bank & Trust Co. of Chicago v. Chicago, R.I. & P. Ry. Co., 294 U.S. 648, 55 S. Ct. 595, 79 L. Ed. 1110 (1935).

[25]See Brubaker, 72 Am. Bankr. L.J. at 25-26.

[26]See Brubaker, 72 Am. Bankr. L.J. at 31 n.130, 34 n.139, 40 n.171; Plank, 59 Md. L. Rev. at 269 n.64. It is not at all clear, however, that these provisions did anything more than simply codify accepted, traditional principles of in rem jurisdiction. Indeed, in Continental Illinois, "in its discussion of the source of the reorganization court's injunctive powers, the Supreme Court emphasized the court's jurisdiction over the debtor's reorganization, not its jurisdiction over the debtor's property." Brubaker 72 Am. Bankr. L.J. at 31 n.130. It does nicely illustrate, though, how the courts viewed the scope of their injunctive powers as ineluctably linked to and essentially coextensive with (and thus limited by) the reach of their in rem jurisdiction.

[27]Whiting Pools, 674 F.2d at 150 (Friendly, C.J.). See id. at 148-49 n.7, 150-52; Plank, 59 Md. L. Rev. at 284-91; Patrick A. Murphy, Use of Collateral in Business Rehabilitations: A Suggested Redrafting of Section 7-203 of the Bankruptcy Reform Act, 63 Cal. L. Rev. 1483, 1492-95 (1975).

[28]R. F. C. v. Kaplan, 185 F.2d 791 (1st Cir. 1950).

[29]Plank, 59 Md. L. Rev. at 291 (footnote omitted).

[30]See Whiting Pools, 674 F.2d at 152-56. See also Plank, 59 Md. L. Rev. at 292-307.

[31]Whiting Pools, 462 U.S. at 207 n.16.

[32]Whiting Pools, 674 F.2d at 155.

[33]Whiting Pools, 462 U.S. at 208. "Nothing in the legislative history evinces a congressional intent to depart from that [pre-Code] practice." Id. Thus, "the bankruptcy court generally has power under § 542 to order the turnover of property repossessed or executed upon by a secured creditor . . . following the debtor's default and prior to his bankruptcy." Whiting Pools, 674 F.2d at 156.

[34]Plank, 59 Md. L. Rev. at 303 (footnotes omitted).

[35]See Maggio v. Zeitz, 333 U.S. at 61-63.

[36]11 U.S.C.A. § 105(a).

[37]Bernstein, 252 B.R. at 849 (emphasis added).

[38]Ralph Brubaker, Of State Sovereign Immunity and Prospective Remedies: The Bankruptcy Discharge as Statutory Ex parte Young Relief, 76 Am. Bankr. L.J. 461, 555 (2002).

[39]Butner v. U.S., 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136, 19 C.B.C. 481, Bankr. L. Rep. (CCH) P 67046 (1979).

[40]S. Rep. No. 95-989, at 82 (1978); H.R. Rep. No. 95-595, at 367 (1977).

[41]Whiting Pools, 674 F.2d at 149-50.

[42]Moreover, § 542(a) uses the general bundled term "property" to thus more colloquially refer to that which the third party must relinquish possession of, rather than the more precise bundle-of-sticks method of describing various "interests" in property used throughout § 541(a). This suggests that the *Whiting Pools* Court correctly interpreted § 542(a) as a means of affirmatively enhancing the estate with a particular property interest—possession—that the estate would not otherwise have.

[43]Whiting Pools, 462 U.S. at 207.

[44]Whiting Pools, 462 U.S. at 207 n.15.

[45]Whiting Pools, 462 U.S. at 207 n.15.

[46]Whiting Pools, 462 U.S. at 205.

[47]Whiting Pools, 462 U.S. at 212-13.

[48]Whiting Pools, 462 U.S. at 207.

[49]Whiting Pools, 462 U.S. at 204.

[50]124 Cong. Rec. S17, 413 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 Cong. Rec. H11,096 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

[51]Whiting Pools, 462 U.S. at 204, 203.

[52]"Our analysis in this case depends in part on the reorganization context in which the turnover order is sought. We express no view on the issue whether § 542(a) has the same broad effect in [Chapter 7] liquidation or [Chapter 13] adjustment of debt proceedings." Whiting Pools, 462 U.S. at 208 n.17.

[53]See David Gray Carlson, Turnover of Collateral in Bankruptcy: Must a Secured Party-in-Possession Volunteer?, 6 J. Bankr. L. & Prac. 483, 507-08 (1997) (making this argument).

[54]See generally In re Robinson, 36 B.R. 35, Bankr. L. Rep. (CCH) P 69574 (Bankr. E.D. Ark. 1983).

[55]Young, 193 B.R. at 626 (quoting In re R. Purbeck & Assocs., 12 B.R. 406, 408 (Bankr. D. Conn. 1981)).

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TURNOVER, ADEQUATE PROTECTION, AND THE AUTOMATIC STAY (PART II): WHO IS "EXERCISING CONTROL" OVER WHAT?

By Ralph Brubaker

This issue of *Bankruptcy Law Letter* is the second of a two-part analysis and critique of the Second Circuit's recent decision of *In re Weber*.[1] In its *Weber* opinion, the Second Circuit joins a growing majority of appellate courts holding that a secured creditor who has lawfully repossessed collateral prepetition must, once the debtor files bankruptcy, immediately and unconditionally surrender that collateral to the appropriate estate representative (usually a Chapter 13 debtor) on pain of contempt for a willful violation of the automatic stay.[2]

The majority position is highly dubious,[3] though, and seems driven more by certain "practical considerations" (as the courts themselves have put it) than a sound, principled interpretation of the meaning of the relevant Code provisions.

