11 USCS § 362, Part 1 of 6

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United States Code Service > TITLE 11. BANKRUPTCY (§§ 101 — 1532) > CHAPTER 3. Case Administration (Subchs. I — IV) > Subchapter IV. Administrative Powers (§§ 361 — 366)

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

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

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

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS § 301, 302, or 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS § 78eee(a)(3)], does not operate as a stay—

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

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act [42 USCS § 666(a)(16)];

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act [42 USCS § 666(a)(7)];

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act [42 USCS §§ 664 and 666(a)(3)] or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act [42 USCS §§ 601 et seq.];

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title [11 USCS § 546(b)] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title [11 USCS § 547(e)(2)(A)];

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

(5) [Deleted]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556 [11 USCS § 555 or 556]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559 [11 USCS § 559]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559 [11 USCS § 559]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the

mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 [46 USCS §§ 53701 et seq.] or section 109(h) of title 49 [49 USCS § 109(h)], or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46 [46 USC S §§ 53701 et seq.];

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 [20 USCS § 1085(j)] or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560 [11 USCS § 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560 [11 USCS § 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986 [26 USCS § 401, 403, 408, 408A, 414, 457, or 501(c)], that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1108(b)(1)] or is subject to section 72(p) of the Internal Revenue Code of 1986 [26 USCS § 72(p)]; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5 [5 USCS §§ 8431 et seq.], that satisfies the requirements of section 8433(g) of such title [5 USCS § 8433(g)];

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d) [26 USCS § 414(d)], or a contract or account under section 403(b) [26 USCS § 403(b)], of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) [11 USCS § 109(g)] to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 [11 USCS § 544] and that is not avoidable under section 549 [11 USCS § 549];

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361 [11 USCS § 361]) for the secured claim of such authority in the setoff under section 506(a) [11 USCS § 506(a)];

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560 [11 USCS § 555, 556, 559, or 560]) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue;

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act [42 USCS § 1320a-7b(f)] pursuant to title XI or XVIII of such Act [42 USCS §§ 1301 et seq. or 1395 et seq.]); and

(29) under subsection (a)(1) of this section, of any action by—

(A) an amateur sports organization, as defined in section 220501(b) of title 36 [36 USCS § 220501(b)], to replace a national governing body, as defined in that section, under section 220528 of that title [36 USCS § 220528]; or

(B) the corporation, as defined in section 220501(b) of title 36 [36 USCS § 220501(b)], to revoke the certification of a national governing body, as defined in that section, under section 220521 of that title [36 USCS § 220521].

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

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

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

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

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title [11 USCS §§ 701 et seq.] concerning an individual or a case under chapter 9, 11, 12, or 13 of this title [11 USCS §§ 901 et seq., 1101 et seq., 1201 et seq., or 1301 et seq.], the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title [11 USCS §§ 101 et seq.] or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge; or

(bb) if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)

(A)

(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)], the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge, and if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

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

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

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

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

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

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2) [11 USCS § 363(c)(2)], be made from rents or other income generated before, on, or after the date of the

commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)

(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] in which the debtor is an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

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

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

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

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

(h)

(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2) [11 USCS § 521(a)(2)]—

(A) to file timely any statement of intention required under section 521(a)(2) [11 USCS § 521(a)(2)] with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722 [11 USCS § 722], enter into an agreement of the kind specified in section 524(c) [11 USCS § 524(c)] applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) [11 USCS § 365(p)] if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2) [11 USCS § 521(a)(2)], after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)

(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)

(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)

(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession,

after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)

(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)

(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)

(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a

preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

History

HISTORY:

Nov. 6, 1978, P. L. 95-598, Title I, § 101, 92 Stat. 2570; July 27, 1982, P. L. 97-222, § 3, 96 Stat. 235; July 10, 1984, P. L. 98-353, Title III, Subtitle A, § 304, Subtitle C, § 363(b), Subtitle F, § 392, Subtitle H, § 441, 98 Stat. 352, 363, 365, 371; Oct. 21, 1986, P. L. 99-509, Title V, Subtitle A, § 5001(a), 100 Stat. 1911; Oct. 27, 1986, P. L. 99-554, Title II, Subtitles B, C, §§ 257(j), 283(d), 100 Stat. 3115, 3116; June 25, 1990, P. L. 101-311, Title I, § 102, Title II, § 202, 104 Stat. 267, 269; Nov. 5, 1990, P. L. 101-508, Title III, Subtitle A, § 3007(a)(1), 104 Stat. 1388-28; Oct. 22, 1994, P. L. 103-394, Title I, §§ 101, 116, Title II, §§ 204(a), 218(b), Title III, § 304(b), Title IV, § 401, Title V, § 501(b)(2), (d)(7), 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Oct. 21, 1998, P. L. 105-277, Div I, Title VI, § 603, 112 Stat. 2681-886; April 20, 2005, P. L. 109-8, Title I, § 106(f), Title II, Subtitle B, § 214, Subtitle C, § 224(b), Title III, §§ 302, 303, 305(1), 311, 320, Title IV, Subtitle A, § 401(b), Subtitle B, §§ 441, 444, Title VII, §§ 709, 718, Title IX, § 907(d), (o)(1), (2), Title XI, § 1106, Title XII, § 1225, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Oct. 6, 2006, P. L. 109-304, § 17(b)(1), 120 Stat. 1706; Dec. 12, 2006, P. L. 109-390, § 5(a)(2), 120 Stat. 2696; Dec. 22, 2010, P. L. 111-327, § 2(a)(12), 124 Stat. 3558; Oct. 30, 2020, P.L. 116-189, § 9, 134 Stat. 970.

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The Automatic Stay in Bankruptcy: An Overview

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Summary

- This article provides a background on the mechanics of the automatic stay, including its purpose, how it is commenced and terminated, and certain prohibitions, limitations, and exceptions to the stay.
- This article also discusses the grounds for relief from the stay and the types of relief available, the consequences of violation, and stay waivers.
- Also provided are links to summaries of the local rules for the automatic stay in certain jurisdictions, allowing attorneys to compare rules across different bankruptcy courts.

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This article provides a background on the mechanics of the automatic stay, including its purpose, how it is commenced and terminated, and certain prohibitions, limitations, and exceptions to the stay. This article also discusses the grounds for relief from the stay and the types of relief available, the consequences of violation, stay waivers, and strategies creditors can use to minimize the risk that these waivers will be held unenforceable.

Introduction

The automatic stay (or the "stay") is one of the most important protections and powerful tools available to a debtor in bankruptcy. It is provided for in section 362 of the Bankruptcy Code. Triggered immediately on filing of the bankruptcy petition, it automatically stops substantially all acts and proceedings against the debtor and its property. It is a nationwide, possibly even worldwide, injunction barring almost all actions against the debtor and its property, including the exercise of remedies concerning collateral, enforcement of prepetition judgments, litigation, collection efforts, and acts to create, perfect, and enforce liens granted before the date the bankruptcy petition was filed. The automatic stay only applies to prepetition events and does not bar suit against the debtor based on a cause of action arising postpetition.

The automatic stay has a broad scope, applying to all creditors, whether secured or unsecured, and to all of the debtor's property, wherever located. It forbids creditors from pursuing both formal and informal actions and remedies against the debtor and its property. It also covers remedies that could be exercised outside of the US. However, consensual negotiations with the debtor are permitted.

Despite the power of the automatic stay, it is temporary (it may be lifted by the court under certain circumstances) and it is subject to certain exceptions.

This article is a discussion of:

- The purpose of the automatic stay (see Purpose of the Automatic Stay, below).
- What actions are prohibited (see Prohibited Acts, below).
- What actions are excepted (see Limitations and Exceptions, below).
- The various bases for relief (see Relief from the Stay, below).
- The consequences of violation (see Violations of the Stay, below).

Purpose of the Automatic Stay

The automatic stay protects the interests of both debtors and creditors. The primary purpose is to assist the debtor. From the debtor's perspective, it provides a breathing spell from the pressure and demands of creditors. The automatic stay provides the debtor with an opportunity to address business problems and negotiate a plan of reorganization without interference from creditors.

Secondarily, the automatic stay generally benefits the creditor group. The stay prevents depletion of the bankruptcy estate by creditors who, to the detriment of other creditors, race to the courthouse or use "self-help" remedies to enforce their rights. In this way, the automatic stay enables the orderly administration of the bankruptcy estate, which in turn promotes the policy of equality of distribution.

Commencement and Termination

The automatic stay is triggered by the filing of the bankruptcy petition and becomes effective without a court order and without notice to creditors.

The automatic stay is terminated automatically in two situations:

- As to particular property, the stay is automatically terminated when this property is no longer property of the estate. For example, if the property is transferred or the trustee abandons the property (unless it reverts to the debtor), it ceases to be property of the estate and a creditor is no longer barred from enforcing its lien on that property (§ 362(c)(1), Bankruptcy Code).
- Generally, the stay automatically terminates on the earliest of:
    - The case being closed or dismissed.
    - The time a discharge is granted or denied.

  (§ 362(c)(2), Bankruptcy Code).

Prohibited Acts

Certain actions are expressly prohibited by the automatic stay (§ 362(a), Bankruptcy Code). Virtually all creditor collection activities are included. The following eight broad categories of acts are banned:

- Filing or continuing to litigate a previously filed judicial, administrative, or other proceeding against the debtor to collect a prepetition claim (§ 362(a)(1),

Bankruptcy Code), subject to the following limitations:

- the prosecution of causes of action that arise after the bankruptcy is filed are not stayed, such as an action for failure to pay postpetition rent;
- only proceedings against the debtor are stayed. For example, an appeal where the debtor was the plaintiff would not be stayed (see Proceedings Brought by the Debtor, below);
- the majority of courts do not stay proceedings on prepetition claims that are brought in the bankruptcy court (see *Snavely v. Miller (In re Miller)*, 397 F.3d 726, 730 (9th Cir. 2005); *Armco Inc. v. North Atl. Ins. Co. Ltd. (In re Bird)*, 229 B.R. 90, 95 (S.D.N.Y. 1999)). However, a minority of courts hold that suits in the bankruptcy court can violate the automatic stay if the claim is one that the creditor could have brought before bankruptcy and does not arise under the Bankruptcy Code (see *In re Roman Catholic Church of the Archdiocese of Santa Fe* , 627 B.R. 916, 920-22 (Bankr. D. N.M. 2021)); and
- requesting and obtaining continuances of a prepetition lawsuit against a debtor do not violate the automatic stay (see *Perryman v. Dal Poggetto (In re Perryman)*, 631 B.R. 899, 903-04 (B.A.P. 9th Cir. 2021)).

  The US Court of Appeals for the Second Circuit recently set a "bright-line rule" that if the debtor is a named party in a prepetition proceeding or action, the automatic stay applies to stop further proceedings under section 362(a)(1) of the Bankruptcy Code, even if the debtor's interest in the underlying property is merely possessory (*Bayview Loan Servicing LLC v. Fogarty (In re Fogarty)*, 39 F.4th 62, 76 (2d Cir. 2022)).

- Enforcing a prepetition judgment against the debtor or property of the estate (§ 362(a)(2), Bankruptcy Code; see *In re Fogarty*, 39 F.4th at 76).
- Obtaining possession or control over estate property, regardless of whether the underlying claim arose before or after the filing of the bankruptcy petition (§ 362(a)(3), Bankruptcy Code). This includes both tangible property (such as land, buildings, and machinery) and intangible property rights (such as rights acquired under a license agreement).
- Creating, perfecting, or enforcing a lien against property of the estate (§ 362(a)(4), Bankruptcy Code). See Perfection of Security Interests, below, for limited exceptions to this prohibition under the stay.

- Creating, perfecting, or enforcing a lien against property of the debtor to the extent that the lien secures a prepetition claim (§ 362(a)(5), Bankruptcy Code). Property of the debtor is broader than property of the estate (for example, property of the debtor includes abandoned property, exempt property, and property acquired postpetition).

- Any act to collect, recover, or assess a claim against the debtor that arose prepetition (§ 362(a)(6), Bankruptcy Code).

- The setoff of mutual prepetition debts arising from different transactions (§ 362(a)(7), Bankruptcy Code). This means a prepetition debt owing to the debtor cannot be netted against a claim asserted against the debtor if they arise from different transactions. In contrast, recoupment, or netting mutual debts arising out of the same transaction, is not stayed (see Recoupment, below).

- US Tax Court proceedings concerning the debtor's tax liability for a taxable period determined by the bankruptcy court (§ 362(a)(8), Bankruptcy Code). These proceedings are stayed because the bankruptcy court has the power to adjudicate relevant tax liability issues.

To take any of the above actions, the creditor must ask the court for relief from the stay (see Relief from the Stay, below). For examples of how the automatic stay prohibits lender actions, see How Lenders are Affected by the Automatic Stay, below.

Inaction

Courts disagree about whether a failure to act can violate the automatic stay. For example, this issue may arise when a creditor refuses to turn over property that it properly repossessed before the petition date.

Under the majority view held in the US Courts of Appeals for the Second, Seventh, Eighth, Ninth, and Eleventh Circuits, a creditor's refusal to return property after a turnover demand is an act to exercise control over the property that violates the stay (see *In re Fulton*, 926 F.3d 916, 923-27 (7th Cir. 2019); *Weber v. SEFCU (In re Weber)*, 719 F.3d 72, 79-81 (2d Cir. 2013); *California Emp't Dev. Dep't v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147, 1151-52 (9th Cir. 1996); *Motors Acceptance Corp. v. Rozier (In re Rozier)*, 376 F.3d 1323, 1324 (11th Cir. 2004); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 774-75 (8th Cir. 1989)).

The US Courts of Appeals for the Third and Tenth Circuits and the District of Columbia have adopted the minority position that mere inaction cannot violate the stay when a

creditor passively retains property that it obtained prepetition (see *In re Denby-Peterson*, 941 F.3d 115, 126 (3d Cir. 2019) (holding that a secured creditor is not required to turn over property of the debtor until the debtor obtains a court order requiring turnover); *WD Equip., LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017); *United States v. Inslaw, Inc.*, 932 F.2d 1467, 1474 (D.C. Cir. 1991)).

For example, a court applied the ruling in *In re Cowen* to hold that an automatic lien created by the Kansas workers' compensation statute to enforce subrogation rights given to an employer to allow reimbursement from the employee's recoveries against third parties for amounts paid by the employer as workers' compensation benefits did not violate the automatic stay (see *Davis v. Tyson Prepared Foods, Inc. (In re Garcia)*, 2017 WL 2951439, at *5-6 (Bankr. D. Kan. July 7, 2017), *aff'd*, 740 F. App'x 163 (10th Cir. 2018)). In contrast, another court applied *In re Fulton* to hold that a creditor violated the automatic stay by continuing to exercise control over garnished funds postpetition (see *In re Nimitz*, 2019 WL 7580141, at *3-5 (Bankr. E.D. Va. Dec. 16, 2019)).

On December 18, 2019, the US Supreme Court granted certiorari in *City of Chicago v. Fulton* to resolve the circuit split concerning this issue (see 140 S. Ct. 680 (2019)). On January 14, 2021, the Court vacated and remanded the Seventh Circuit's decision, ruling that merely holding property does not violate the stay, because a stay violation requires an affirmative act that would "disturb the status quo of estate property" as of the petition date (*City of Chicago v. Fulton*, 141 S.Ct. 585, 587 (2021). However, the US Supreme Court limited its ruling in *In re Fulton* to section 363(a)(3) of the Bankruptcy Code, which prohibits any act to obtain possession of, or exercise control over, estate property, and did not address potential automatic stay violations set out in other sections, including sections 362(a)(4), (6), and (7) of the Bankruptcy Code.

Following the US Supreme Court's decision in *In re Fulton*:

- On remand, the Seventh Circuit remanded to the bankruptcy court to determine whether the creditor violated sections 362(a)(4) (enforcing a lien against property) or (a)(6) (acting to recover a claim), despite the US Supreme Court's decision that the creditor did not violate section 362(a)(3) (see *In re Fulton*, 843 F. App'x 799, 800 (7th Cir. 2021)).

- At least one court has refused to dismiss a complaint expanding the scope of *Fulton* to other subsections of section 362(a) and also held that *Fulton* "at least left open the possibility that inaction combined with other facts might nonetheless violate the automatic stay" (*Barrera-Perez v. City of Chicago (In re Cordova)*, 635 B.R. 321, 343 (Bankr. N.D. Ill. 2021)).