Last month's issue traced the origins and evolution of the turnover power through the 1984 amendments to the Bankruptcy Code, which amended the automatic stay provision of § 362(a)(3) in a manner that the majority courts believe effects a dramatic change in prior turnover practice—to wit, that a secured creditor can no longer retain collateral repossessed prepetition pending provision of court-ordered adequate protection. This month's issue critically examines the courts' interpretation of that amendment to § 362(a)(3).

The 1984 Amendment to § 362(a)(3) Enjoining any Act to Exercise Control over Property of the Estate

If the pre-1984 history of the § 542(a) turnover power were the end of the story, then cases like *Weber* would be easily resolved. The secured creditor clearly could retain possession of collateral repossessed prepetition pending a determination of necessary adequate protection, made by the bankruptcy court in the context of a trustee or DIP's request for turnover of the repossessed collateral.

The only thing, then, that makes cases such as *Weber* at all difficult is the 1984 amendment to Code § 362(a)(3), which added the following italicized language:

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Indeed, the determinative nature of this amendment is revealed by the fact that,

> under the Code, prior to the § 362(a)(3) amendment, the common [pre-Code] practice of conditioning turnover orders on proof of adequate protection continued. Courts uniformly supported the practice that "[a] secured creditor may insist upon adequate protection *as a condition precedent* to the turnover of property since the property may not be used, sold, or leased under section 363 without it."[4]

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Turnover First, Then Adequate Protection

Those courts finding a stay violation when a secured creditor retains possession of collateral repossessed prepetition interpret the "exercise control" language added to § 362(a)(3) as an amendment directed at precisely that situation. As the Sixth Circuit BAP stated, "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control' over" property of the estate.[5] Thus, these courts see § 362(a)(3) as a correlative enhancement of the estate's § 542(a) turnover rights:

> The duty to turn over the property is not contingent upon any predicate violation of the stay, any order of the bankruptcy court, or any demand by the creditor. Rather, the duty arises upon the filing of the bankruptcy petition. The failure to fulfill this duty, regardless of whether the original seizure was lawful, constitutes a prohibited attempt to "exercise control over the property of the estate" in violation of the automatic stay.[6]

As with any conduct stayed by § 362(a), to the extent the operation of the stay (in this case, by compelling turnover) will impair the value of the creditor's lien, the creditor's "[e]ntitlement to adequate protection in the first instance . . . is triggered by a creditor's request to the bankruptcy court, and if you don't ask for it, you won't get it."[7] Under this interpretation of § 362(a)(3), then, a secured creditor cannot withhold possession of the repossessed collateral pending provision of adequate protection. Rather, the secured creditor must affirmatively request adequate protection from the bankruptcy court via, for example, a stay relief motion.

This turnover-adequate protection approach, though, is entirely dependent upon an interpretation of "exercise control" that includes mere retention of pre-existing possession, and that interpretation, while perhaps superficially appealing, is not at all compelling and, indeed, is highly problematic.

Adequate Protection Before Turnover

Pre-1984 Established Practice

The opposite minority approach resists the broader interpretation of "exercise control" because of its dramatic departure from pre-1984 practice, emphasizing the Supreme Court's interpretive

canon that presumes continuity in the law and continuation of established practice, in the absence of an unambiguous statutory directive or some legislative history indicating an intention to reverse the established practice.

> When Congress amends the bankruptcy laws, it does not write "on a clean slate." Furthermore, this Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in . . . practice that is not the subject of at least some discussion in the legislative history.[8]

Some majority courts contest the notion that their interpretation is a reversal of pre-1984 practice.[9] This contention, however, simply is not credible, and of course, these courts cite *no* pre-1984 instances in which a repossessing secured creditor's mere retention of possession of its collateral (in the absence of a turnover order) was held to be contemptuous conduct, in and of itself (presumably because there are none).[10]

Moreover, the meaning of "exercise control" in amended § 362(a)(3), as a trigger for violation of an injunction, is extremely vague and has been a perennial source of difficulty in determining its scope. As the D.C. Circuit explained, the problem lies in the potentially "extraordinary" sweep of an unbounded notion of "exercise control," particularly given the indubitable breadth of the notion of "property of the estate" as including any kind of "interest" of the debtor in any kind of tangible or intangible property.

> [Section 362(a)(3)] cannot require that every party who acts in resistance to the debtor's view of its rights violates [the automatic stay] if found in error by the bankruptcy court. . . . Since willful violations of the stay expose the offending party to liability for compensatory damages, costs, attorney's fees, and, in some circumstances, punitive damages, it is difficult to believe that Congress intended a violation whenever someone already in possession of property mistakenly refuses to capitulate to a bankrupt's assertion of rights in that property.[11]

What's more, there is absolutely no legislative history explaining Congress's objective in adding the intractably vague "exercise control" language to § 362(a)(3). At a minimum, then, the majority interpretation seems to run counter to the prevailing presumption *against* such a stark reversal of established practice. The problems with the majority interpretation, however, do not end there, as careful application of the statutory language seems to make the alternative, minority interpretation equally (if not more) plausible.

"Control" as Distinct from "Possession"

Adequate protection-turnover courts disagree with the notion that the language employed in the 1984 amendment to § 362(a)(3) was directly specifically at retention of possession. Indeed, use of the word "control" in the 1984 amendment to § 362(a)(3) suggests that the drafters meant to distinguish the newly prohibited "control" from the already-prohibited acts to obtain "possession," in order to reach nonpossessory conduct that would nonetheless interfere with the estate's authority over a particular property interest. Indeed, the legislative history explaining the originally enacted version of § 362(a)(3) also suggested such a distinction, although the original statutory language clearly did not address nonpossessory "control."[12]

An "Act" as Distinct from Failure to Act

The minority interpretation also reasons from the automatic stay's general function of merely preserving the petition-date status quo while parties' relative rights and obligations can be ascertained through the appropriate bankruptcy process, and preserving the petition-date status quo in this context means permitting the creditor to remain in possession of the property pending provision of adequate protection as ordered by the bankruptcy court.

By prohibiting only an "act . . . to exercise control," the 1984 amendment to § 362(a)(3) does, in fact, seem in accord with a general design of preventing affirmative conduct that would upset the petition-date status quo or otherwise interfere with the trustee's or DIP's "control" of property of the estate. "The automatic stay, as its name suggests, serves as a restraint only on acts to gain possession or control over property of the estate."[13] By contrast, if a creditor does nothing and simply retains possession of property that the creditor already has in its possession, it seems difficult to say that the creditor has performed an "act" prohibited by the stay. Indeed, that is essentially how the Supreme Court

interpreted § 362(a)(3) in the *Citizens Bank v. Strumpf* case, where the Court said that a bank's refusal to pay to the Chapter 13 DIP-depositor sums on deposit in the debtor's bank account "was neither a taking of possession of [debtor's] property nor an exercising of control over it, but merely a refusal to perform its promise" to repay deposited sums.[14]

Under this view, then, the "exercise control" amendment prohibits only affirmative conduct directed at "control" rather than "possession" of estate property. Such prohibited nonpossessory "control," in the absence of stay relief from the bankruptcy court, might include a nondebtor counterparty's unilateral postpetition termination of an executory contract,[15] or the postpetition efforts of someone other than the trustee or DIP (such as an individual shareholder or creditor of a corporate debtor or even the individual debtor in a Chapter 7 case) to prosecute a cause of action belonging to the debtor's bankruptcy estate.[16]

Thus, a § 542(a)/105(a) turnover *cause of action* to recover possession may well be a cause of action that is properly considered property of the estate, and the efforts of anyone other than the trustee or DIP to assert or otherwise interfere with the trustee or DIP's exclusive authority to assert the estate's turnover rights might well be considered a prohibited "act . . . to exercise control over property of the estate" within the meaning of § 362(a)(3). But "it is difficult to believe that Congress intended a violation whenever someone already in possession of property . . . refuses to capitulate to a bankrupt's assertion of rights in that property."[17]

Exceptions to a Secured Creditor's Turnover Obligation

The minority, adequate protection-turnover courts also reject the broader interpretation of § 362(a)(3) as inconsistent with, rather than complementing, the design of the turnover provisions. Unlike § 362(a)(3), the estate's turnover rights are not absolute. As the Supreme Court specifically noted in *Whiting Pools*, "there are explicit limitations on the reach of § 542(a),"[18] pursuant to which turnover is *not* required. Yet, under the broad interpretation of "exercise control," failure to turn over property when turnover is *not* required, nonetheless, would constitute a stay violation.

For example, § 542(a) expressly provides that property is *not* subject to turnover if "such property is of inconsequential value or benefit to the estate." Determinations regarding value and benefit of property are not self-evident incorrigible propositions, particularly when one takes into account the estate's adequate protection obligations with respect to property encumbered by a lien. Thus, § 542(a) (on its face) seems to contemplate such a determination by the bankruptcy court in the context of a turnover action initiated by the estate, similar to the procedure for such value and benefit determinations in the context of abandonment of property of the estate.[19] If the court in that turnover action determines that the property is of inconsequential benefit to the estate and, thus, *not* subject to turnover, under the broad interpretation of "exercise control," the court would nonetheless be compelled to reach the absurd conclusion that the defendant violated the automatic stay by retaining possession of that property.

The *Weber* court, therefore, was simply incorrect in its assertion that § 542(a) is "self-executing" and "requires that any entity in possession of property of the estate deliver it to the trustees, *without condition*."[20] As the historical evolution of the turnover power clearly reveals, "§ 542(a) is *not* self-executing."[21] And given that truism, it seems highly unlikely that Congress would indirectly impose a self-effectuating turnover obligation via § 362(a)(3) that exceeds the scope of the § 542(a) turnover provision. Indeed, it is only by means of a post-hoc boot-strap, under the influence of the overly broad interpretation of § 362(a)(3), that the courts have misconstrued § 542(a) as somehow being self-executing when (on its face) it clearly cannot be, and its origins further confirm that conclusion.

Possession Becomes Property of the Estate Only Upon Turnover

Limiting the reach of the automatic stay in a manner compatible with the turnover provisions simply requires a modicum of care and precision in specifying the "property" protected by § 362(a)(3). By its terms, § 362(a)(3) only prohibits acts to exercise control over "property of the estate." In its definition of "property of the estate," the "Bankruptcy Code explicitly adopts the legal understanding of 'prop-

erty' as interests in property," which "reflects the 'bundle of sticks' metaphor" for property interests, and "its use in the definition of property of the estate and its use throughout the Code reflect Congress's deliberate choice."[22] As Professor Plank puts it:

> The explicit use of the bundle of sticks metaphor in § 541(a)(1) shows that Congress intended to distinguish the debtor's interest in a property item and a third party's interest in the property item. To the extent that a third party has an interest in a property item in which the debtor has an ownership interest, that interest is excluded from the interest of the debtor in that property item.[23]

With respect to turnover, the particular property interest (the "stick" in the metaphorical property "bundle of sticks") that is at stake is, of course, the one expressly referenced in § 542(a)—"possession." When a secured creditor is in possession on the petition date, the secured creditor's continued postpetition retention of possession is not an exercise of control over "property of the estate," because as the Supreme Court indicated in *Whiting Pools*, under those circumstances possession is *not* a property interest to which the estate automatically succeeds on the filing date under § 541(a)(1).[24] Rather, possession becomes "property of the estate" under § 541(a)(7) only to the extent the estate successfully invokes turnover through § 542(a), which (as we've seen) clearly contemplates initiation of a turnover action, in which the creditor can then raise any defenses to turnover specified by § 542(a).