- At least two courts have held that creditors retaining a valid prepetition attachment of a debtor's bank account did not violate the automatic stay because the creditors did not pursue garnishment proceedings postpetition and therefore they only maintained the status quo (see *Stuart v. City of Scottsdale (In re Stuart)*, 632 B.R. 531, 538-44 (B.A.P. 9th Cir. 2021); *Margavitch v. Southlake Holdings, LLC (In re Margavitch)*, 2021 WL 4597760, at *5-8 (Bankr. M.D. Pa. Oct. 6, 2021)).

Limitations and Exceptions

While the scope of the automatic stay is extremely broad, it is limited by judicial and statutory exceptions. The judicial limitations have evolved over time and represent judges' interpretations of the statute. The statutory exceptions reflect policy decisions where Congress has determined that the rights of certain parties prevail over the need to protect the debtor from its creditors.

Judicially Crafted Limitations

Non-Debtors

The stay does not extend to third parties, such as a debtor's guarantors, affiliates, co-debtors, officers and principals, co-defendants, and partners. It generally only applies to the debtor and its property (see *Teachers Ins. & Annuity Ass'n v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986); *Nevada Power Co. v. Calpine Corp. (In re Calpine Corp.)*, 365 B.R. 401, 408 (S.D.N.Y. 2007); *Diocese of Rochester v. AB 100 Doe (In re Diocese of Rochester)*, 2022 WL 1638966, at *4-5 (Bankr. W.D.N.Y. May 23, 2022)). As a result, a creditor may pursue its claims against the debtor's guarantors and co-debtors to the extent that they are non-debtors in the bankruptcy. However, the extension of the automatic stay to non-debtors is "extraordinary relief" (see *In re SDNY 19 Mad Park, LLC*, 2014 WL 4473873 (Bankr. S.D.N.Y. Sept. 11, 2014)).

Creditors should be aware that there are certain situations where a non-debtor may be protected:

- Courts have extended the automatic stay to non-debtors when a claim against the non-debtor will have an immediate adverse economic consequence for the debtor's estate (see *Residential Capital, LLC v. Federal Hous. Fin. Agency (In re Residential Capital, LLC)*, 529 F. App'x 69 (2d Cir. 2013). This relief requires a showing of special circumstances and that an action against a non-debtor party threatens the debtor's reorganization efforts. Examples include a claim against a non-debtor for an obligation guaranteed by the debtor, a claim against the debtor's insurer, and actions where there is an identity of interest between the

debtor and the non-debtor defendant such that the debtor may be considered the real defendant (see *Queenie, Ltd. v. Nygard Int'l,* 321 F.3d 282, 287-88 (2d Cir. 2003); *Gucci Am., Inc. v. Duty Free Apparel, Ltd.,* 328 F. Supp.2d 439, 441-42 (S.D.N.Y. 2004)). Similarly, the US Bankruptcy Court for the Southern District of New York extended the automatic stay to bar a creditor's actions against a third party which duplicated the trustee's fraudulent transfer claims against the same party, ruling that those claims were property of the estate (see *Fox v. Picard (In re Madoff)*, 848 F.Supp.2d 469, 478-85 (S.D.N.Y. 2012)).

- In unusual circumstances, a court may invoke its equitable powers to protect any third party which it deems important to the success of the debtor's reorganization (see *Union Trust Phila., LLC v. Singer Equip. Co., Inc. (In re Union Trust Phila., LLC)*, 460 B.R. 644, 657-58 (E.D. Pa. 2011)) or to enjoin litigation against non-debtors if doing so is "likely to enhance the prospects for a successful resolution of the disputes attending [the] bankruptcy" (*Caesars Entm't Operating Co., Inc. v. BOKF, N.A. (In re Caesars Entm't Operating Co., Inc.)*, 808 F.3d 1186, 1188 (7th Cir. 2015)). A court has equitable powers to issue orders "necessary or appropriate to carry out the provisions of this title" (§ 105, Bankruptcy Code). Courts may invoke this power to prohibit creditor action against third parties, known as a "section 105 injunction." Unlike the automatic stay injunction, it is not automatically triggered. This relief requires a hearing on notice to interested parties and must satisfy the typical equitable standard for issuance of injunctions (see *In re Calpine*, 365 B.R. at 409-14). For example, the US Bankruptcy Court for the Southern District of New York issued a section 105 injunction where a creditor's action against a third party threatened the trustee's ability to reach a settlement on its fraudulent transfer claims against the same party (see *In re Madoff*, 848 F.Supp.2d at 485-87).

Letters of Credit

The automatic stay has been interpreted to allow a beneficiary to draw down on a letter of credit issued on the account of a debtor (see *Elegant Merch., Inc. v. Republic Nat'l Bank (In re Elegant Merch., Inc.)*, 41 B.R. 398 (Bankr. S.D.N.Y. 1984); *In re M.J. Sales & Distrib. Co., Inc.*, 25 B.R. 608, 615 (Bankr. S.D.N.Y. 1982)). Drawing on a letter of credit does not create, perfect, or enforce a lien on the debtor's property. Presumably the lender would have already perfected its liens on the debtor's property securing the letter of credit before the bankruptcy filing. These perfected liens remain valid in the bankruptcy whether or not the letter of credit is drawn.

Once drawn down by the beneficiary, the lender issuing the letter of credit would immediately have a secured claim against the debtor for reimbursement. However, any attempt by the lender to enforce its claim is subject to the automatic stay. The lender's

only recourse is to file a claim against the debtor under normal claim settling procedures. Also, drawing on the letter of credit would not divest the debtor of estate property, because the bank honors a letter of credit by paying the beneficiary of the letter with its own funds, not with the debtor's assets. Finally, enjoining payment of letters of credit would frustrate their primary commercial purpose, which is the intended substitution of the known and secured credit of a bank for the unknown and risky credit of the other party to the transaction.

Administrative Freeze on Bank Account

The US Supreme Court further limited the scope of the automatic stay to allow a bank to impose a temporary administrative freeze on the account of a debtor who owes the bank money. The US Supreme Court reasoned that a bank's mere placing of an administrative hold, pending resolution of its claim, on the debtor's account up to an amount the bank claimed was subject to setoff, was not itself a prohibited act of setoff (see Prohibited Acts, above), and did not violate the automatic stay (see *Citizens Bank of Md. v. Strumpf*, 516 U.S. 16 (1995)).

Proceedings Brought by the Debtor

Most courts have held that the stay does not apply to proceedings originally brought by the debtor, including all subsequent appeals in those proceedings, regardless of which party brings the appeal (see *Freeman v. Commissioner of Internal Revenue,* 799 F.2d 1091, 1092-93 (5th Cir. 1986); *Baack v. Horizon Womens Care Pro. LLC (In re Horizon Womens Care Pro. LLC)*, 506 B.R. 553, 556-57 (Bankr. D. Colo. 2014)). Conversely, these courts have interpreted the stay to apply only to actions originally brought against the debtor, including all subsequent appeals in those proceedings, regardless of whether the debtor is the appellant or the appellee (see *TW Telecom Holdings Inc. v. Carolina Internet Ltd.,* 661 F.3d 495 (10th Cir. 2011); *Association of St. Croix Condo. Owners v. St. Croix Hotel Corp.,* 682 F.2d 446, 449 (3d Cir. 1982)). Most recently, the US Bankruptcy Appellate Panel for the Ninth Circuit clarified that a nonbankruptcy court's postpetition order does not violate the stay when a creditor is defending against claims brought by a debtor prepetition (see *Censo, LLC v. NewRez, LLC (In re Censo, LLC)*, 638 B.R. 416 (B.A.P. 9th Cir. 2022)).

Similarly, some courts have held that sales or transfers of property initiated by the debtor are not subject to the automatic stay (see *Burkart v. Coleman (In re Tippett),* 542 F.3d 684, 691-92 (9th Cir. 2008)).

Recoupment

Courts have determined that the stay does not apply to recoupment actions, which are actions to net mutual claims arising out of the same transaction (see *Reiter v. Cooper,* 507

U.S. 258, 265 n.2 (1993); *Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 147 (2d Cir. 2002); *New York State Elec. & Gas Corp. v. McMahon (In re McMahon)*, 129 F.3d 93, 96 (2d Cir. 1997)).

Statute of Limitations and Expiration of Contracts

Most courts have held that the automatic stay does not apply to suspend time limitations to begin certain actions (although section 108 of the Bankruptcy Code may otherwise stop the running of certain time limits) (for example, see *Aslanidis v. United States Lines, Inc.,* 7 F.3d 1067, 1074-75 (2d Cir. 1993); *US Lines, Inc. v. US Lines Reorganization Trust,* 262 B.R. 223, 235-36 (Bankr. S.D.N.Y. 2001)).

The stay does not prevent termination of a contract which expires by its own terms after commencement of a bankruptcy case (for example, see *In re Margulis,* 323 B.R. 130, 133 (Bankr. S.D.N.Y. 2005); *In re Policy Realty Corp.*, 242 B.R. 121, 126 (Bankr. S.D.N.Y. 1999)).

Corporate Governance

Courts have determined that the automatic stay does not affect a debtor's corporate governance obligations, such as holding a stockholders' meeting, unless it can be shown that the call for the meeting amounted to "clear abuse" (a determination which depends on whether the debtor's rehabilitation will be seriously threatened or merely delayed) (see *Johns-Manville Corp. v. Equity Sec. Holders Comm. (In re Johns-Manville Corp.),* 801 F.2d 60, 64 (2d Cir. 1986); *In re SS Body Armor I*, 527 B.R. 597, 604-07 (Bankr. D. Del. 2015); *Fogel v. US Energy Sys., Inc.*, 2008 WL 151857 (Del. Ch. Jan. 15, 2008)).

Ministerial Acts

Courts have held that the automatic stay does not apply to bar ministerial acts that involve no deliberation or discretion, such as the entry of a judgment by a court clerk (see *McCarthy v. North Bay Plumbing, Inc. (In re Pettit)*, 217 F.3d 1072, 1080 (9th Cir. 2000); *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527-28 (2d Cir. 1994)).

Fraudulently Transferred Property

The US Courts of Appeals for the Second and Tenth Circuits have held that the automatic stay does not apply to unrecovered property that is the subject of a fraudulent transfer claim because this property does not become part of the estate until it is recovered under section 541(a)(3) of the Bankruptcy Code (see *Rajala v. Gardner*, 709 F.3d 1031, 1037-38 (10th Cir. 2013); *Federal Deposit Ins. Corp. v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d 125, 130-31 (2d Cir. 1992)). However, the US Court of Appeals for the Fifth Circuit has held that the automatic stay does apply to unrecovered fraudulently transferred property because this property is part of the estate (see *American Nat'l Bank of Austin v.*

MortgageAmerica Corp. (In re MortgageAmerica Corp.), 714 F.2d 1266, 1275 (5th Cir. 1983)). Courts outside of these jurisdictions are split on the issue.

Statutory Exceptions

There are 28 policy-based exceptions to the automatic stay (§ 362(b), Bankruptcy Code). Some of these exceptions only apply in distinct situations and are rarely invoked. For example, any action by an accreditation agency regarding the licensing of the debtor as an educational institution is not subject to the stay. Other exceptions to the stay tend to arise more often in individual bankruptcies, such as criminal proceedings against the debtor and the withholding of income for domestic support obligations.

The most commonly invoked exception is any action by a governmental unit to enforce its "police and regulatory power" (§ 362(b)(4), Bankruptcy Code). This refers to acts to protect the public health, safety, or welfare, such as preventing fraud, protecting the environment, or protecting the consumer. These public policy-driven actions are excepted from the stay, but actions protecting pecuniary interests, such as seeking to collect a debt owed to the government, are not excepted. The government is not given special status as a creditor.

Perfection of Security Interests

From a secured creditor's perspective, the most relevant exception concerns perfection of security interests under relation-back statutes (§ 362(b)(3), Bankruptcy Code). Acts to perfect, or to maintain or continue the perfection of a security interest, to the extent permitted in the Bankruptcy Code, are excepted from the automatic stay. They are permitted by the Bankruptcy Code in two situations:

- Perfection, maintenance, or continuation of perfection of an interest in property is not prohibited by the stay if applicable non-bankruptcy law recognizes the effectiveness of retroactive perfection (§ 546(b), Bankruptcy Code). For example, the Uniform Commercial Code (UCC) provides for the retroactive perfection of a purchase-money security interest (PMSI) (UCC § 9-324(a)). This means that under state law, the general rule is that an unperfected purchase-money security interest is effective against an entity that acquires rights in this property before the interest is perfected, if perfection occurs within the grace period fixed by the statute (20 days) (§ 546(b)(1)(A), Bankruptcy Code). The filing of a UCC-3 continuation statement is also excepted from the automatic stay (if it occurs within the time fixed by applicable non-bankruptcy law) (§ 546(b)(1)(B), Bankruptcy Code).

- The Bankruptcy Code contains a similar concept (§ 547(e)(2)(A), Bankruptcy Code). It provides that perfection of an interest in property (and perfection of purchase-money security interests under section 547(c)(3)(B) of the Bankruptcy Code) is not prohibited by the automatic stay if it occurs within a 30-day grace period.

However, if the statute does not allow the lien to relate back to a prepetition period, then the exception does not apply (see *In re Linear Elec. Co., Inc.*, 852 F.3d 313 (3d Cir. 2017)).

Relief from the Stay

Relief from the stay may be granted by the court on its own motion or on request from a party in interest after notice and a hearing. The parties requesting relief from the stay tend to be secured creditors. It is the creditor's responsibility to seek relief from the stay before taking any action against the debtor or its property. A prudent creditor will always do so, or risk sanctions for violations of the stay (see Violations of the Stay, below).

Although courts may be reluctant to grant relief from the stay early in a bankruptcy case, there are several reasons why creditors should still consider seeking early relief from the stay:

- Some courts have held that the right to receive adequate protection is not triggered until the creditor seeks relief from the stay (see *In re Continental Airlines, Inc.*, 154 B.R. 176, 180-81 (Bankr. D. Del. 1993)).

- The Bankruptcy Code provides the stay is terminated concerning the party seeking relief 30 days after it made the request for relief, unless the court orders the stay to continue in effect (§ 362(e), Bankruptcy Code).

- Seeking early relief can create a baseline to establish "cause" justifying relief from the stay (see "For Cause" Including Lack of Adequate Protection, below). "Cause" can encompass many factors, such as undue delay, misconduct, mismanagement, or waste. If an early request for relief is denied, a later request can highlight the debtor's lack of progress during the case, using the first request as a reference point.

On January 14, 2020, the US Supreme Court resolved a circuit split and ruled that a bankruptcy court's order unreservedly denying relief from the automatic stay is a final, immediately appealable order under 28 U.S.C. Section 158(a) (see *Ritzen Grp. Inc. v. Jackson Masonry, LLC*, 140 S.Ct. 582 (2020)). Resolving an issue left undecided by *Ritzen*, the US Court of Appeal for the Ninth Circuit later held that denial of a stay-relief motion

without prejudice can still be a final, appealable order (see *Harrington v. Mayer (In re Mayer)*, 28 F.4th 67, 71-72 (9th Cir. 2022)).

Types of Relief

The nature of relief available will depend on the facts of each case and if certain grounds for relief are present (see Grounds for Relief, below). The type of relief granted, if any, is within the complete discretion of the court. The court may terminate, annul, modify, or condition the stay (§ 362(d), Bankruptcy Code).

- Termination. The stay is over and the creditor may take action against the debtor.
- Annulment. The stay is annulled, as if it had never come into existence. As a consequence, annulling the stay retroactively validates actions taken when the stay was in effect. Annulment is a rare remedy that is usually available only to innocent creditors who are unaware of the bankruptcy or when there is wrongdoing on the part of the debtor. For example, the court may annul the stay when the debtor did not file the bankruptcy petition in good faith. The court will evaluate the conduct of both the debtor and the creditor in weighing the equities. This type of relief is granted sparingly only in unusual and compelling circumstances.
- Modification. The stay is altered so that certain acts may be permitted. Generally, modification must be justified by a showing that continuation of the stay will affirmatively harm the creditor. For example, the stay may be modified to permit repossession of certain property or to allow a trial to proceed in a state court, if prohibiting these acts would prejudice the creditor's rights. Stay modification is required even if the relief is being sought to defend or protect the estate (see *State Farm Ins. Co. v. Carapella (In re Gaime)*, 17 F.4th 1349, 1353 (11th Cir. 2021)).
- Conditioning. The termination, modification, or the continuance of the stay is conditioned on any number of circumstances that may be appropriate in a given case. For example, modification of the stay may be conditioned on each party complying with a stipulation that, on remand of a case to the state court, they will file a joint motion to consolidate the case with a pending case.

Retroactive Relief from the Automatic Stay

According to the US Supreme Court, *nunc pro tunc* orders are not permissible (see *Roman Catholic Archdiocese of San Juan, P.R. v. Acevedo Feliciano*, 140 S. Ct. 696, 700-01 (2020)). In other words, a *nunc pro tunc* order can only memorialize an action that the court

actually took at a previous time but was not officially recorded. Courts differ on the applicability of the *Acevedo* ban on *nunc pro tunc* orders to orders granting relief from the automatic stay.

The US Bankruptcy Court for the Eastern District of New York follows *Acevedo*, finding that a court cannot grant *nunc pro tunc* relief from the automatic stay (see *In re Telles*, 2020 WL 2121254, at *5 (Bankr. E.D.N.Y. Apr. 30, 2020)). However, the US Bankruptcy Appellate Panel for the Ninth Circuit distinguished *Acevedo*, finding that it does not bar bankruptcy courts from annulling the automatic stay *nunc pro tunc* (see *Merriman v. Fattorini (In re Merriman)*, 616 B.R. 381, 391-95 (B.A.P. 9th Cir. 2020)).

Grounds for Relief

There are four grounds for obtaining relief from the automatic stay (§ 362(d), Bankruptcy Code):

"For Cause" Including Lack of Adequate Protection

From a secured creditor's perspective, this is the most important basis for relief. Secured creditors are entitled to adequate protection to protect against actual or threatened diminution in the value of their collateral during the bankruptcy case (§ 361, Bankruptcy Code). Collateral can be hard assets (property) or soft assets (cash). Diminution in value may be caused by a variety of factors, including depreciation, physical loss or damage, declining fair market values, failure to insure or maintain the property, or the non-payment of taxes. These type of losses are attributable to the stay because the creditor is enjoined by the stay from foreclosing or taking any other action to protect the value of its collateral.

If the debtor is unable or unwilling to provide adequate protection to a secured creditor, there is sufficient cause for the court to order relief from the stay (§ 362(d)(1), Bankruptcy Code). The creditor can then foreclose on the collateral and realize an amount sufficient to recover the balance due on the debt.

Conversely, if the value of the collateral is not depreciating, or if the loss is not attributable to the stay, then the debtor is not required to furnish adequate protection to the creditor, and there is no basis for relief from the stay. For example, a loss is not attributable to the stay if a creditor was enjoined from enforcing its lien by a prepetition order issued by a nonbankruptcy court. The creditor's inability to foreclose in this scenario is totally unrelated to the bankruptcy filing.

Some courts subscribe to the theory that if a creditor is oversecured, the excess value is an "equity cushion" which is sufficient to protect the creditor without the need for

adequate protection (and therefore, no cause to lift the stay).

Aside from lack of adequate protection, the court has broad discretion to determine what is "cause" for granting relief from the automatic stay. It is dependent on the particular facts of each case. For example, a court may lift the stay for cause to allow a tort plaintiff to proceed in a different forum against the debtor, if the plaintiff agrees that liability would be limited to the extent of the debtor's insurance coverage. Cause for relief from the stay can also exist if the debtor did not file the bankruptcy petition in good faith, or if the debtor fails to maintain, preserve, or insure collateral.

Acts Against Property

A secured creditor may obtain relief from the automatic stay for acts against property if both the:

- Debtor does not have equity in the property.
- Property is not necessary to an effective reorganization.

(§ 362(d)(2), Bankruptcy Code).

- Debtor has no equity in the property. The first requirement is satisfied if the total of all encumbrances, or junior liens, exceeds the value of the property. This differs from the equity cushion analysis, which ignores subordinate liens. This can be proved with an appraisal, testimony of an appraiser, or with the debtor's own financial information in its filed schedules. The creditor must satisfy this burden.
- Property not necessary for an effective reorganization. It is the debtor's burden to prove that the property is necessary for an effective reorganization. To meet the second requirement, the creditor must rebut this assertion by showing that an effective reorganization may occur without the property in issue, or alternatively, that the debtor is unlikely to successfully reorganize within a reasonable time.
    - Property not necessary. That the property is crucial for the debtor's mere survival is not enough. It must be essential for an effective reorganization with a reasonable possibility of success within a reasonable time. For example, equipment used by the debtor to manufacture goods to make its Chapter 11 payments could arguably be property necessary to an effective reorganization. As another example, certain real property would be necessary to an effective reorganization for a debtor whose business is managing or leasing real estate. Conversely, for a debtor engaged in the business of drilling oil and gas wells, these wells, while helpful, are

arguably not necessary for an effective reorganization, as they are speculative and depleting assets.

- No effective reorganization. The logic is if there can be no effective reorganization, then none of the debtor's property is necessary. The US Supreme Court has suggested that this should be a meaningful test (see *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 375-76 (1988)). The debtor must show that an effective reorganization is in prospect or that there exists a reasonable possibility of a successful reorganization in the near future. The creditor may rebut this assertion in any number of ways, such as by establishing that the debtor cannot effectively reorganize due to market conditions, or has no realistic prospect of obtaining postpetition financing, or various other reasons related to the debtor's business operations including the deteriorating condition of the debtor's property or the property's inability to generate sufficient cash flow.

As a practical matter, it may be more difficult to obtain relief from the stay on this ground early in the case. Courts require a less detailed showing of the likelihood of a successful reorganization during the first 120 days of a Chapter 11 case, during which time the debtor is given the exclusive right to propose a plan of reorganization (§ 1121(b), Bankruptcy Code). However, even within the first 120 days, relief will be granted if there is a lack of any realistic prospect of effective reorganization (see *In re 4th St. E. Investors, Inc.,* 2012 WL 1745500 (Bankr. C.D. Cal. May 15, 2012)).

Single Asset Real Estate

Single asset real estate cases involve business operations with a single real estate property or project, other than residential real property with less than four residential units, which generates substantially all of the gross income of the debtor (§ 101(51B), Bankruptcy Code). They are usually two-party disputes, and do not resemble a typical Chapter 11 business reorganization case. A secured creditor in such a case may foreclose on its collateral unless one of the following occurs within the first 90 days of the case (or a later date extended by the court for cause):

- The debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time.

- The debtor starts paying monthly interest payments to the secured creditor at the non-default contract rate of interest.

(§ 362(d)(3), Bankruptcy Code).

Acts Against Real Estate

Acts against real estate, such as eviction or foreclosure, may not be stayed if the court finds that the case was filed as "part of a scheme to delay, hinder, and defraud creditors" either by multiple bankruptcy filings, or by transferring all or part of an interest in this property without the consent of the secured creditor or the court (§ 362(d)(4), Bankruptcy Code). The court order granting relief from the stay is recorded in local real property records and is binding for two years in any future case involving the same property, unless the subsequent debtor can show changed circumstances or good cause.

Violations of the Stay

An individual debtor who is injured by a willful violation of the automatic stay may recover actual damages, including costs, attorneys' fees, and, if appropriate, punitive damages (§ 362(k), Bankruptcy Code). Willfulness does not require that the creditor intended to violate the stay, but rather that its acts violating the stay were intentional (see *California Coast Univ. v. Aleckna (In re Aleckna)*, 13 F.4th 337, 342 (3d Cir. 2021); *University Med. Ctr. v. Sullivan (In re University Med. Ctr.)*, 973 F.2d. 1065, 1087 (3d Cir. 1992)). A creditor's good faith belief that its actions complied with the stay does not, on its own, establish a defense to willfulness (see *In re Aleckna*, 13 F.4th at 342). However, a defendant does not willfully violate the stay if the law governing the alleged violation was sufficiently uncertain and the defendant, in good faith, relied on persuasive legal authority to support its position (see *In re Aleckna*, 13 F.4th at 342-44).

A willful stay violation may permit a debtor to recover attorneys' fees incurred in stopping the stay violation and litigating a damages claim for this violation, including defending the damages award on appeal (see *Mantiply v. Horne (In re Horne)*, 876 F.3d 1076, 1081 (11th Cir. 2017)). The Ninth Circuit recently held that a debtor is entitled to appellate counsel fees for successfully challenging the bankruptcy court's award of attorney fees and winning larger damages for a willful violation of the stay (see *Easley v. Collection Serv. of Nev.*, 910 F.3d 1286, 1290-93 (9th Cir. 2018)). More recently, the Third Circuit held that a claim to recover damages under section 362(k) of the Bankruptcy Code may exist independently of the underlying bankruptcy case, and creates a private right of action that may be maintained without reopening a closed or dismissed bankruptcy case (see *Healthcare Real Estate Partners LLC v. Summit Healthcare REIT, Inc. (In re Healthcare Real Estate Partners, LLC)*, 941 F.3d 64, 68-72 (3d Cir. 2019)).

Some jurisdictions have extended this provision to other entities, such as corporations and partnerships debtors. New York courts have limited this provision to natural persons only, while Delaware courts have extended it to corporate debtors. Corporate debtors in all jurisdictions may seek contempt proceedings for willful violations of the stay. Courts

have used their civil contempt power under section 105(a) of the Bankruptcy Code to hold that even stay violations caused by computer error are willful violations of the stay (see *In re Wedco Mfg., Inc.*, 2014 WL 5573433 (Bankr. D. Wy. Oct. 31, 2014)).

While courts tend to order severe sanctions against willful violators of the stay, they are generally lenient towards those who inadvertently violate the stay in good faith. Yet, even innocent violations run the risk of sanctions. Even merely technical violations of the stay do not absolve creditors from liability under section 363(k) (see *Koeberer v. California Bank of Com. (In re Koeberer)*, 632 B.R. 680, 690 (B.A.P. 9th Cir. 2021)). The court may impose compensatory damages even if the creditor acted in good faith and on the advice of counsel. At a minimum, actions taken in violation of the stay are void as a matter of law. A monetary penalty may not be imposed unless the stay violation occurred after the creditor received actual notice of the bankruptcy filing (§ 342(g)(2), Bankruptcy Code).

There are several ways creditors can avoid running afoul of the automatic stay. The best approach is to negotiate a resolution of the matter before the debtor files for bankruptcy to avoid the issue of the stay completely. If that is not possible, the next approach should be to negotiate with the debtor to obtain a stipulated order permitting the creditor to take the desired action despite the stay. For example, the debtor may stipulate that a creditor may have relief from the stay if the creditor agrees to limit its recovery to insurance policy proceeds. As a last resort, a creditor can litigate for relief from the stay, if one or more of the grounds for relief applies (see Grounds for Relief, above) or for a declaration that the stay does not apply (see Limitations and Exceptions, above).

US Supreme Court's Decision in *Taggart*

At least one court has rejected a strict liability standard for violating a corporate debtor's automatic stay because it would be inconsistent under the US Supreme Court's decision in *Taggart v. Lorenzen* (139 S. Ct. 1795 (2019)), which rejected a strict liability standard for violating an individual debtor's discharge injunction in a Chapter 7 case (see *Harker v. Eastport Holdings, LLC (In re GYPC, Inc.)*, 634 B.R. 983, 989-91 (Bankr. S.D. Ohio 2021); see also *Tate v. Fairfax Vill. I Condo. (In re Tate)*, 2020 WL 634293, at *3 n.2 (Bankr. D.C.C. Feb. 10, 2020) (citing *Taggart* in finding a willful stay violation in a Chapter 13 case and imposing sanctions under section 362(k)(1) of the Bankruptcy Code); but see *In re Spiech Farms, LLC*, 603 B.R. 395, 408 n.22 (Bankr. W.D Mich. 2019) (stating in a Chapter 7 case that "[t]his court does not read *Taggart* to change the Sixth Circuit's standard for determining whether a creditor can be held in contempt for violating the automatic stay")).

Waivers of the Stay

The automatic stay causes delay and inconvenience to creditors who want to exercise remedies to realize the value of their collateral. For example, lenders should consider requesting a waiver of the stay before a bankruptcy is filed in forbearance agreements executed during loan workout negotiations and in the resulting restructuring agreements. While the Bankruptcy Code does not expressly prohibit prepetition waivers of the stay, they are not self-executing in favor of creditors, nor per se enforceable. Despite language in the waiver providing for the automatic lifting of the stay on the filing of the bankruptcy petition, the creditor must file a motion for relief from the stay, with notice to all creditors and other parties in interest.

Courts balance several factors in determining the enforceability of these waivers (see *Southwest Ga. Bank v. Desai (In re Desai)*, 282 B.R. 527, 532 (Bankr. M.D. Ga. 2002)). Generally, courts consider a prepetition waiver of the stay as a factor in the decision whether to grant relief from the stay. The importance of the prepetition waiver in the decision may depend on the context in which the waiver was obtained. According to at least one court, stay waivers contained only in initial loan documents should be given little weight (as they are likely boilerplate), while those contained in a confirmed plan of reorganization should be respected (as they are negotiated and approved after notice to all interested parties) and those granted in forbearance agreements, workouts, and other agreements should be considered on a case-by-case basis (see *In re Bryan Road, LLC*, 382 B.R. 844, 848 (Bankr. S.D. Fla. 2008)). For example, one court approved a stay waiver on the grounds that the debtor, postpetition, specifically ratified and agreed to be bound by the forbearance agreement containing the stay waiver (see *In re Triple A & R Cap. Inv., Inc.*, 519 B.R. 581, 586 (Bankr. D. P.R. 2014)). Another court enforced a stay waiver provision in a forbearance agreement, finding that the waiver did not automatically entitle the lender to relief from the stay, but rather gave the lender the ability to seek this relief unopposed by the debtor/borrower (see *SummitBridge Nat'l Invs. VI, LLC v. Orchard Hills Baptist Church, Inc. (In re Orchard Hills Baptist Church, Inc.)*, 608 B.R. 309, 317 (Bankr. N.D. Ga. 2019)).

Overall, it is unclear whether, and under what conditions, these waivers will be upheld. Other factors courts consider include:

- The sophistication of the party making the waiver and if both parties were represented by experienced counsel.
- The consideration given for the waiver, including the length of the waiver period, and the risks assumed and concessions granted by the lender.
- The effect on other parties, such as unsecured creditors and junior lienholders.
- The feasibility of the debtor's plan.

- The presence of any evidence that the waiver was obtained by coercion, fraud, or mutual mistake of material facts.
- Whether enforcing the waiver will promote the public policy of encouraging out-of-court restructurings and settlements.
- Whether there appears to be a likelihood of reorganization.
- The extent to which the creditor would be otherwise prejudiced if the waiver is not enforced.
- The time gap and changes in circumstances between the date of the waiver and the date of the bankruptcy filing.
- Whether the debtor has equity in the property and if the creditor is otherwise entitled to relief from the stay under section 362(d) of the Bankruptcy Code (see Grounds for Relief, above).

The weight given to each factor is determined on a case-by-case basis in the court's discretion, based on the facts and circumstances surrounding the granting of the waiver. Many courts will enforce prepetition stay waivers even if the bankruptcy filing was not in bad faith and even if the debtor has some equity in the property (making relief otherwise unavailable under section 362(d) (see Acts Against Property, above)), if other compelling factors are present. The burden is on the party opposing enforcement of the waiver (the debtor) to demonstrate that the court should not enforce it. Enforcement of prepetition stay waivers is seen most often in single asset real estate cases, which involve few assets and usually only one creditor (see Single Asset Real Estate, above). That said, there is no consistency or predictability in this area. Some courts will only enforce stay waivers in single asset real estate cases, while other courts find them per se enforceable, and yet other courts will only enforce these agreements under certain conditions.

Enforcement of Stay Waivers

To minimize the risk that a prepetition waiver of the stay will be held unenforceable, the workout or restructuring agreement should:

- Set out a complete picture of the facts, serving as a statement of the parties' intent at the time the documents are executed.
- Clearly specify the facts and circumstances which support a basis for relief from the stay, such as the debtor has no equity in the property and no realistic prospect for successful reorganization (see Grounds for Relief, above).