Of course, the most prominent among the "explicit limitations on the reach of § 542(a)" that the Supreme Court specifically highlighted in *Whiting Pools* is "that the property be usable under § 363."[25] By express incorporation of § 363, then, when the estate seeks turnover of property "*proposed* to be used, sold, or leased, by the trustee, the *court* . . . *shall prohibit or condition* such use, sale, or lease as is necessary to *provide adequate protection*" of the secured creditor's lien rights.[26]

Not surprisingly, this more careful analysis of the statutory language and the relationship between § 542(a) and cognate provisions in §§ 362 and 363 ultimately reinforces the clear implications of the history of the pre-Code turnover power because, as the Supreme Court acknowledged in *Whiting Pools*, § 542(a) is simply a codification thereof. Sections 542(a) and 363(e), together, make a secured creditor's obligation to turn over repossessed collateral (for use by the trustee or DIP) contingent upon the trustee or DIP requesting a turnover order from the *court*, and in the context of that turnover proceeding, the bankruptcy *court* can then make a determination regarding what the estate must do to adequately protect the value of the secured creditor's lien rights (such as maintaining insurance and making periodic cash payments) and thus fulfill the express statutory condition (1) to the estate's right to use the property under § 363 and thus also (2) to the secured creditor's obligation to turn over the property under § 542—fully consistent with the pre-Code turnover power that § 542(a) was intended to codify.

The majority courts' contrary interpretation rests upon an overly aggressive interpretation of the 1984 amendment to § 362(a)(3) attributable to a specious understanding of the "property" protected by that provision. Regrettably, though, much of the blame for this confusion lies with the Supreme Court's *Whiting Pools* opinion. There is one particular passage from *Whiting Pools* that seems to lend credibility to the majority courts' interpretation of § 362(a)(3) and, thus, figures prominently in their justificatory rationales. It is, at most, however, simply loose (and erroneous) dictum.

At one point the *Whiting Pools* opinion states that "§ 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code,"[27] thus implying that any possessory right granted the estate by § 542(a) is somehow immediately considered property of the estate under § 541(a)(1) "as of the commencement of the case," *before* the estate actually obtains possession via turnover. Both that statement itself, though, and the implication attributed to it are false. Indeed, the *Whiting Pools* Court itself subsequently contradicts that statement by acknowledging that the plain language of § 541(a)(1) does not and cannot "grant[] to the estate a possessory interest . . . that was not held by the debtor at the commencement of the" bankruptcy case—thus, the Court's reliance on § 542(a) to do that work.[28]

Moreover, that statement entirely overlooks those subparagraphs of § 541(a), such as (a)(3) and (a)(7),

that (unlike § 541(a)(1)) *are* by their express terms "intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code,"[29] such as the avoiding power provisions to which the *Whiting Pools* Court expressly likened § 542(a). And in the context of those avoiding power provisions, many lower courts (including the Second Circuit itself) have *refused* to indulge the *Whiting Pools* suggestion that property recoverable thereby should somehow be considered property of the estate "as of the commencement of the case" under § 541(a)(1), before the estate actually recovers the property at issue. For example, in *In re Colonial Realty Co.*, the Second Circuit flatly rejected the contention that "fraudulently transferred property [i]s part of the bankruptcy estate under § 541(a)(1) prior to its recovery," holding that the language and structure of § 541(a) "clearly reflects the congressional intent that such property is *not* to be considered property of the estate until it is recovered."[30]

Thus, it may well be true that "[w]ithholding possession of property from a bankruptcy estate is the essence of 'exercising control' *over possession*,"[31] as the majority courts repeatedly (and tellingly) emphasize. But such an exercise of control *over possession* is a violation of the § 362(a)(3) automatic stay only if possession is property of the estate. When a secured creditor is in possession on the petition date, though, possession is *not* property of the estate, and possession only becomes property of the estate once the estate actually obtains possession via turnover.

Only through reliance upon *Whiting Pools*' dangerously misleading dictum could the Second Circuit in *Weber* come to the bizarre conclusion that "*Whiting Pools* teaches that filing of a petition will generally transform a debtor's equitable [ownership] interest into a bankruptcy estate's possessory right."[32] And the Second Circuit could only conclude that SEFCU's " 'exercising control' over the object in which the estate's equitable [ownership] interest lay"[33]—i.e., retaining possession of the car—was a stay violation by construing "property of the estate" in a colloquial sense (i.e., the car) rather than the legal "interest in property" bundle-of-sticks meaning expressly employed in the Bankruptcy Code's definition of "property of the estate."[34]

No Protection Is Not Adequate Protection

The majority courts' interpretation of § 362(a)(3) essentially turns that provision into a self-executing turnover provision, requiring *no* adequate protection and with *no* turnover defenses at all. That interpretation, of course, makes the "explicit limitations on the reach of § 542(a)"[35] entirely superfluous. Indeed, if failure to immediately turn over repossessed collateral once the debtor files bankruptcy is exercising control over property of the estate in violation of the stay, then § 542(a) itself seems superfluous and unnecessary—other than to fill out the circular reasoning that § 542(a) somehow makes possession property of the estate over which the creditor is exercising control—circular reasoning that then completely ignores the "explicit limitations on the reach of § 542(a)."[36] Moreover, interpreting § 362(a)(3) as an independent, self-executing turnover provision not only mandates immediate turnover for the estate's proposed use without any provision of adequate protection, it can also fully jeopardize the secured creditor's entire "right to adequate protection [that] replace[s] the protection afforded by possession."[37]

Because most courts hold that a secured creditor's right to receive adequate protection is triggered only through the filing of the creditor's request with the court, many courts have also held that the extent of adequate protection to which the creditor is entitled (i.e., the value of the creditor's lien) must be measured as of the date the secured creditor files its request with the court. If § 362(a)(3) compels immediate turnover by a secured creditor when the debtor files bankruptcy, faithful compliance with this obligation will mean that, as a practical matter, turnover will invariably precede the creditor's filing of a formal motion for adequate protection with the bankruptcy court. Consequently, in those courts measuring adequate protection as of the date of the creditor's motion, the secured creditor will be subjected to a period during which its lien is subject to wholesale dissipation with no recourse.

For example, a possessory lien (such as a service provider's lien,[38] an execution lien,[39] or a security interest perfected by possession[40]) will vanish the moment the creditor relinquishes possession to the trustee or DIP, thus immediately terminating the

creditor's right to adequate protection. Likewise, if the creditor turns over uninsured property that is promptly destroyed by fire, the creditor's right to adequate protection also goes up in smoke. The secured creditor's inevitable and entirely understandable desire to delay the turnover at least long enough to preserve the right to receive the "indubitable equivalent" specifically mandated by the Code, certainly does not suggest conduct that should be considered sanctionable contempt. Indeed, in *Citizens Bank v. Strumpf*,[41] the Supreme Court was presented with a similar conflict between a broad interpretation of the automatic stay and the express statutory protections afforded a secured creditor by the § 542(b) turnover provision, and the Court held that the former must yield to the latter.

In the *Strumpf* case, when the debtor filed Chapter 13, he was in default on a $5,000 loan debt owed Citizens Bank and also had a checking account with the Bank. In response to the debtor's bankruptcy filing, the Bank put a temporary freeze on any further withdrawals from the account while it sought permission from the bankruptcy court to exercise its setoff rights with respect to the account. Although § 542(b) mandates turnover to the estate of debt payments owing a debtor, this obligation is expressly abated "to the extent that such debt may be offset under section 553." The bankruptcy court nonetheless held the Bank in contempt for violation of the automatic stay, forcing the Bank to remove its freeze on the debtor's account. The court subsequently granted the Bank relief from stay to exercise its setoff rights, but by that point there were no more funds in the account to setoff.

The Supreme Court, however, held that the bankruptcy court erred in construing the stay in a manner that eviscerated the setoff rights expressly preserved by § 542(b)—i.e., the automatic stay should *not* be interpreted as a self-executing turnover provision that exceeds the scope of the § 542(b) turnover provision. Likewise, "[t]he right of adequate protection cannot be rendered meaningless by an interpretation of §§ 362(a)(3) and 542(a) that would compel turnover even before an opportunity for the court's granting of adequate protection."[42] Indeed, in a very recent decision from the Eighth Circuit BAP, *In re WEB2B Payment Solutions, Inc.*,[43] the court's reasoning (although dicta) implicitly acknowledges that the majority courts' interpretation of § 362(a)(3) as applied to a secured creditor's retention of possession of collateral is inconsistent with *Strumpf*.

In *WEB2B*, the court held that a secured creditor with a security interest perfected by possession did, in fact, lose its perfected lien (and thus its right to any adequate protection) upon turnover of the collateral to the Chapter 7 trustee, notwithstanding the fact that immediate turnover seemed compelled by the Eighth Circuit's early, influential, now-majority interpretation of § 362(a)(3) in *In re Knaus*.[44] The BAP, though, also suggested (without discussing or even citing *Knaus*) that "[t]aken together, *Whiting Pools* and *Strumpf* provide a roadmap for creditors whose rights in collateral will be relinquished with possession," to wit, "that a creditor in [the] position . . . where relinquishment of possession will in and of itself destroy the creditor's rights . . . may withhold turning the collateral over until the bankruptcy court is able to make a determination as to whether, and to what extent, the creditor is entitled to adequate protection."[45]

Carving out an exception for a secured creditor whose "relinquishment of possession will in and of itself destroy the creditor's rights," however, cannot (by any stretch of the imagination) be wrung from the language of § 362(a)(3). If " 'exercising control' over the object in which the estate's equitable [ownership] interest lay"[46]—i.e., retaining possession—violates § 362(a)(3), that is the case whether or not the secured creditor's "relinquishment of possession will in and of itself destroy the creditor's rights." As the *Sharon* majority acknowledged, "[t]here is *no* 'exception' to § 362(a)(3) that excuses . . . refusal to deliver possession."[47]

And neither is it a sufficient response to suggest that "[i]f the creditor is concerned that its interest will be irreparably harmed if the property is turned over before [a] motion for relief from stay can be heard it may request an emergency hearing under § 362(f)."[48] If retaining possession, in and of itself, is a violation of § 362(a)(3), as the majority courts hold, then any such emergency hearing "would come only after a period during which the creditor is in contempt."[49] Indeed, even in the more routine case in which the mere filing of the creditor's stay relief

motion will preserve the creditor's right to adequate protection of the value of its lien as of that moment (although, of course, not guarantee that the estate will or can actually provide that protection), even retaining possession of the collateral long enough to file a motion with the bankruptcy court is, under the majority interpretation of § 362(a)(3), a willful and contemptuous stay violation.