- Clearly reflect the parties' intention that enforcement of the waiver was a significant, if not primary, motivation for the creditor to enter into the agreement.

- Specifically state that enforcement of the waiver is expressly subject to the court's approval, to avoid the implication that the creditor is threatening the court's authority to decide the enforceability of the waiver.

It is also advisable that:

- Creditors clearly establish that they gave consideration for the stay waiver. This consideration may take the form of forbearance to exercise remedies, loan concessions, or amendments to the credit agreement. However, creditors should not bargain too much away in exchange for the waiver, as the existence of the waiver is only one factor that courts consider in their lift-stay analysis (see Waivers of the Stay, above), and it is likely that creditors still must demonstrate some ground for relief from the stay (see Grounds for Relief, above).

- If there are other creditors with significant claims against the borrower, these creditors specifically consent in writing to the stay waiver, or become party to the actual stay waiver document.

- The borrower be represented and advised by experienced counsel.

- The creditor be able to definitively show that the debtor has no equity in the property (for example, the outstanding loan balance exceeds the value of the collateral securing the loan) (see Acts Against Property, above).

- Creditors consider inserting a stay waiver in a consensual plan of reorganization to protect against future bankruptcies. A stay waiver approved by a court in a plan and confirmation order should be enforceable (see *In re Bryan Road*, 382 B.R. at 848; *In re Desai,* 282 B.R. at 530 n.2). For example, one court enforced a stay waiver contained in a court-approved settlement agreement in the debtor's prior Chapter 11 case (see *In re BGM Pasadena, LLC*, 2016 WL 1738109 (Bankr. C.D. Cal. Apr. 27, 2016)).

How Lenders Are Affected by the Automatic Stay

In practice, the automatic stay forbids lenders (as well as all other creditors) from taking most actions against the debtor, including:

- Informal collection actions, such as calling the debtor or sending threatening letters to demand payment.
- Sending notices of default under a credit agreement. This is why bankruptcy is an automatic event of default in most credit agreements.
- Obtaining liens on property of the estate.
- Perfecting liens by filing or possession, including filing a financing statement under Article 9 of the UCC to perfect a security interest in estate property (see Perfection of Security Interests, above, for limited exceptions).
- Foreclosing on collateral to enforce a security interest in estate property. In fact, one bankruptcy court held that a creditor violated the automatic stay when it foreclosed on property in which the debtor had no ownership interest, but was a guarantor of the underlying debt and a named defendant in a foreclosure judgment. The court held that the foreclosure sale was both a continuation of a judicial action against the debtor and the continuation of a judicial action to recover a claim against the debtor, in violation of section 362(a)(1) of the Bankruptcy Code (see *In re Ebadi*, 448 B.R. 308, 314-17 (Bankr. E.D.N.Y. 2011)).
- Repossessing collateral that is property of the estate.
- Selling collateral which was repossessed before the filing of the bankruptcy petition.
- Generally exercising any remedy provided for in a credit agreement.

Checklist for Lenders

Before the bankruptcy petition is filed:

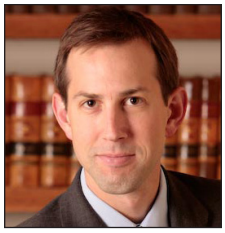
- Ensure that loan documents provide that bankruptcy is an automatic event of default (see How Lenders are Affected by the Automatic Stay, above).
- Try to negotiate a resolution before the debtor files for bankruptcy.
- If possible, obtain an agreed waiver of stay in workout and out-of-court restructuring agreements (see Enforcement of Stay Waivers, above).

After the bankruptcy petition is filed:

- Do not take any action (including sending notice of default) that could violate the stay (see How Lenders are Affected by the Automatic Stay, above).
- Consider any permitted actions that can be taken, for example:
    - freeze the debtor's bank account (see Administrative Freeze on Bank Account, above); and
    - enforce the debt against non-debtor guarantors (see Non-Debtors, above).
- Consider whether there are any grounds for relief from the stay, notably for lack of adequate protection or if the debtor has no equity in the encumbered property and there is no realistic prospect of a successful reorganization (see Grounds for Relief, above).
- Make any requests for relief from the stay as early as possible in the case (see Relief from the Stay, above).

STOP! DO NOT PASS GO, DO NOT COLLECT $200—Primer on the Automatic Stay for Non-Bankruptcy Practitioners

by Susan Heath Sharp and Daniel R. Fogarty



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After years of legal battling, your client obtains a final judgment only to find out that the judgment debtor just filed bankruptcy. Your client turns to you for advice on what to do next. To your client's frustration, all collection efforts come to a screeching halt. Protections afforded by the automatic stay are a critical component of the Bankruptcy Code,[1] and there are few matters as fundamental to the bankruptcy process as the operation of the automatic stay.

The automatic stay applies equally in all chapters of bankruptcy—Chapter 7 (liquidation) and Chapters 9, 11, 12, and 13 (reorganization)—whether the bankruptcy is voluntary or involuntary. The automatic stay is intended to provide the debtor with breathing room in order to attempt a repayment or reorganization plan or simply to be relieved of "the financial pressures that drove the debtors into bankruptcy."[2] The existence of the automatic stay stops collection efforts against the debtor and the debtor's property, thereby creating a more level playing field "by avoiding the piecemeal or distressed liquidation of the debtor's assets and a race to the courthouse" by one creditor to the detriment of all creditors.[3]

The automatic stay applies to almost any type of formal or informal action taken against the debtor and property of the debtor's bankruptcy estate. The bankruptcy estate includes virtually all property of the debtor at the time of filing and is created under § 541 of the Bankruptcy Code. The concept of property of the estate is exceedingly broad and encompasses property rights including "all legal or equitable interests of the debtor in property."[4] Congress intended to bring "anything of value" that a debtor owns into the estate, including the debtor's contingent claims and causes of action even if commenced after filing the bankruptcy petition.[5]

It is important to note that the automatic stay is self-executing upon filing the bankruptcy petition; there is no other action that a debtor needs to take for the imposition of the stay.[6] The automatic stay is "effective against the world regardless of whether a party had notice of the bankruptcy filing or of the automatic stay."[7] Violations of the automatic stay have serious consequences for a creditor, including the imposition of contempt sanctions for a knowing and willful violation, because the automatic stay is essentially the equivalent of a court order.

Scope of the Automatic Stay

The automatic stay is extremely broad in scope, providing the debtor with protection from an extensive range of actions and activities. It automatically stays collection actions, foreclosures, and almost all judicial proceedings against the debtor and the debtor's property.[8]

The automatic stay protects the debtor and estate property, but does not protect third parties, such as corporate officers or directors, partners in the debtor's partnership, co-defendants in pending litigation, or separate legal entities. These third parties are not without protection. Most circuits recognize that a bankruptcy court possesses the statutory authority under § 105(a) to issue injunctive relief in favor of non-debtors under certain circumstances, which generally involves actions against certain co-debtors or insiders, such as guarantors, sureties, or partners, that may affect the debtor's ability to reorganize. And § 1301 of the Bankruptcy Code specifically provides a co-debtor stay in the case of "consumer debt of the debtor from any individual that is liable on such debt with the debtor."[9]

Another limit to the scope of the automatic stay is for post-petition acts. Actions on a claim against a debtor that arises after the commencement of a case are not stayed, provided that any enforcement of a claim does not act against property of the bankruptcy estate.[10]

Even though the Bankruptcy Code's automatic stay provisions do not apply to a debtor's acts, but rather only to acts against the debtor, some case law has developed holding that the stay applies to the continuation of an appeal by the debtor in litigation

filed pre-petition against the debtor.[11] Appellate courts generally stay an appeal until the bankruptcy court grants stay relief.[12]

While § 362(b) lists 28 very specific activities that are excepted from the automatic stay, experienced bankruptcy practitioners generally seek stay relief from the bankruptcy court or proceed with extreme caution before moving forward on excepted conduct because of the risk of court sanctions for violating the automatic stay. The excepted conduct includes such activities as criminal action or proceeding against the debtor, collection of domestic support obligations from property that is not property of the estate, suspension of driver's license or professional license, and the exercise by the government of its police or regulatory powers.

Duration of the Automatic Stay

The automatic stay does cease at some point. The automatic stay remains in effect against property of the estate until such property is no longer property of the estate.[13] This occurs either because the property is claimed as exempt by the debtor, sold or abandoned by the bankruptcy estate, or because a plan of reorganization has been confirmed. In the case of exempt property (e.g., retirement funds, homestead, certain personal property as determined under state law) such property remains exempt from pre-petition creditors.

The Bankruptcy Abuse Prevention and Consumer Act of 2005 modified the automatic stay in the case of individual serial bankruptcy filings so that the automatic stay will last only 30 days if a debtor had a prior bankruptcy within the year before the current filing, unless the debtor seeks to extend the stay.[14] In the case of a debtor who had two or more prior cases pending within a year, and such cases were dismissed during the one-year period, there is no stay in effect upon filing.[15] Out of the abundance of caution, one dealing with a serial filer should confirm that the stay has been terminated before taking any action.[16]

With respect to acts against the debtor, the automatic stay remains in effect until the case is closed or dismissed, or in the case of an individual until a discharge is granted or denied.[17] If a discharge is granted, the stay is replaced by the discharge injunction, which permanently stays actions on discharged debts.

Relief From Stay

If your client is subject to the automatic stay, it cannot take any actions subject to the stay without approval from the bankruptcy court, in bankruptcy parlance referred to as relief from the automatic stay. Section 362(d) sets forth the grounds for relief from the stay, which is generally handled by filing a motion with the bankruptcy court (and payment of a filing fee). The court may either terminate, annul, modify, or condition the stay "for cause, including the lack of adequate protection of an interest in property" or grant relief from the stay against property "if the debtor does not have equity in the such property; and such property is not necessary to effective reorganization."[18]

Creditors often attempt to contract for stay relief through provisions in pre-petition contracts that waive or alter the automatic stay. As a general rule, bankruptcy courts typically do not enforce such provisions because the purpose of the stay is to protect creditors as well as the debtor. Courts that have considered the waiver issue have used three basic approaches: (1) uphold the stay waiver in broad unqualified terms on the basis of freedom of contract; (2) reject the stay waiver as unenforceable per se as against public policy; and (3) treat the waiver as a factor in deciding whether "cause" exists to lift the stay.[19]

Violation of Stay

Because the stay is imposed automatically, and often without notice to the party stayed, the automatic stay may be violated by a party without realizing the stay is in effect. Generally speaking, "actions taken in violations of the automatic stay are void *ab initio* and therefore without effect," including orders entered by state courts.[20]

Since a party may have knowledge of the bankruptcy but choose to ignore it or be under the mistaken belief that they may still proceed against the debtor or property of the estate, most courts will impose contempt sanctions for a knowing and willful violation.[21] As a general rule, punitive damages for violation of the automatic stay are appropriate only when the violator has engaged in egregious, intentional misconduct.[22] Once a creditor has notice of the bankruptcy case, the creditor has the "responsibility to refrain from violating the stay."[23] Many courts, putting a higher burden on a creditor than merely refraining from violating the stay, "have emphasized the obligation of creditors to take affirmative action to terminate or undo any action that violates the automatic stay" and failure to do so may be considered a willful violation.[24]

Because of the fundamental importance of the automatic stay to the bankruptcy process, it is exceedingly broad and brings stiff penalties if violated. When dealing with its potential application, exercise caution and don't take a chance. ⊙

Endnotes

[1]11 U.S.C. § 101 et seq. Unless otherwise indicated, all section references herein are to the Bankruptcy Code (Title 11 of the U.S. Code).

[2]*In re Weidenbenner*, 521 B.R. 74, 81 (Bankr. S.D.N.Y. 2014).

[3]*Ford v. Loftin (In re Ford),* 296 B.R. 537, 548 (Bankr. N.D. Ga. 2003).

[4]§ 541(a).

[5]H.R. Rep. No. 95-595, at 367 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6323.

[6]§ 362(a).

[7]*Henkel v. Frese, Hansen, Anderson, Hueston, & Whitehead, P.A., el al.* (*In re Newgent Golf Inc.)*, 402 B.R. 424, 433 (Bankr. M.D. Fla. 2009) (citations omitted).

[8]§ 362(a) provides that filing a petition operates as a stay against the following activities—

continued on page 27

(1)the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
(3)any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
(4) any act to create, perfect, or enforce any lien against property of the estate;
(5)any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
(6)any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
(7)the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
(8)the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

[9]II U.S.C. § 1301(a).
[10]§ 362(a)(1).
[11]*See, e.g.*, *Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982).
[12]*See id.*
[13]II U.S.C. § 362(c)(1).
[14]§ 362(c)(3).
[15]§ 362(c)(4).
[16]§ 362(j).
[17]§ 362(c)(2).
[18]§ 362(d).
[19]*In re Triple A & R Capital Inv. Inc.*, 519 B.R. 581, 584 (Bankr. D.P.R. 2014), *aff'd* No. 14-1896, 2015 WL 1133190 (D.P.R. Mar. 12, 2015).
[20]*Newgent Golf*, 402 B.R. at 433 (citing *United States v. White,* 466 F.3d 1241, 1244 (11th Cir. 2006)).
[21]II U.S.C. § 362(k) provides—

(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
(2)If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

[22]*Roche v. Pep Boys Inc.* (*In re Roche*), 361 B.R. 615 (Bankr. N.D. Ga. 2005).
[23]*In re Baird,* 319 B.R. 686, 689 (Bankr. M.D. Ala. 2004) (citing *Mitchell Const. Co. Inc. v. Smith* (*In re Smith*), 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995)).
[24]*In re Wright*, 75 B.R. 414 (M.D. Fla. 1987).

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT DISTRICT OF NEW JERSEY **Caption in Compliance with D.N.J. LBR 9004-2(c)**	
LTL MANAGEMENT, LLC, Debtor.	Case No. 21-30589 (MBK)
LTL MANAGEMENT, LLC, Plaintiff, v. THOSE PARTIES LISTED ON APPPENDIX A TO COMPLAINT and JOHN AND JANE DOES 1-1000, Defendants.	Adv. Pro. No. 21-03032 (MBK) Chapter 11 Hearing Date: February 18, 2022

All Counsel of Record

MEMORANDUM OPINION

This matter comes before the Court by way Debtor's bankruptcy case (Case No. 21-30589) and subsequent adversary proceeding (Adv. Pro. No. 21-03032) and motion ("Motion") (ECF No. 2 in Adv. Pro. No. 21-03032)[1] filed by Plaintiff LTL Management, LLC ("LTL" or "Debtor") seeking an Order (I) Declaring That the Automatic Stay Applies to Certain Actions Against Non-Debtors or (II) Preliminarily Enjoining Such Actions and (III) Granting a Temporary Restraining

[1] Unless otherwise specified, all ECF Nos. will refer to docket entries in the Adversary Proceeding, Adv. Pro. No. 21-03032.

Order Pending a Final Hearing. The Motion was initially filed in the Western District of North Carolina. Debtor filed a Supplemental Brief (ECF No. 128) to incorporate applicable Third Circuit law. The matter was fully briefed and scheduled for a Final Hearing. The Court has fully considered the submissions of the parties and the arguments set forth on the record at a hearing held on February 18, 2022. For the reasons set forth below, the Court grants Debtor's Motion and resolves the adversary proceeding in favor of Debtor. The Court issues the following findings of fact and conclusions of law as required by FED. R. BANKR. P. 7052.[2] Contemporaneously with filing this Memorandum Opinion, the Court is filing a separate Opinion Denying the Motions to Dismiss with respect to the pending motions to dismiss this chapter 11 proceeding. These matters have been tried collectively at evidentiary hearings held on February 14-18, 2022. The Court also adopts and incorporates herein the factual findings and conclusions of law set forth in the separate Memorandum Opinion dated February 25, 2022.

I. Venue and Jurisdiction

The Court has jurisdiction over this contested matter under 28 U.S.C. §§ 1334(a) and 157(a) and the Standing Order of the United States District Court dated July 10, 1984, as amended September 18, 2012, referring all Bankruptcy cases to the Bankruptcy Court. As explained in detail below, this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (G). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

[2] To the extent that any of the findings of fact might constitute conclusions of law, they are adopted as such. Conversely, to the extent that any conclusions of law constitute findings of fact, they are adopted as such.