The Relative Balance of Burdens and Harms

The majority courts, of course, are not entirely oblivious to the immense difficulties surrounding their interpretation of § 362(a)(3). Rather, they choose to simply overlook or give short shrift to those problems because they believe that "a myriad of policy considerations" "militate in favor of placing the onus on the creditor, rather than on the debtor, to seek judicial relief."[50] Indeed, as a practical matter, that is all that is at stake with this interpretive issue: who should bear the burden of initiating proceedings in the bankruptcy court should the parties fail to agree on the terms for a consensual turnover, with the most significant bone of contention being what is required in the way of adequate protection of the secured creditor's lien. And these "practical considerations"[51] seem to be driving the majority courts' resolution of the interpretive issue. Indeed, majority courts fully acknowledge that the secured creditor *is* entitled to adequate protection of its lien and that the bankruptcy court retains ultimate authority to set the terms of adequate protection (should the parties themselves fail to agree on adequate protection).

According to the majority courts, though, "allowing the creditor to maintain possession of the asset until it subjectively feels that adequate protection is in place, or until the debtor moves for the asset's return, unfairly tips the bargaining power in favor of the creditor."[52] The problem, though, is that the majority interpretation tips the balance to the opposite extreme, virtually assuring that there will *never* be a negotiated turnover with agreed adequate protection because *no* adequate protection whatsoever is necessary to obtain immediate turnover (under pain of contempt sanctions) under the majority interpretation. A well-advised debtor, therefore, would *never* offer *any* adequate protection in demanding turnover and would *always* put the secured creditor to the burden of moving for stay relief/adequate protection before the bankruptcy court, or use the prospective burden of doing so as leverage in adequate protection negotiations, but only *after* securing turnover *without* providing *any* adequate protection, which (as we've seen) holds the (not unrealistic) prospect of entirely eviscerating the secured creditor's right to receive adequate protection.

That "practical" implication of the majority interpretation is extremely troubling because, as Judge Spector perceptively pointed out, "we are dealing here with a property interest—the creditor's right of possession. The contention that a creditor loses that interest on the strength of nothing more than the trustee's [or DIP's] say-so may well be at odds with the Fifth Amendment"[53] and, at a minimum, seems inconsistent with the statutory allocation of the burden of proof regarding adequate protection to the trustee or DIP, *not* the secured creditor.[54] As Judge Teel has correctly noted, prepetition repossession itself "is often undertaken to assure adequate protection (such as when a car is uninsured or a lack of interest payments has increased the liability above the car's liquidation value)."[55]

The majority courts' willingness to provide such an extreme (to the point of potentially unconstitutional) advantage to the estate in adequate protection negotiations undoubtedly flows from the fact that this issue recurs most frequently in Chapter 13 cases, where the entire reason for the bankruptcy filing may well be so that the debtor can regain possession and use of a vehicle necessary for work-related transportation. Indeed, being without a vehicle for any extended period of time may jeopardize the debtor's job or business, an understandable concern that the majority interpretation addresses quite effectively.

If the debtor must initiate proceedings in the bankruptcy court to obtain turnover of the repossessed vehicle (under the minority interpretation of § 362(a)(3)), Bankruptcy Rule 7001(1) mandates an adversary proceeding with formal summons and complaint, and all of the normal timetables for full-blown all-out litigation, such as 30 days to answer the complaint, etc., which obviously is *not* conducive to an expedited resolution of the adequate protec-

tion issue, which is essentially the only contested issue to be litigated. If the secured creditor must initiate proceedings in the bankruptcy court, however (under the majority interpretation of § 362(a)(3)), the secured creditor *can* proceed by motion requesting relief from the automatic stay/adequate protection under Bankruptcy Rule 4001(a), and under that scenario, the Bankruptcy Code itself directs expedited resolution of the adequate protection issue under the hearing timetable mandated by Code § 362(e).

Expeditious resolution of a turnover order (and corollary adequate protection determination) is indeed appropriate as a matter of course. The Bankruptcy Rules, however, do *not* provide an appropriate process therefor if the minority interpretation of § 362(a)(3) prevails—thus, the compelling impetus for the majority interpretation and the pervasive instinct that the negotiating leverage the minority interpretation affords the secured creditor is legitimately regarded as "unfair."

The majority courts' highly questionable interpretation of § 362(a)(3), therefore, may well be attributable principally to the curious decision of the drafters of the 1973 Bankruptcy Rules to require that turnover be sought via an adversary proceeding. That decision effected a marked departure from the "summary" nature of turnover proceedings under the 1898 Act, pursuant to which "[t]he procedure for exercising summary turnover jurisdiction was by written petition . . . with notice to the respondent by an order to show cause."[56]

The 1973 Bankruptcy Rules and then the 1978 Bankruptcy Code initiated an (as yet unsuccessful[57]) effort to "relegate[] the differences between summary proceedings and plenary suits" inherited from English bankruptcy practice "to a place of minor historical significance."[58] In the process, though, some of the accumulated wisdom embodied in that distinction may have been discarded and now forgotten, and a "summary" process for obtaining turnover relief (and corollary adequate protection determinations) appears to be one such casualty. Indeed, in 1983 the Advisory Committee reversed the 1973 decision to require an adversary proceeding for stay relief (and corollary adequate protection) requests,[59] and in 1987, they did the same with respect to a trustee's turnover proceedings against a debtor.[60] The 1973 decision to require an adversary proceeding for all other turnover requests, however, remains unchanged, but perhaps warrants renewed attention from the Bankruptcy Rules Advisory Committee. If nothing else, the way in which the competing procedural regimes seem to be distorting the interpretation of § 362(a)(3) is cause for concern.

ENDNOTES:

[1]In re Weber, 719 F.3d 72 (2d Cir. 2013).

[2]See Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); In re Knaus, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989); In re Yates, 332 B.R. 1, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005); In re Sharon, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999); In re Abrams, 127 B.R. 239, 21 Bankr. Ct. Dec. (CRR) 1283, 25 Collier Bankr. Cas. 2d (MB) 15, Bankr. L. Rep. (CCH) P 74023 (B.A.P. 9th Cir. 1991).

[3]Judges Teel, Spector, and Stosberg have written particularly thoughtful opinions challenging the majority approach. See In re Sharon, 234 B.R. 676, 688, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (Stosberg, J., dissenting); In re Bernstein, 252 B.R. 846, 36 Bankr. Ct. Dec. (CRR) 211, 45 Collier Bankr. Cas. 2d (MB) 297 (Bankr. D. D.C. 2000) (Teel, B.J.); In re Barringer, 244 B.R. 402, 43 Collier Bankr. Cas. 2d (MB) 1615 (Bankr. E.D. Mich. 1999) (Spector, B.J.); In re Young, 193 B.R. 620 (Bankr. D. D.C. 1996) (Teel, B.J.). Accord Charles J. Tabb, The Law of Bankruptcy § 3.6, at 262-64 & § 5.13, at 442 n.4, 444 (2d ed. 2009); Ralph Brubaker, Which Comes First: the Turnover or the Adequate Protection?, 20 Bankr. L. Letter No. 12, at 1 (Dec. 2000); Thomas E. Plank, The Outer Boundaries of the Bankruptcy Estate, 47 Emory L.J. 1194, 1267-71 (1998).

The Eleventh Circuit's case law on the subject, while also departing from the majority approach, is badly misguided, as this contributing author has argued in a previous issue of *Bankruptcy Law Letter*. Ralph Brubaker, Turnover Rights Revisited (or Repudiated *Sub Silentio*?): Who "Owns" Collateral Repossessed by a Secured Creditor?, 22 Bankr. L. Letter No. 8, at 1 (Aug. 2002). See also Stephen J. Ware, Security Interests, Repossessed Collateral, and Turnover of Property to the Bankruptcy Estate, 2002 Utah L. Rev. 775.

[4]Young, 193 B.R. at 626 (quoting In re R. Purbeck & Assocs., 12 B.R. 406, 408 (Bankr. D. Conn. 1981)).

[5]Sharon, 234 B.R. at 682.

[6]Knaus, 889 F.2d at 775.

[7]Sharon, 234 B.R. at 684.

[8]Dewsnup v. Timm, 502 U.S. 410, 419 (1992) (citations omitted).

[9]See Thompson, 566 F.3d at 705-06.

[10]The contention that, "at a minimum, it appears that bankruptcy courts approved of differing practices concerning adequate protection" pre-1984, relies upon two entirely inapt bankruptcy court decisions. Thompson, 566 F.3d at 706 (quoting In re Sharon, 200 B.R. 181, 190, Bankr. L. Rep. (CCH) P 77101 (Bankr. S.D. Ohio 1996), aff'd, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999)). In one, the bankruptcy court ordered turnover without any provision for adequate protection because the repossessing creditor's security interest was unperfected and thus *invalid* in bankruptcy! See In re R. Purbeck & Associates, Ltd., 12 B.R. 406 (Bankr. D. Conn. 1981). In the other, the creditor refusing return of the collateral had repossessed *postpetition* in violation of the automatic stay! See Matter of Endres, 12 B.R. 404 (Bankr. E.D. Wis. 1981).

[11]United States v. Inslaw, 932 F.2d 1467, 1473 (D.C. Cir. 1996) (citation omitted).

[12]In explaining the clause prohibiting any "act to obtain possession . . . of property from the estate," both the House and Senate Reports described this provision as designed to protect "property over which the estate has control *or* possession." S. Rep. No. 95-989, at 50 (1978) (emphasis added); H.R. Rep. No. 95-595, at 341 (1977) (emphasis added).

[13]Inslaw, 932 F.2d at 1474.

[14]Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 21, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995).

[15]See, e.g., In re Computer Communications, Inc., 824 F.2d 725, 16 Bankr. Ct. Dec. (CRR) 615, 17 Collier Bankr. Cas. 2d (MB) 556, Bankr. L. Rep. (CCH) P 71933 (9th Cir. 1987).

[16]See generally Ralph Brubaker, Piercing the Corporate Veil of a Bankruptcy Debtor: Distinguishing the Bankruptcy Estate's Distinctive Roles as Successor to the Debtor and as "Super Creditor," 25 Bankr. L. Letter No. 9, at 1, 3 (Sept. 2005).

[17]Inslaw, 932 F.2d at 1473.

[18]U.S. v. Whiting Pools, Inc., 1983-2 C.B. 239, 462 U.S. 198, 206, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983).

[19]See 11 U.S.C.A. § 554(a)-(b) (providing for court-ordered abandonment, "after notice and a hearing," of "any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate").

[20]Weber, 719 F.3d at 79 (emphasis added).

[21]Tabb, Bankruptcy § 3.6, at 263.

[22]Plank, 47 Emory L.J. at 1194, 1209, 1213.