II. Background

On October 14, 2021, LTL filed a voluntary petition for chapter 11 relief in the United States Bankruptcy Court for the Western District of North Carolina (the "North Carolina bankruptcy court"). *Petition*, ECF No. 1 in Case No. 21-30589. LTL is an indirect subsidiary of Johnson & Johnson ("J&J") and traces its roots back to Johnson & Johnson Baby Products, Company ("J&J Baby Products"), a New Jersey company incorporated in 1970 as a wholly owned subsidiary of J&J. *Declaration of John K. Kim in Support of First Day Pleadings* ("*Kim Decl.*") ¶¶ 9-10, ECF No. 5 in Case No. 21-30589. J&J, a New Jersey company incorporated in 1887, first began selling JOHNSON'S® Baby Powder in 1894, launching its baby care line of products. *Id.* at ¶¶ 10-14. In 1972, J&J established a formal operating division for its baby products business, which included JOHNSON'S® Baby Powder. *Id.* In 1979, J&J transferred all its assets associated with the Baby Products division to J&J Baby Products. *Id.* In connection with this transfer, J&J Baby Products assumed all liabilities associated with the Baby Products division. *Supplemental Declaration of John K. Kim in Support of Debtor's Complaint for Declaratory and Injunctive Relief and Related Motions ("Kim Supp. Decl.*") ¶ 5, ECF No. 3. Over the next few decades, nearly all assets[3] of the Baby Products division were transferred in a series of transactions and mergers, ultimately resting with one of J&J's corporate subsidiaries, Johnson & Johnson Consumer Inc. ("Old JJCI") in 2015. *Kim Decl.* ¶ 10-14, ECF No. 5 in Case No. 21-30589. Following these intercompany transactions, Old JJCI assumed responsibility for all claims alleging that J&J's talc-containing baby powder caused ovarian cancer and mesothelioma. *Id*. at ¶¶ 15, 32.

[3] The only exception being those assets allocated to its diaper programs.

Similarly, through a series of transfers and indemnification agreements, Old JJCI assumed responsibility for all claims alleging that another J&J product, "Shower to Shower" caused cancer or other diseases. *Debtor's Supplemental Memorandum in Support of Preliminary Injunction Motion* ("*Debtor's Supp. Mem.*") 12-14, ECF No. 128. Old JJCI also agreed to indemnify various retailers ("Retailers") who sold Old JJCI's talc-containing products for claims related to the sale of such products. *Kim Supp. Decl.* ¶¶ 8-12, ECF No. 3.

On October 12, 2021, Old JJCI engaged in a series of transactions (the "2021 Corporate Restructuring") through which it ceased to exist and two new companies, LTL and Johnson & Johnson Consumer Inc. ("New JJCI"), were formed. *Kim Decl.* ¶ 16, 22-23, ECF No. 5 in Case No. 21-30589. The alleged purpose of this restructuring was to "globally resolve talc-related claims through a chapter 11 reorganization without subjecting the entire Old JJCI enterprise to a bankruptcy proceeding." *Id.* at ¶ 21. As a result of the restructuring, LTL assumed responsibility for all of Old JJCI's talc-related liabilities. *Id.* at ¶¶ 16, 24. Through the restructuring, LTL also received Old JJCI's rights under a funding agreement (the "Funding Agreement"). *Id.* at ¶ 24. Under the Funding Agreement, J&J and New JJCI are obligated to pay, *inter alia*, "any and all costs and expenses" LTL incurs during its bankruptcy case, "including the costs of administering the Bankruptcy Case" to the extent necessary. *Funding Agreement* 6*, Annex 2 to Declaration of John K. Kim in Support of First Day Pleadings*, ECF No. 5 in Case No. 21-30589.

Shortly after filing for bankruptcy on October 14, 2021 in the Western District of North Carolina, Debtor initiated the instant adversary proceeding, seeking declaratory and injunctive relief. Specifically, the Complaint requests an order declaring that the automatic stay applies to

certain actions against nondebtors (the "Protected Parties") or, in the alternative, asks the Court to enjoin such actions and grant a temporary restraining order pending a final hearing. *Complaint*, ECF No. 1. Debtor simultaneously filed the instant Motion requesting a preliminary injunction enjoining the prosecution of actions outside of the chapter 11 case on account of the same talc claims that exist against the Debtor in the chapter 11 case. *Motion*, ECF No. 2. The North Carolina bankruptcy court held a two-day evidentiary hearing on November 4 and 5, 2021. On November 10, 2021, Judge Whitley issued oral findings of fact and conclusions of law and granted the motion on a preliminary basis. *North Carolina Bankruptcy Court's Order Granting Motion for Preliminary Injunction*, ECF No. 102. As the result of Judge Whitley's Order, the defendants were "prohibited and enjoined, pursuant to sections 105 and 362 of the Bankruptcy Code, from commencing or continuing to prosecute any [talc-related claims] against any of the Protected Parties" for a period of 60 days. *Id.* at 7-8. Judge Whitley made clear that his Order was without prejudice and was "not intended to bind a subsequent Presiding Court." *Id.* at 7. He then transferred the bankruptcy case to the Bankruptcy Court for the District of New Jersey, and, on November 17, 2021, this Court assumed exclusive jurisdiction of the adversary proceeding and the underlying bankruptcy case.[4]

[4] This matter was initially scheduled to be heard on January 11, 2022, three days ahead of the January 14 expiration date of the Preliminary Injunction imposed by the North Carolina Order. However, after the case was transferred to this Court, the Original TCC filed a Motion for Withdrawal of Reference (ECF No. 110) with the district court. Because the district court had not ruled on that motion—and in light of an identity of issues and evidence with the pending Motions to Dismiss in the main bankruptcy case—this Court adjourned the hearing date for this Motion to February 18, 2022, the final scheduled date for argument on the Motion to Dismiss. Accordingly, On January 15, 2022, this Court entered a Bridge Order (ECF No. 157) extending the Preliminary Injunction entered by the North Carolina Bankruptcy Court to February 28, 2022. In the interim, the District Court denied the Motion for Withdrawal of the Reference (ECF No. 32 in Case No. 21-cv-20252).

Following the transfer of the case to the District of New Jersey, Debtor supplemented its initial brief and amended and restated its arguments in support of the relief sought to reflect Third Circuit precedent. At its core, Debtor's argument remains the same and is two-fold. First, Debtor cites to 11 U.S.C. § 362 and contends that the automatic stay prohibits prosecution of talc claims against the Protected Parties. Second, Debtor asserts that the Court should exercise its authority under 11 U.S.C. § 105(a) to enjoin the continuation or commencement of the talc claims against the Protected Parties.

Several interested parties oppose the Motion, including: the Official Committee of Talc Claimants[5] (ECF No. 142), certain plaintiff-insurers (the "Objecting Insurers") (ECF No. 141), and attorneys for Alystock, Witkin, Kreis & Overholtz, PLLC ("AWKO") (ECF No. 143). The Debtor submitted an omnibus reply (ECF No. 146).[6]

In opposition to the Motion, the Original TCC contends that an extension of the stay under § 362(a) is not warranted. Moreover, the TCC asserts that this Court lacks subject matter jurisdiction to enjoin actions between nondebtors under § 105(a). AWKO likewise opposes the Motion and raises similar arguments. AWKO asserts that J&J must file its own bankruptcy

[5] At the time it filed its Opposition (ECF No. 142) on December 22, 2021, there existed only one Official Committee of Talc Claimants (the "Original TCC"). Soon thereafter, however, the United States Trustee reconstituted the Original TCC and appointed two separate committees: the Official Committee of Talc Claimants I (the "Ovarian Cancer Claimants Committee" or "TCC I") and the Official Committee of Talc Claimants II (the "Mesothelioma Claimants Committee" or "TCC II"). The U.S. Trustee's actions were challenged by way of motions filed in the underlying bankruptcy proceeding, which the Court granted in an Opinion dated January 20, 2022 (ECF No. 1212 in Case No. 21-30589). An Order memorializing the Court's ruling was entered on January 26, 2022 (ECF No. 1273). However, given the procedural posture of, and the pending motions in, both the underlying bankruptcy case and the instant adversary proceeding, the Court stayed the effect of its ruling, ordering that both TCC I and TCC II (collectively, the "Committees") "shall remain in full force and effect through March 8, 2022." *Order Granting Motions Challenging United States Trustees' Notice of Appointment* 2, ECF No. 1273 in Case No. 21-30589.

[6] On February 1, 2022, TCC II filed a Sur-Reply (ECF No. 166); however, that pleading was struck for the reasons set forth on the record during the hearing on February 10, 2022.

petition to enjoy the benefits and protections of the Bankruptcy Code's automatic stay and argues that equitable relief under § 105(a) is not warranted. Finally, the Objecting Insurers object to the Motion only to the extent it seeks to enjoin pending litigation in the Superior Court of New Jersey (the "New Jersey Coverage Action").

III. Discussion

A. The Automatic Stay

Section 362(a) of the Bankruptcy Code provides, in relevant part, that

> a petition filed under section 301, 302, or 303 of this title . . . operates as a stay applicable to all entities, of—
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > . . .
> >
> > (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[.]

11 U.S.C. § 362(a).

The Third Circuit has explained that the purpose of the automatic stay is "two-fold." *In re Denby-Peterson*, 941 F.3d 115, 122 (3d Cir. 2019). First, it serves to "protect the debtor, by stopping all collection efforts, harassment, and foreclosure actions, thereby giving the debtor a respite from creditors and a chance to attempt a repayment or reorganization plan or simply be relieved of the financial pressures that drove him or her into bankruptcy[.]" *Id.* (quotations, citations, and alterations omitted). Second it "protect[s] creditors by preventing particular

creditors from acting unilaterally in self-interest to obtain payment from a debtor to the detriment of other creditors." *Id.*

Although the scope of the automatic stay is broad, its protections typically apply only to debtors, not nondebtor defendants. *ACandS, Inc. v. Travelers Cas. & Sur. Co.,* 435 F.3d 252, 259 (3d Cir. 2006) (noting that "the scope of the automatic stay is broad and covers all proceedings against a debtor"); *McCartney v. Integra Nat. Bank N.*, 106 F.3d 506, 509 (3d Cir. 1997) (holding that "the clear language of section 362(a) stays actions only against a 'debtor.'"); *see also In re SN Liquidation, Inc.*, 388 B.R. 579 (Bankr. D. Del. 2008). Nevertheless, by way of the Motion, Debtor seeks a declaration that the automatic stay enjoins actions against the Protected Parties, who are nondebtor entities.

1. Authority for Extension of Stay to Nondebtors

Prior to engaging in analysis, this Court clarifies the framework within which motions seeking this type of relief are evaluated. As with the instant Motion, most motions seeking to prevent litigation against nondebtor third parties are premised on both the automatic stay under §362(a) and a court's equitable powers under § 105(a). However,

> [I]t is unclear whether the Third Circuit views staying an action to aid a debtor's reorganization the result of extending the § 362(a) stay or the result of issuing a separate injunction pursuant to, for example, a district court's inherent power to stay a pending action or a bankruptcy court's power under § 105(a).

Stanford v. Foamex L.P., No. CIV. A. 07-4225, 2009 WL 1033607, at *1 n.7 (E.D. Pa. Apr. 15, 2009). Courts in this circuit have recognized that "caselaw concerning the use of authority conferred by section 105(a) to implement the substantive powers created by section 362(a) is not entirely consistent." *In re Philadelphia Newspapers, LLC*, 423 B.R. 98, 103 n.8 (E.D. Pa. 2010)

(citing *In re Philadelphia Newspapers, LLC*, 407 B.R. 606, 611 (E.D. Pa. 2009) (noting that courts have often conflated the analysis of sections 362(a) and 105(a), and confused the issue). Indeed, many courts have used some iteration of the phrases "extension of the stay" and "injunctive relief" interchangeably when discussing whether to permit actions against nondebtor third parties to proceed. Additionally, many courts have cited only to § 105(a). *See, e.g.*, *In re W.R. Grace & Co.*, 115 F. App'x 565, 568 (3d Cir. 2004) (reviewing a § 105(a) injunction); *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 751 (Bankr. E.D. Pa. 1986) (granting an injunction under § 105(a), without discussion of § 362(a)).

In this Court's view, ample authority exists to conclude that § 362(a), § 105(a), or a court's inherent powers can each serve as independent bases for extension of a stay to nondebtor third parties. For example, in *In re A.H. Robins Co., Inc.*—a case which the Third Circuit has cited with approval—the Fourth Circuit meticulously set forth the courts' powers, discussing each different source of authority in a separate section of the decision. *See In re A.H. Robins Co (A.H. Robins Co. v. Piccinin)*, 788 F.2d 994, 1001-1003 (4th Cir. 1986) (cited with approval in *McCartney v. Integra Nat. Bank N.*, 106 F.3d 506 (3d Cir. 1997)). The *Robins* court stated that a bankruptcy court may preclude lawsuits directly under: (1) § 362(a); or (2) by way of an injunction under §105(a); or (3) pursuant to its inherent power. 788 F.2d at 1001-003. The following year, in a subsequent case also related to the A.H. Robins bankruptcy, the Fourth Circuit clarified that it held in *Robins* "that the district court had four independent grounds on which it could stay the plaintiffs' suit against [the nondebtor third party]." *In re A.H. Robins Co. Inc. (A.H. Robins Co. v Aetna)*, 828 F.2d 1023, 1024 (4th Cir. 1987) (referring to § 362(a)(1), § 362(a)(3), § 105(a), and a court's

inherent powers under 28 U.S.C. § 1334 as independent bases for extension of the automatic stay to nondebtor third parties).

Further, the Third Circuit in *McCartney v. Integra Nat. Bank N*. recognized "a number of cases where courts have applied the automatic stay protection to nondebtor third parties." 106 F.3d 506, 510 (3d Cir. 1997). In doing so, the Third Circuit cited to *Robins* and explicitly acknowledged that the *Robins* court had relied on "both the automatic stay provision and the bankruptcy court's equitable powers under 11 U.S.C. § 105 to enjoin actions against nondebtor codefendants." *Id.* (citing *Robins*, 788 F.2d. 994). In its analysis, the *McCartney* court held that the plaintiff "was stayed from pursuing a deficiency judgment action against the nondebtor third party" because—due to the unusual circumstances of the case—doing so would "defeat the purpose of § 362." *Id.* at 511. Thus, the Third Circuit in *McCartney* upheld extension of the stay to a nondebtor solely on the basis of § 362, and without mention of § 105(a) in its analysis. To this Court, the decision in *McCartney* appears to be an endorsement of § 362 as an independent basis for extending the stay.

Nevertheless, several courts still view this as an open-ended question. *See, e.g.*, *In re Philadelphia Newspapers, LLC*, 423 B.R. at 103 n.8; *In re Philadelphia Newspapers, LLC*, 407 B.R. at 611; *Stanford v. Foamex L.P.*, 2009 WL 1033607, at *1 n.7. In their view, however, the issue is "academic as the practical effect (i.e., the staying of an action) is the same regardless of the means employed." *Foamex*, 2009 WL 1033607, at *1 n.7; *see also In re Philadelphia Newspapers, LLC*, 423 B.R. at 103 n.8 (declining to "delve into this analytical quagmire . . . [regarding] . . . whether the order issued by the Bankruptcy Court constituted the extension of the

stay under section 362(a) or an injunction under section 105(a)" because it was "of no moment for purposes of this appeal"). This Court disagrees. Although a discussion of the ultimate *effect* may be purely "academic" because the end result is the same, the proper *procedure* for getting there under each basis employs different methodologies and, thus, cannot be brushed aside as semantics. Significantly, if a court were to determine that § 362(a)(3), alone, serves as a proper basis to extend the stay to a nondebtor, then the inquiry could end there. However, to the extent a court wishes to rely on § 105(a) to enjoin actions against nondebtors, the court must first decide that it has subject matter jurisdiction. *See In re W.R. Grace & Co.,* 591 F.3d 164, 170–71 (3d Cir. 2009) (quoting *In re Combustion Eng'g, Inc.,* 391 F.3d 190, 225 (3d Cir.2004)) (holding that, because § 105(a) does not provide an independent source of federal subject matter jurisdiction, a court must establish that it has subject matter jurisdiction prior to issuing an injunction under § 105(a)).

Ultimately, until the Third Circuit provides clearer guidance, this issue remains unsettled. Indeed, in several cases out of the Eastern District of Pennsylvania, district courts have used and re-used a three-step inquiry to determine whether the bankruptcy court's extension of a stay to a nondebtor was appropriate: "(1) whether the Bankruptcy Court had jurisdiction to issue the injunction; (2) whether the Bankruptcy Court properly extended the automatic stay under section 362(a) to the non-debtors; and (3) whether the Bankruptcy Court properly exercised its discretion in issuing the injunction." *In re Philadelphia Newspapers, LLC*, 423 B.R. at 102 (citing *Philadelphia Newspapers II,* 407 B.R. at 611). Therefore, although this Court maintains that application of the stay to nondebtor third parties can be premised on several distinct grounds, this

Court will follow the framework established in the *In re Philadelphia Newspapers* line of cases. Accordingly, the Court first addresses its jurisdiction.

B. Subject Matter Jurisdiction

"Bankruptcy jurisdiction extends to four types of title 11 matters: (1) cases 'under' title 11; (2) proceedings 'arising under' title 11; (3) proceedings 'arising in' a case under title 11; and (4) proceedings 'related to' a case under title 11." *Stoe v. Flaherty*, 436 F.3d 209, 216 (3d Cir. 2006), as amended (Mar. 17, 2006) (citing 28 U.S.C. § 1334(b) and *In re Combustion Eng'g, Inc*., 391 F.3d 190, 225 (3d Cir. 2004) (citations omitted)). "The first three categories are considered 'core' proceedings, whereas the fourth category, 'related to' proceedings, are considered 'non-core' proceedings." *In re E. Orange Gen. Hosp., Inc.*, 587 B.R. 53, 71 (D.N.J. 2018) (citing *In re Resorts Int'l, Inc.*, 372 F.3d 154, 162 (3d Cir. 2004)). A bankruptcy court has the power to hear, decide and enter final orders and judgments in the first three categories of proceedings. 28 U.S.C. §157(b)(1); *In re Roggio*, 612 B.R. 655, 660 (Bankr. M.D. Pa. 2020).

A proceeding "arise[s] under" the Bankruptcy Code when the Bankruptcy Code creates the cause of action or provides the substantive right being invoked. *Stoe v. Flaherty*, 436 F.3d at 217. (3d Cir. 2006). A proceeding "arise[s] in" a case when it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. *Id.* at 216 (quoting *United States Trustee v. Gryphon at the Stone Mansion, Inc.*, 166 F.3d 552, 556 (3d Cir. 1999) and explaining that a proceeding arises in a bankruptcy case if it has "no existence outside of the bankruptcy"). Finally, "a claim falls within the bankruptcy court's 'related to' jurisdiction if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *In re Winstar*

Commc'ns, Inc., 554 F.3d 382, 405 (3d Cir. 2009) (internal quotations and citations omitted); *see also In re W.R. Grace & Co.*, 591 F.3d 164 (3d Cir. 2009).

The Original TCC maintains that this Court lacks subject matter jurisdiction over this issue. First, the Original TCC contends that Debtor's request for injunctive relief is not a core proceeding because it does not "arise under" or "arise in" the bankruptcy case. The Original TCC does not develop this argument and asserts, broadly, that injunctive relief is not unique to bankruptcy cases and that "Debtor's mere invocation of § 105 (or § 362, for that matter) is insufficient to establish that the injunction it seeks" is a core proceeding. *Objection of Original TCC* 80, ECF No. 142. The Original TCC then adds that, "[e]ven if these statutory provisions fall under the Court's 'core' jurisdiction in a general sense, the Court is without any jurisdiction to stay actions between non-debtors unless those actions could have some conceivable impact on the estate." *Id.* at 80-81. As Debtor points out, the Original TCC is incorrect. To the extent a proceeding is a "core" proceeding, the Court has jurisdiction and the inquiry ends there. Courts need not consider the impact on the estate unless they are exercising "related-to" jurisdiction. The case law cited by the Original TCC in its supporting footnote supports this position. *See, e.g.*, *Stoe v. Flaherty*, 436 F.3d 209 (finding that the court lacked jurisdiction because the matter was *not* a core proceeding).

Although "the Third Circuit has not addressed this precise issue, other courts have concluded that motions to extend an automatic stay and injunction to non-debtor third parties pursuant to sections 362 and 105 qualify as 'core' proceedings." *LTL Mgmt., LLC v. Those Parties Listed on Appendix A to Complaint*, No. 21-cv-20252 (FLW), 2022 WL 190673, at *4 (D.N.J. Jan. 21, 2022) (collecting cases). Further, Debtor in this case invokes § 362 to obtain the relief it seeks.

Because the instant proceeding invokes a substantive right under the Bankruptcy Code and is a proceeding that, by its nature, could arise only in the context of a bankruptcy case, the Court determines that it is a core proceeding over which this Court can exercise jurisdiction. In denying the Original TCC's motion to withdraw the reference, the district court reached the same conclusion. *Id.* ("Here, the Adversary Proceeding is a 'core' proceeding.").

In any event, the Court determines that it also has "related to" jurisdiction. The Original TCC contends that talc-related claims against the nondebtor Protected Parties have "no conceivable effect on the Debtor's bankruptcy estate . . . ." *Objection of Original TCC* 81, ECF No. 142. As discussed in greater detail *infra*, this Court disagrees. "What will or will not be sufficiently related to a bankruptcy to warrant the exercise of subject matter jurisdiction is a matter that must be developed on a fact-specific, case-by-case basis." *In re W.R. Grace & Co.*, 591 F.3d 164, 174 n.9 (3d Cir. 2009). Here, the Court concludes that Debtor is liable for the talc claims as the result of pre-petition corporate transactions, including the 2021 Corporate Restructuring, and various contractual indemnification obligations. Additionally, although the extent of shared insurance coverage is disputed, it remains uncontested that Debtor shares insurance policies—which are estate property under 11 U.S.C. § 541(a)—with the Protected Parties. Therefore, continued litigation of talc claims against the Protected Parties has a "conceivable effect" on the bankruptcy estate because it effectively seeks to collect and liquidate claims against Debtor and could deplete available insurance coverage. The weight of the case law supports this conclusion. *See, e.g.*, *In re Union Tr. Philadelphia, LLC*, 460 B.R. 644, 657 (E.D. Pa. 2011) (finding that debtor's potential indemnification obligations and the impact on debtor's reorganization efforts,

taken together, provide an adequate basis for the Court to find that the state court proceedings are sufficiently "related to" the underlying bankruptcy); *In re Philadelphia Newspapers, LLC*, 423 B.R. at 103 (finding "related to" jurisdiction where debtor might be obligated to indemnify third party in the event of a judgment); *Philadelphia Newspaper, LLC*, 407 B.R. at 614–15 (finding "related to" jurisdiction due to the impact of the litigation on the debtor's reorganization efforts as well as the debtor's practice of indemnifying its employees).[7]

C. § 362(a)(1)

In support of its position, Debtor first cites to subsection (1) of § 362(a). Specifically, Debtor contends that the talc claims are—at their core—an attempt to liquidate and recover claims against Debtor. Debtor explains that Old JJCI no longer exists and Debtor, alone, is responsible for the talc claims. Debtor also contends that Old JJCI's and J&J's talc-related liabilities were transferred to Debtor as the result of the corporate transactions previously discussed. Thus, Debtor asserts that talc-related claims against Old JJCI and J&J constitute "action[s] or proceeding[s] against the debtor" to collect pre-petition debts and are expressly precluded under § 362(a)(1). *Debtor's Supp. Mem.* 41, ECF No. 128 (citing *In re Heating Oil Partners*, No. 08-1976, 2009 WL 5110838, at *6-7 (D. Conn. Dec. 17, 2009)).

[7] In a footnote, the Original TCC relies on the Third Circuit's decision in *Federal-Mogul* for the proposition that "related to" bankruptcy jurisdiction "exists only where 'the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit.' " *Objection of Original TCC* 81, n.38, ECF No. 142. (quoting *In re Fed.-Mogul Glob., Inc.*, 300 F.3d 368, 382 (3d Cir. 2002)). As Debtor points out, however, the court in *Federal-Mogul* did not reach the merits of whether the district court had "related to" jurisdiction. *In re Fed.-Mogul Glob., Inc.*, 300 F.3d at 384. Instead, the appellate court reviewed the district court's denial of defendant's transfer motion in the context of deciding whether to grant a writ of mandamus. *Id.* Thus, the Original TCC's reliance on *Federal-Mogul* does not alter this Court's conclusion with respect to subject matter jurisdiction.

Additionally, Debtor points out that it is responsible for claims asserted against the Retailers and certain other indemnified parties, including New JJCI and J&J (the "Indemnified Parties"). Accordingly, Debtor argues that although talc claims are asserted against these other entities, Debtor is the true defendant. Indeed, Third Circuit precedent recognizes that the automatic stay under § 362(a)(1) can be extended to third parties where "unusual circumstances" exist. *See McCartney v. Integra Nat. Bank N.*, 106 F.3d at 510. Such unusual circumstances may be found "where 'there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.'" *Id.* (quoting *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)); *see also In re Philadelphia Newspapers, LLC*, 407 B.R. 606, 616 (E.D. Pa. 2009) (explaining that unusual circumstances exist warranting extension of the stay to nondebtors when: "(i) the non-debtor and debtor enjoy such an identity of interests that the suit of the non-debtor is essentially a suit against the debtor; or (ii) the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization"); *In re W.R. Grace & Co.*, No. 01-01139 (JKF), 2004 WL 954772, at *2 (Bankr. D. Del. Apr. 29, 2004).

The Original TCC and AWOK (collectively, the "Objecting Parties") vehemently object to Debtor's request to extend the automatic stay to the Protected Parties. Their primary argument in opposition is bottomed on the Objecting Parties' distaste for the 2021 Corporate Restructuring and the use of the Texas divisional merger statute to create a special purpose vehicle in the hours before the bankruptcy filing to accomplish J&J's goals. *See Objection of Original TCC* 49-52, ECF No. 142, *Objection of AWOK* ¶12, ECF No. 143. Both Objecting Parties ask this Court to

look beyond the plain statutory language and see the larger picture. *See Objection of Original TCC* 51-53, ECF No. 142; *Objection of AWOK* 7, ECF No. 143 (asking the Court to "take into account all the relevant circumstances"). In short, they contend it would be inequitable—and produce an "absurd result"—if courts were to permit nondebtors to "avail themselves of the automatic stay simply by unilaterally allocating to the debtor indemnity and other obligations on the eve of the bankruptcy filing." *Objection of Original TCC* 53, ECF No. 142.

This Court recognizes that it is obligated "to construe statutes sensibly and avoid constructions which yield absurd or unjust results." *Douglass v. Convergent Outsourcing*, 765 F.3d 299, 302 (3d Cir. 2014) (quoting *United States v. Fontaine*, 697 F.3d 221, 227 (3d Cir. 2012); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989)). However, as discussed at length in the Opinion Denying the Motions to Dismiss, this Court finds no impropriety in the divisional merger used here to create a special-purpose vehicle to address the talc claims and, thus, perceives no "absurd or unjust result" produced if the automatic stay is extended to the Protected Parties to enable Debtor to achieve its ultimate objective. As Debtor points out, and as expressly found by Judge Whitley after the initial hearing, if the stay is *not* extended to the Protected Parties, it is difficult to envision how a successful reorganization can be achieved in this case. *See Transcript of Hearing* 142:15-17, ECF No. 392 in Case No. 21-30589 (Nov. 10, 2021) ("We're not going to have a bankruptcy case of any sort if everybody can go sue J&J and assert the same claims that they would be asserting there.").

The Court acknowledges and appreciates the Objecting Parties' concerns regarding Old JJCI's pre-petition corporate restructuring and Debtor's subsequent bankruptcy filing.

Nevertheless, as detailed in the Opinion Denying the Motions to Dismiss, this Court determines that those valid concerns do not change the fact that Debtor was created pursuant to—and in compliance with—a long-standing Texas statute. Additionally, those concerns do not establish bad faith, nor do they undermine the legitimate purpose of this bankruptcy. In so ruling, this Court considered the totality of circumstances, including, but not limited to, litigation posture outside the bankruptcy court, the subjective intent of Debtor and management, the degree of financial distress facing Debtor, the pressures from non-moving creditors, pre-petition litigation conduct, the nature of the creditor body and the extent of assets, the structure and formation of Debtor, and Debtor's reorganizational purpose and exit strategy. In sum, the Court is not persuaded by the Objecting Parties' allegations of gamesmanship or inequity. Those arguments provide neither grounds for dismissal, nor a sufficient basis to decline to extend the stay to the Protected Parties. The case law on which the Original TCC relies is distinguishable.[8] Therefore—working from the baseline that the bankruptcy was filed in good faith—this Court focuses its attention on Third Circuit precedent as applied to the facts of this case in resolving the instant Motion.

[8] Citing *In re Owens Corning*, 419 F.3d 195, 212 (3d Cir. 2005) and *In re Integrated Telecom Express, Inc.*, 384 F.3d 108 (3d Cir. 2004), the Original TCC contends that "the Third Circuit has rejected similar attempts to 'game' the Bankruptcy Code." *Objection of Original TCC* 53, ECF No. 142. However, in *In re Owens Corning*, the court denied substantive consolidation where it was used as a means of giving debtor(s) an advantage over one group in plan negotiations, and the court in *In re Integrated* found a lack of good faith where the bankruptcy was filed with the sole purposes of prejudicing one creditor. As discussed at length in this Court's Opinion Denying the Motions to Dismiss, the bankruptcy in this case does not provide Debtor with an improper tactical advantage and does not result in prejudice to nondebtor creditors. Thus, *In re Owens Corning* and *In re Integrated* do not change this Court's analysis. The Original TCC also cites multiple cases for the proposition that "feigned" or "collusive" filings should be rejected. *Objection of Original TCC* 54, ECF No. 142 (citing *Poe v. Ullman*, 367 U.S. 497, 505, 81 S. Ct. 1752, 1757, 6 L. Ed. 2d 989 (1961); *United States v. Johnson*, 319 U.S. 302, 303, 63 S. Ct. 1075, 1076, 87 L. Ed. 1413 (1943); *Muskrat v. United States*, 219 U.S. 346, 31 S. Ct. 250, 55 L. Ed. 246 (1911). Again, this Court has resolved the issue of good faith and finds the instant bankruptcy is neither "feigned" nor "collusive" and serves a legitimate bankruptcy purpose. Accordingly, the cases cited by the Original TCC are unpersuasive and do not serve as a basis for denying extension of the automatic stay.

1. Identify of Interests

Here, the Court finds that the nondebtor Protected Parties and Debtor enjoy such an identity of interests that a lawsuit asserting talc-related claims against the Protected Parties is essentially a suit against Debtor. Following the two-day evidentiary hearing in the North Carolina Bankruptcy Court, Judge Whitley reached the same conclusion. *See Transcript of Hearing* 141:8-12, ECF No. 392 in Case No. 21-30589 (Nov. 10, 2021) ("I believe there is, in effect, an identity of interest within the meaning of the *Robins* case and that, notwithstanding the potential that some of the claims may be direct, almost all of them, if not all of them, relate to the debtor's operations."). As an initial matter, the talc claims against the Protected Parties involve the same products, same time periods, same alleged injuries, and same evidence as claims against Debtor. *See id.* 138:14-19 ("They're being sued on, effectively, the same products, the same time periods, etc.). The Objecting Parties do not—and cannot—dispute that Old JJCI no longer exists and that Debtor assumed its liabilities. *See* TEX. BUS. ORGS. CODE ANN. § 10.008(a)(2), (3) (directing that "all liabilities and obligations" of the dividing entity automatically "are allocated to one or more of the . . . new organizations in the manner provided by the plan of merger"). Likewise, the Objecting Parties do not—and cannot—deny the corporate transactions and indemnity agreements that left Debtor ultimately responsible for talc-related liabilities. Judge Whitley similarly concluded that Old JJCI assumed liability associated with the J&J Baby Products Division. *Transcript of Hearing* 138:13-17, ECF No. 392 in Case No. 21-30589 (Nov. 10, 2021) ("I believe under the circumstances that the language used effectively means that what we had was an assumption of all of the liabilities of the debtor and that is broad enough to cover future product liability claims.").