[23]Plank, 47 Emory L.J. at 1221.

[24]"Interests in the seized property that could have been exercised by the debtor . . . are already part of the estate by virtue of § 541(a)(1)." U.S. v. Whiting Pools, Inc., 462 U.S. 198, 207 n. 15, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). Section 542(a), though, "grants to the estate a possessory interest . . . that was *not* held by the debtor at the commencement of" the bankruptcy case. 462 U.S. at 207.

[25]Whiting Pools, 462 U.S. at 206 & n.12.

[26]11 U.S.C.A. § 363(e) (emphasis added).

[27]Whiting Pools, 462 U.S. at 205.

[28]See Whiting Pools, 462 U.S. at 207 & n.15.

[29]Whiting Pools, 462 U.S. at 205.

[30]In re Colonial Realty Co., 980 F.2d 125, 131, 23 Bankr. Ct. Dec. (CRR) 1143, 28 Collier Bankr. Cas. 2d (MB) 28, Bankr. L. Rep. (CCH) P 75283 (2d Cir. 1992) (emphasis added). Accord Rajala v. Gardner, 709 F.3d 1031, 1037-39, 57 Bankr. Ct. Dec. (CRR) 188, 69 Collier Bankr. Cas. 2d (MB) 403, Bankr. L. Rep. (CCH) P 82441 (10th Cir. 2013), petition for cert. filed, 81 U.S.L.W. 3704 (U.S. June 10, 2013). But see In re MortgageAmerica Corp., 714 F.2d 1266, 1275-76, 12 Bankr. Ct. Dec. (CRR) 151, 9 Collier Bankr. Cas. 2d (MB) 603 (5th Cir. 1983) (relying upon the *Whiting Pools* statement to the contrary).

[31]Thompson, 566 F.3d at 703 (quoting Sharon, 243 B.R. at 682) (emphasis added).

[32]Weber, 719 F.3d at 79. See also Sharon, 234 B.R. at 682 (under "*Whiting Pools*, possession of the Debtor's car was part of the bundle of rights that became 'property of the estate' at the Chapter 13 petition").

[33]Weber, 719 F.3d at 79.

[34]See also Thompson, 566 F.3d at 703 ("GMAC exercised control over Thompson's vehicle when it refused to return it to the bankruptcy estate upon request").

[35]Whiting Pools, 462 U.S. at 206.

[36]Whiting Pools, 462 U.S. at 206.

[37]Whiting Pools, 462 U.S. at 207.

[38]See, e.g., In re Colortran, Inc., 210 B.R. 823, 38 Collier Bankr. Cas. 2d (MB) 862 (B.A.P. 9th Cir. 1997), aff'd in part, vacated in part, 165 F.3d 35 (9th Cir. 1998) (table decision).

[39]See, e.g., In re Bernstein, 252 B.R. 846, 36 Bankr. Ct. Dec. (CRR) 211, 45 Collier Bankr. Cas. 2d (MB) 297 (Bankr. D. D.C. 2000).

[40]See, e.g., In re WEB2B Payment Solutions,

Inc., 488 B.R. 387, 57 Bankr. Ct. Dec. (CRR) 202, Bankr. L. Rep. (CCH) P 82449 (B.A.P. 8th Cir. 2013).

[41]Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S. Ct. 286, 133 L. Ed. 2d 258, 28 Bankr. Ct. Dec. (CRR) 97, 33 Collier Bankr. Cas. 2d (MB) 869, Bankr. L. Rep. (CCH) P 76666A (1995).

[42]Bernstein, 252 B.R. at 851.

[43]In re WEB2B Payment Solutions, Inc., 488 B.R. 387, 57 Bankr. Ct. Dec. (CRR) 202, Bankr. L. Rep. (CCH) P 82449 (B.A.P. 8th Cir. 2013).

[44]In re Knaus, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989).

[45]WEB2B, 488 B.R. at 393.

[46]Weber, 719 F.3d at 79.

[47]Sharon, 234 B.R. at 683 (emphasis added).

[48]Thompson, 566 F.3d at 707 (quoting Colortran, 210 B.R. at 827-28).

[49]Bernstein, 252 B.R. at 851.

[50]Thompson, 566 F.3d at 703, 706.

[51]Weber, 719 F.3d at 80.

[52]Thompson, 566 F.3d at 707.

[53]Barringer, 244 B.R. at 409.

[54]See 11 U.S.C.A. §§ 362(g)(2), 363(p)(1).

[55]Young, 193 B.R. at 627.

[56]In re Riding, 44 B.R. 846, 850, 12 Bankr. Ct. Dec. (CRR) 635, 11 Collier Bankr. Cas. 2d (MB) 859, Bankr. L. Rep. (CCH) P 70173 (Bankr. D. Utah 1984). Judge Allen's *Riding* opinion contains a very useful and extremely exhaustive history of the evolution of procedural requirements for turnover relief. See id. at 849-57.

[57]"[S]ubtle influence[s] of the more limited English concept of [summary in rem] bankruptcy jurisdiction continue[] to linger" in unexpected places, and perhaps always will. Ralph Brubaker, On the Nature of Federal Bankruptcy Jurisdiction: A General Statutory and Constitutional Theory, 41 Wm. & Mary L. Rev. 743, 939 (2000).

[58]Riding, 44 B.R. at 854.

[59]"The formalities of the adversary proceeding process and the time for serving pleadings are not well suited to the expedited schedule" necessary for stay relief/adequate protection determinations. 1983 Advisory Committee Note to Bankruptcy Rule 7001.

[60]See Advisory Committee Note to the 1987 Amendment to Bankruptcy Rule 7001.