The Original TCC states in its opposition that "the claim of shared identities of interests is based solely on the allocation of agreements to the debtor on the eve of the bankruptcy filing for the very purpose of extending the stay." *Objection of Original TCC* 56, ECF No. 14. The Court is willing to accept that summarization and views it as a valid basis for extending the stay to the Protected Parties—not as a reason to decline extension of the stay as advanced by the Original TCC.

2. Impact on Bankruptcy Estate and Reorganization

The Original TCC additionally argues that "the existence of an indemnification from the debtor to a non-debtor . . . is an insufficient ground for extension of the automatic stay." *Objection of Original TCC* 57, ECF No. 14. Rather, the Original TCC insists that a debtor must also demonstrate that "the indemnification obligation threatens the debtor's assets or reorganization." *Id.* Relevant case law and the underlying purpose of the automatic stay support the Original TCC's interpretation. The court in *Robins* provided an illustration, noting that a situation in which extension of the stay would be warranted "would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case [because] . . . [t]o refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute." *A.H. Robins Co. v. Piccinin*, 788 F.2d at 999; *see also McCartney*, 106 F.3d at 510. Thus, a critical factor in deciding whether to extend the stay is the potential adverse impact on a debtor's estate and prospect of reorganization.

The Original TCC asserts that Debtor cannot prove that its indemnification obligations expose it to adverse consequences because "Debtor is a shell and has no actual estate to be impacted." *Objection of Original TCC* 58, ECF No. 142. Again, the Original TCC's argument

is rooted in its contention that this bankruptcy is a "charade." *Id.* at 57. The Court has already addressed and dispelled this argument in the accompanying Opinion Denying the Motions to Dismiss and will not belabor the point here. The bottom line is that Debtor is valid corporate entity, created properly and in accordance with Texas statute, with a bankruptcy estate comprised of assets and liabilities—including talc-related liabilities and indemnity obligations assumed from Old JJCI. Although the Original TCC attempts to characterize the Funding Agreement as a circular exchange of liability and payments that leaves Debtor's estate ultimately unaffected, this argument ignores the fact that, pursuant to the terms of the Funding Agreement, Debtor must first use its own assets to fund the trust—resorting only to financial contributions from J&J and New JJCI as a backstop. Thus, in this Court's view, the talc claims have an undeniable impact on Debtor's estate. Moreover, the Original TCC's unsupported allegations that Debtor and J&J "will not honor its reimbursement obligations under the Funding Agreement" or intend to "maroon [their] liability" represent mere speculation and wholly ignore this Court's role in supervising the bankruptcy case, the creation and funding of a trust, and trust distributions. *Objection of Original TCC* 58, ECF No. 142. Given Debtor's and J&J's actions in this case—which, to date, have been candid and transparent—there is simply no indication that the Funding Agreement is a "scheme to hinder, delay, and defraud talc powder creditors" as the Original TCC alleges. *Id.* And, to the extent Debtor's actions drift in that direction, this Court is prepared to take swift action and will honor its commitment of ensuring that claimants receive fair and timely compensation under a comprehensive and transparent distribution scheme.

Given the facts of this case, the Court concludes that continued litigation against the

Protected Parties would liquidate pending tort claims, as well as indemnification claims, against Debtor outside of chapter 11 and potentially deplete available insurance coverage—frustrating the purpose of the automatic stay. *See, e.g.*, *In re Dow Corning Corp.*, 86 F.3d 482, 494 (6th Cir. 1996), *as amended on denial of reh'g and reh'g en banc* (June 3, 1996) ("The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy."). Moreover, continued litigation against the Protected Parties would divert funds and resources toward defense costs and potentially disrupt the flow of funds and resources to Debtor's trust pursuant to the Funding Agreement. *See, e.g. In re MCSi, Inc.*, 371 B.R. 270, 271–72 (S.D. Ohio 2004) (quoting *Gray v. Hirsch,* 230 B.R. 239, 243 (S.D.N.Y.1999) and collecting cases in which courts "stayed actions against non-debtor co-defendants 'where they have found that the bankrupt estate would be adversely affected because the creditor's action would prevent the non-debtor from contributing funds to the reorganization, or would consume time and energy of the non-debtor that would otherwise be devoted to a reorganization effort' "). Furthermore, continued litigation against the Protected Parties would undoubtedly impair mediation efforts and negotiations within this bankruptcy and would complicate estimation hearings, with multiple uncoordinated hearings nationwide.

3. Joint Tortfeasor

The Original TCC also asserts that J&J is a joint tortfeasor with direct liability and, thus, the automatic stay should not preclude prosecution of those independent and direct claims against J&J as a nondebtor third party. The Original TCC cites a host of cases and asserts that

it is "settled law that 'joint tortfeasors' are not entitled to the benefit of the automatic stay upon a co-defendant's bankruptcy filing." *Objection of Original TCC* 60, ECF No. 142. This assertion and the selective portions of underlying case law are misleading. Indeed, as previously discussed, the automatic stay typically applies only to the debtor and, like any other nondebtor third party, does not extend to "joint tortfeasors." Also discussed, there exists an exception to this general rule in that the stay can be extended when the circumstances so warrant. Thus, even assuming direct liability exists, the analysis for whether an extension of the automatic stay is warranted based on "unusual circumstances" remains unaffected. The authority upon which the Original TCC relies does not convince this Court otherwise. Specifically, the Original TCC cites to *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 128 (4th Cir. 1983) and *Gold v. Johns-Manville Sales Corp.*, 723 F.2d 1068, 1076 (3d Cir. 1983), and quotes the *Robins* court. However, in both *Johns-Manville* and *Williford*, the joint tortfeasors sought to stay proceedings under the theory that the debtor co-defendants were "indispensable parties." Neither of those cases involved the situation presented here, wherein Debtor argues that suits against the Protected Parties (the "joint tortfeasors") will have an adverse impact on the bankruptcy estate. Additionally, the Original TCC quotes from the *Robins* decision and asserts that the *Robins* court "opin[ed]" that the automatic stay would "clearly not extend to such non debtor." *Robins*, 788 F.2d at 999. However, the language quoted is truly dicta in which the *Robins* court discusses the analysis of a bankruptcy court in the District of Connecticut, *see In re Metal Ctr., Inc.*, 31 B.R. 458 (Bankr. D. Conn. 1983). Further, in the very next sentence, the *Robins* court acknowledges the exception to the general rule in its continued discussion of the *In re Metal* opinion, explaining

that if "a debtor and nondebtor are so bound by statute or contract that the liability of the nondebtor is imputed to the debtor by operation of law, then the Congressional intent to provide relief to debtors would be frustrated by permitting indirectly what is expressly prohibited in the Code. . . . Clearly, the debtor's protection must be extended to enjoin litigation against others if the result would be binding upon the debtor's estate." *Robins*, 788 F.2d at 999 (quoting *In re Metal Ctr., Inc.*, 31 B.R. at 462).

For the foregoing reasons, the Original TCC's "joint tortfeasor" argument does not preclude extension of the automatic stay to the Protected Parties.

4. Challenge to the 1979 Agreement

The Original TCC disputes Debtor's talc liability by challenging the 1979 transaction in which Old JJCI agreed to indemnify J&J (the "1979 Agreement"). Specifically, the Original TCC claims there is no legal or factual support in the record. The Court disagrees. The 1979 Agreement provides, in relevant part:

> WHEREAS, J&J has a number of operating divisions conducting various lines of business; and WHEREAS, one of these operating divisions is named the JOHNSON & JOHNSON BABY PRODUCTS COMPANY Division (sometimes hereinafter called the "BABY Division"); and
>
> WHEREAS, the Subsidiary corporation, is wholly-owned by J&J and J&J is desirous of **transferring to this Subsidiary all assets and liabilities** which are now allocated to the BABY Division on the books or records of Johnson & Johnson; …
>
> *1979 Agreement* (emphasis added), *Movants' Ex.* 600.02.

Section 1 of the 1979 Agreement clearly provides that J&J Baby Products assumed all

liabilities of every kind and description associated with the Baby Products division and indemnified J&J for such liabilities:

> J&J . . . does grant, bargain, sell, assign, alien, remise, release, convey, transfer, set over and confirm, unto the Subsidiary, its successors and assigns, forever, all the businesses, franchises, properties and assets . . . which are now allocated on its books or records of J&J to its Baby Division . . . .
>
> . . .
>
> . . . Subsidiary agrees to assume . . . all the indebtedness, liabilities and obligations of every kind and description which are allocated on the books or records of J&J as pertaining to its BABY Division and the Subsidiary hereby covenants and agrees with J&J that the Subsidiary will forever . . . indemnify and save harmless J&J against all the indebtedness, liabilities and obligations aforesaid hereby assumed. . . .
>
> . . .
>
> [T]he covenants and agreements herein contained shall inure to the benefit of and shall bind the respective parties hereto and their respective successors and assigns.

Id. §§ 1, 4. In interpreting the language of the 1979 Agreement and the relevant circumstances, the Court concludes that J&J Baby Products assumed all liabilities, including contingent and future product liability claims. The Original TCC makes much of the fact that the 1979 Agreement uses the phrase "on the books or records." In the Original TCC's view, the use of this phrase has a specific meaning in the context of corporate law and, thus, limited the scope of liability assumed to only those liabilities existing and reported on J&J's books and records at the time of the transaction. The Original TCC cites to *Deutsche Bank Nat'l Tr. Co. v. Fed. Deposit Ins. Corp.*, 109 F. Supp. 3d 179 (D.D.C. 2015) in support of this position. In *Deutsche*, the court analyzed a contractual provision that provided for the sale of liabilities and used the phrase "which are reflected on the Books and Records" to define those liabilities. *Deutsche*, 109 F. Supp

at 198. When a dispute arose as to the amount of the liabilities assumed in the contract, the *Deutsche* court concluded that "the liabilities assumed by [the buyer] do not extend beyond the amounts listed [in the seller's] financial accounting records." *Id.* However, the contractual clause at issue in *Duetsche* is distinguishable from the clause at issue in this case in several respects. First, the contract in *Duetsche* memorialized a sale between two unrelated entities as opposed to the inter-company transfer in the present case. Second, the contract in *Deutsche* provided that the liabilities were assumed "expressly . . . at Book Value." *Id.* The reference to "Book Value"—which is absent from the contract at issue in the instant case—suggests a finite value to the liability being transferred. In contrast, the agreement at issue here does not include such definitive language. Instead, it includes the word "forever" and explains that the contract will bind the parties as well as their successors and assigns. *1979 Agreement*, § 1. Accordingly, it appears the 1979 Agreement contemplates continuing and future obligations resulting from the transfer of the business. In this respect the Court is persuaded by the decision in *Bouton v. Litton Indus., Inc.*, 423 F.2d 643 (3d Cir. 1970), a case relied on by Debtor. Like the parties in *Bouton*, the parties in this case expressed a clear intention of carrying that business forward after the transfer. *Bouton*, 423 F.2d at 651.

Additionally, the court in *Deutsche* used extrinsic evidence to determine the meaning of the contract. *Deutsche*, 109 F. Supp at 204-207. The New Jersey Supreme Court "permit[s] a broad use of extrinsic evidence to achieve the ultimate goal of discovering the intent of the parties." *Conway v. 287 Corp. Ctr. Assocs.*, 187 N.J. 259, 270, 901 A.2d 341, 347 (2006) ("Extrinsic evidence may be used to uncover the true meaning of contractual terms.") (citing *Atl.*

N. Airlines v. Schwimmer, 12 N.J. 293, 304, 96 A.2d 652, 657 (1953)); *see also Caldwell Trucking PRP v. Rexon Tech. Corp.*, 421 F.3d 234, 243–44 (3d Cir. 2005) (stating that "under New Jersey law, courts should interpret a contract considering the objective intent manifested in the language of the contract in light of the circumstances surrounding the transaction") (internal quotations and citations omitted); *Pier 541 LLC v. Crab House, Inc.*, No. 19-00437, 2021 WL 4438128, at *3 (D.N.J. Sept. 28, 2021). While the *Deutsche* court ultimately concluded that the contract limited the amount of liability assumed, the factual distinctions between the circumstances in *Deutsche* and the case at hand compel this Court to reach an opposite conclusion. The meeting minutes for the J&J Board of Directors Meeting held on December 12, 1978 provide insight into the purpose of the 1979 Agreement. Specifically, the minutes reflect that, in furtherance of J&J's "long standing policy of decentralization of corporate business," the 1979 Agreement was intended to transfer all assets to subsidiaries who would, in turn, assume liabilities. *c* Thus, the construction of the 1979 Agreement advanced by the Original TCC, which limits the liability assumed to such reported in the books and records at the time of the transaction, is inconsistent with the stated purpose of the transaction as reflected in the Board Minutes.

During oral argument on this Motion, counsel for TCC II asserted that the language of the 1979 Agreement was "particular" and "specific," suggesting that the Court should not look beyond the plain meaning of the Agreement's terms for purposes of interpretation. However, evidence of circumstances is admissible in aid of interpretation of an integrated agreement, even though the contract on its face is free from ambiguity. *See Conway*, 187 N.J. 259 (citing

Schwimmer, 12 N.J. 293). In point of fact, this Court finds the 1979 Agreement to be ambiguous as to the status and treatment of future liability. Indeed, the 1979 Agreement is silent in this respect. "Under New Jersey law, ambiguities in an indemnification agreement are generally construed against the indemnitee," which is the party receiving indemnity. *Caldwell Trucking PRP*, 421 F.3d at 244 (3d Cir. 2005) (citing *SmithKline Beecham Corp. v. Rohm & Haas Co.*, 89 F.3d 154, 161 n.3 (3d Cir. 1996). Thus, in this case, any ambiguity in the 1979 Agreement should be construed in favor of Old JJCI as the indemnitor. The Court need not engage further in this analysis as the record demonstrates that both Old JJCI and the Protected Parties share a common understanding as to which party was responsible for talc-related liabilities following the 1979 Agreement.

In addition, when faced with the absence of a critical contractual term—here, future liability—"courts 'will imply a reasonable missing term or, if necessary, will receive evidence to provide a basis for such an implication.' " *Twp. of White v. Castle Ridge Dev. Corp.*, 419 N.J. Super. 68, 76–77, 16 A.3d 399, 404 (App. Div. 2011) (quoting *Satellite Entm't Ctr., Inc. v. Keaton,* 347 N.J. Super. 268, 276, 789 A.2d 662 (App. Div. 2002)). "In particular, courts will look to, among other things, all the relevant circumstances surrounding the transaction, as well as evidence of the parties' course of dealing, usage and course of performance." *Elliott & Frantz, Inc. v. Ingersoll–Rand Co.,* 457 *F.*3d 312, 328 (3d Cir. 2006) (applying New Jersey law); *see also* 49 N.J. PRACTICE PROCEDURE § 7:25 (2010 ed.) (citing RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1979)). Accordingly, the Court considers the parties' course of performance since the time of the 1979 Agreement to glean the intent of the parties.

Debtor represents, and the Original TCC does not dispute, that "all talc-related costs not otherwise covered by insurance have been charged to Old JJCI since the assumption of liabilities under the 1979 Agreement." *Debtor's Omnibus Reply* 19, ECF No 146. Although the Original TCC attempts to frame this course of action as "purely a function of accounting policy, not legal responsibility," *Objection of Original TCC* 38, ECF No. 142, deposition and trial testimony from Adam Lisman—who is the assistant controller for Johnson & Johnson and the Apex Company—confirms that the accounting was based on an underlying obligation. Specifically, Mr. Lisman confirmed that since the 1979 transaction, Old JJCI is legally responsible for, and has actually paid, all talc-related expenses. *Trial Tr.* 123:21-22, Feb. 16, 2022, ECF No. 1518 ("My understanding is that JJCI borne [sic] all financial responsibility [for the talc litigation]."); *Lisman Dep. Tr*. 117:1-3, Oct. 30, 2021, *Ex. H to Toroborg Decl.*, ECF No. 1444-9 ("[T]hese are talc product liability costs that JJCI was ultimately responsible for, which is why it is showing up as an expense on their account."); *id* at 194:21, 195:10 ("Q: And does that mean that accounting follows the legal obligation associated with the expense? . . . A: Yes.") (objections omitted). Accordingly, the parties' course of performance since the time of the 1979 Agreement reinforces this Court's conclusion that Old JJCI was legally responsible for talc-related liabilities as a result of the 1979 Agreement.

The 1979 Agreement also provides J&J Baby Products with an irrevocable power of attorney to substitute itself "for J&J and in its [J&J's] name and stead . . . on behalf of and for the benefit of the Subsidiary" to, among other things, "defend and compromise any and all actions, suits or proceedings in respect of any said Properties"—defined as the Baby Products

division's "businesses, franchises, properties and asset." *1979 Agreement* §2, *Movants' Ex.* 600.02. Thus, in 1979, J&J Baby Products became the real party in interest for all actions, suits or proceedings relating to the talc previously sold by J&J or in any way arising out of the talc business that was being transferred. And, as the result of a series of transactions culminating in the 2021 Corporate Restructuring, Debtor assumed that liability and substituted in as the real party in interest. This, in turn, weighs in favor of extending the stay.

5. Retailers

The Original TCC next contends that an extension of the stay to the Retailers is inappropriate because no identity of interests exists between Debtor and the Retailers. In support of this position, the Original TCC revives its argument that the Retailers are joint tortfeasors who may owe direct liability to talc claimants. The Original TCC asserts that "the fact that Old JJCI, after the fact, may have entered into Tender Agreements [or indemnification agreements] with the retailers does not eliminate such liability." *Objection of Original TCC* 70, ECF No. 142. Nonetheless, as discussed, the existence of joint tortfeasor status or direct liability does not end the inquiry as to whether the automatic stay should be extended to a nondebtor co-defendant. Here, Debtor certifies that it owes contractual, common law, and statutory indemnification obligations to the Retailers and the Indemnified Parties. *Kim Decl.* ¶ 53, ECF No. 5 in Case No. 21-30589. These obligations—viewed in conjunction with the fact that the claims against the Retailers involve the same products, the same time period, the same alleged defect, and the same alleged harm as the claims against Debtor—are sufficient to establish the "unusual circumstances" warranting extension of the stay. In fact, the Court cannot identify a scenario

where a retailer would have liability without some action or inaction by Debtor's predecessor also forming the basis of a cause of action. There is nothing in the record to demonstrate that any single lawsuit—out of the tens of thousands pending—consist of claims against Retailers in which J&J or Old JJCI have not been named as a defendant for the manufacture/sale of the product.

6. Absolute Indemnification

The Original TCC asserts that Debtor's indemnification obligation must be "absolute" to warrant extension of the automatic stay. *See, e.g. Robins* (giving example of "unusual circumstance" as where a debtor has "absolute" indemnity obligation to nondebtor); *Stanford v. Foamex L.P.*, No. CIV. A. 07-4225, 2009 WL 1033607, at *2 n.9 (E.D. Pa. Apr. 15, 2009) ("Even assuming that Foamex is the real party in interest, Foamex's indemnification obligations do not appear absolute, as required by courts extending the stay due to the existence of indemnification agreements; *id*. (collecting cases, including *Hess Corp. v. Performance Texaco, Inc.*, No. 3:08-CV-1426, 2008 WL 4960203 at *2 (M.D. Pa. Nov. 19, 2008) (reasoning that indemnification agreements constitute unusual circumstances only in "actions against non-debtors who are entitled to *absolute indemnity* by the debtor for a judgment against them") (emphasis added)) (citing *In re Mid-Atl. Handling Sys., LLC*, 304 B.R. 111, 128 (Bankr. D.N.J. 2003)). In opposition, Debtor cites to *In re Dow Corning Corp.*, for the proposition that "[t]here is no requirement that there be 'automatic' liability in respect of indemnification obligations." *Debtor's Omnibus Reply* 31, ECF No. 146 (citing *In re Dow Corning, Corp*., 86 F.3d 482 (6th Cir. 1996), *as amended on denial of reh'g and reh'g en banc* (June 3, 1996)). Notably, in *In re*

Dow Corning, the Sixth Circuit observed that "[i]t has become clear following *Pacor* that 'automatic' liability is not necessarily a prerequisite for a finding of "related to" jurisdiction." *In re Dow Corning, Corp*., 86 F.3d at 491 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 987 (3d Cir. 1984)). Thus, the discussion of "automatic" liability in that case—and in *Pacor*—was in the context of a jurisdictional analysis; not in the context here, in which this Court is considering whether an "unusual circumstance" exists warranting extension of the automatic stay to a nondebtor third party. Nevertheless, this Court remains unpersuaded that "absolute" indemnity is a prerequisite for extension of the automatic stay.

The Fourth Circuit clarified in the follow-up case related to the A.H. Robins bankruptcy that it previously "found that a stay was authorized under 11 U.S.C. § 362(a)(3) because Aetna *might* seek indemnification from Robins for any damages it had to pay, thus implicating the debtor's property." *In re A.H. Robins Co. Inc. (A.H. Robins Co. v. Aetna)*, 828 F.2d 1023, 1025 (4th Cir. 1987) (emphasis added). The Fourth Circuit's use of the word "might" suggests that conditional indemnification is sufficient to trigger extension of automatic stay. Other courts which have addressed this issue likewise indicate that the mere possibility of indemnification obligations warrants extension of the automatic stay. *See, e.g.*, *In re W.R. Grace & Co.*, 115 F. App'x 565, 568–69 (3d Cir. 2004) (refusing to modify injunction precluding state court action against nondebtor third parties because the "prospect of indemnification" warranted a stay); *In re Philadelphia Newspapers, LLC*, 423 B.R. 98 (E.D. Pa. 2010) (holding that unusual circumstances existed to justify extension of automatic stay where debtor owed potential indemnification obligation); *In re Philadelphia Newspapers, LLC*, 407 B.R. 606, 616 (E.D. Pa.

2009) (holding that "the 'unusual circumstances' to warrant the extension of the section 362(a) stay [were] present . . . [in part] because the Debtors owe potential contractual and common law duties to indemnify the Non–Debtors").

Notwithstanding, Debtor asserted during trial that its indemnification obligation is, in fact, automatic. Counsel for Debtor argued that the only prerequisite to the indemnification obligation is that Debtor manufactured the product, which its predecessor indisputably did. Thus, Debtor concludes that indemnification obligations inarguably exist in this case and are automatically triggered by lawsuits involving talc products. The Objecting Parties did not demonstrate—in their briefing or during trial—that Debtor's indemnification obligations are conditional or that there exists a basis for Debtor to avoid indemnification liability. Accordingly, even assuming absolute indemnification is a prerequisite, or that Debtor's indemnification obligations are conditional, nothing in the record provides this Court with a plausible basis for concluding that the limitations on Debtor's obligations would come into play. The Court therefore determines that Debtor's indemnification obligations are automatic and, as a corollary, rejects the Original TCC's objection premised on absolute indemnification. *See, e.g.*, *Gulfmark Offshore, Inc. v. Bender Shipbuilding & Repair Co.*, No. CIV. A. 09-0249, 2009 WL 2413664, at *2 (S.D. Ala. Aug. 3, 2009) (rejecting party's objection premised on absence of absolute indemnification because objecting party "points to no facts or circumstances tending to suggest that those conditions [to indemnification liability] would or might be relevant here").

7. Tender Agreements

The Original TCC further submits that Debtor has not "proven the existence, let alone, terms, of all of these claimed Tender Agreements. Scant few are in the record." *Objection of Original TCC* 70, ECF No. 142. In response, Debtor counters that "this [argument] ignores that the Debtor has provided a summary of all the Tender Agreements, produced exemplars of many such agreements and also has common-law indemnification obligations to the Retailers." *Debtor's Omnibus Reply* 24, ECF No. 146. Moreover, this Court would be willing at a later date to review continuance of the stay if a record exists establishing the lack of a Tender Agreement or other contractual obligation.

8. Res Judicata, Collateral Estoppel, and Evidentiary Prejudice

The Debtor additionally relies on the principles of res judicata, collateral estoppel, and record taint in support of its Motion. Specifically, Debtor contends that permitting continued litigation against the Protected Parties "creates risks of binding the Debtor through res judicata and collateral estoppel, and creating an evidentiary record that prejudices the Debtor." *Debtor's Supp. Mem.* 44, ECF No. 128. The Court agrees.

In *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 206 L. Ed. 2d 893 (2020), the Supreme Court explained the doctrines of res judicata and collateral estoppel. "[I]ssue preclusion (sometimes called collateral estoppel) . . . precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment." *Id.* at 1594 (citing *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L.Ed.2d 308 (1980)) (other citations

omitted). Claim preclusion (or res judicata), on the other hand, "prevents parties from raising issues that could have been raised and decided in a prior action—even if they were not actually litigated." *Id; see also Beasley v. Howard*, 14 F.4th 226, 231–32 (3d Cir. 2021).

a. Collateral Estoppel

The Court will first address the doctrine of collateral estoppel. In order for collateral estoppel to apply, the following four elements must be satisfied: "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action." *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 247–48 (3d Cir. 2010) (quoting *Szehinskyj v. Att'y Gen*., 432 F.3d 253, 255 (3d Cir. 2005)). Collateral estoppel will also apply to a person who is not a formal party, to the extent such person also had "the opportunity to present proofs and argument" in the previous litigation. *Taylor*, 553 U.S. at 895 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 39, cmt. a (AM. L. INST. 1980)).

In the instant case, the Original TCC contends that Debtor's apprehension regarding potential use of collateral estoppel in future litigation is "misplaced." *Objection of Original TCC* 72, ECF No. 142. The Original TCC argues that collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case. *Id.* (citing *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)). Debtor will not be a party to continued litigation against the nondebtor defendants, thus, in the Original TCC's view, Debtor cannot be collaterally estopped from later

litigating any issue decided in those actions. The Third Circuit explicitly cautioned against this type of logic in *In re W.R. Grace & Co.*, 115 F. App'x 565 (3d Cir. 2004). In that case, a debtor sought extension of the automatic stay to a co-defendant and relied, in part, on the theory of collateral estoppel. The plaintiff in *In re W.R. Grace* set forth the same theory that the Original TCC advances here: If the debtor is not a party to the litigation against the nondebtor, the debtor will not be collaterally estopped from later litigating those same issues in an action against it. The Third Circuit cautioned that this theory should not be tested at the debtor's peril because "[i]t is more supposition than certainty at this juncture." *Id.* at 569. In a footnote, the Third Circuit explained that it believed the issue to be "at least unclear," and cited several cases where courts had determined that a debtor may be adversely affected by liability determinations or witness testimony in suits against nondebtors. *Id.* at 569 n.4 (citing *United Nat'l Ins. Co. v. Equip. Ins. Managers,* No. 95–CV–0116, 1997 WL 241152, at *11–13 (3d Cir. May 6, 1997); *In re American Film Technologies, Inc.,* 175 B.R. 847, 850 (Bankr. D. Del. 1994); *In re Johns–Manville Corp.,* 40 B.R. 219, 225 (S.D.N.Y. 1984) (discussing the potential effect that witness testimony could have on the debtor)). Further, the Third Circuit observed that "the courts have never adopted the absence of collateral estoppel as the test for preventing actions from proceeding against third parties when the debtor is protected by the automatic stay. Rather, courts employ a broader view of the potential impact on the debtor." *In re W.R. Grace & Co.*, 115 F. App'x at 570 (quoting *In re A.H. Robins Co.*, 828 F.2d at 1025) (explaining that a proper test for extension of the stay "is generally whether the litigation 'could interfere with the reorganization of the debtor' ")).

This Court sees no reason to deviate from the prudent course navigated by the Third Circuit in *In re W.R. Grace*. The possibility that collateral estoppel may not adversely impact Debtor in subsequent litigation does not outweigh the many reasons why extension of the stay is appropriate. The cases cited by the Original TCC are distinguishable and do not suggest otherwise. First, the Second Circuit in *Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282 (2d Cir. 2003) denied extension of the to a nondebtor where the basis for doing so was premised "solely" on the apprehension of later use against the debtor of offensive collateral estoppel or the precedential effect of an adverse decision. Here, Debtor's basis for extending the stay is not bottomed "solely" on collateral estoppel concerns. This Court additionally notes that, in *Queenie*, the Second Circuit observed that the stay can apply to nondebtors if a claim against the nondebtor will have an immediate adverse economic consequence for the debtor's estate and did, in fact, extend the stay to a different entity because it was wholly-owned by the debtor, and adjudication of a claim against that nondebtor entity would have an immediate adverse economic impact on the debtor. *Id.* at 287-88 (citing *A.H. Robins Co. v. Piccinin,* 788 F.2d at 999 (4th Cir. 1986)) (other citations omitted). Thus, the holding *Queenie* does not support the Original TCC's position regarding collateral estoppel and, instead, further buttresses this Court's decision to extend the stay in light of the adverse economic impact of the continued litigation on Debtor.

Next, *Int'l Union of Painters & Allied Trades Dist. Council No. 21 Health & Welfare Fund v. Serv. Painting, Inc.*, No. CV 18-3480, 2019 WL 2143370 (E.D. Pa. May 16, 2019)—another case relied on by the Original TCC—is distinguishable. In that case, the court explained that "collateral estoppel concerns arise when the debtor owes an indemnification obligation to

the non-debtor," and the court declined to extend the stay because the nondebtor had neither argued nor offered evidence that the debtor owed him an indemnification obligation. *Id.* at *9. Here, Debtor's indemnification obligations are clearly established. Likewise, *In re MCSi, Inc.*, 371 B.R. 270 (S.D. Ohio 2004) offers the Original TCC no help. In that case, third parties sought to lift the stay as to certain nondebtor co-defendants who had previously been covered by the stay by way court order. The nondebtor co-defendants objected. In its analysis, the *MCSi* court acknowledged that proceedings against nondebtor co-defendants can be properly stayed if certain "unusual circumstances" exist. *Id.* at 271 (citing *Parry v. Mohawk Motors of Michigan, Inc.,* 236 F.3d 299, 314 (6th Cir.2000), *cert. denied,* 533 U.S. 951, 121 S. Ct. 2594, 150 L.Ed.2d 752 (2001); *A.H. Robins Company, Inc.*, 788 F.2d 994). However, the *MCSi* court rejected each and every basis for extending the stay and found no such "unusual circumstances" present. Thus, when addressing the nondebtors' concern regarding collateral estoppel, the court observed that—although it was a valid concern—"this concern has never been the sole justification for extending the stay as to such co-defendants." *Id.* at 275. Further, a critical factor in the *MCSi* court's analysis was that the debtor did not oppose lifting the stay as to those nondebtor co-defendants and "its silence is deafening." *In re MCSi, Inc.*, 371 B.R. at 275. In the present case, Debtor is not silent and instead is explicitly requesting extension of the stay, and, again, collateral estoppel is not its sole basis for doing so.

b. Res Judicata

Res judicata—or claim preclusion—precludes relitigation of claims that could have been asserted and decided in a prior action. It bars not only claims that were brought in a previous

action, but also claims that could have been brought. *Beasley v. Howard*, 14 F.4th 226, 231 (3d Cir. 2021); *Post v. Hartford Ins. Co.,* 501 F.3d 154, 169 (3d Cir. 2007). The Supreme Court has explained that "[i]f a later suit advances the same claim as an earlier suit between the same parties [or their privies], the earlier suit's judgment 'prevents litigation of all grounds for, **or defenses to**, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.'" *Lucky Brand Dungarees, Inc.*, 140 S. Ct. at 1594-95 (quoting *Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 60 L.Ed.2d 767 (1979)) (emphasis added). A party seeking to invoke the res judicata doctrine must demonstrate that there has been "(1) a final judgment on the merits in a prior suit involving (2) the same parties or their privies and (3) a subsequent suit based on the same cause of action." *Duhaney v. Att'y Gen. of the U.S.*, 621 F.3d 340, 347 (3d Cir. 2010) (citing *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008)); *see also Kenny v. Schrading*, No. 20-cv-15786 (MASDEA), 2021 WL 5495898, at *2 (D.N.J. Nov. 23, 2021).

Although Debtor cites to both collateral estoppel *and* res judicata in its submissions, the substantive argument it presents is focused entirely on collateral estoppel. The cases on which Debtor relies in support of its position likewise focus on the potential prejudicial effect of collateral estoppel, as opposed to res judicata.[9] Indeed, the parties' briefs devote very little

[9] *See, e.g.*, *McCartney v. Integra Nat. Bank N.*, 106 F.3d 506, 512 (3d Cir. 1997) (no mention of res judicata); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1000 (4th Cir. 1986) (using term "res judicata" only once while quoting another case and providing no analysis of the doctrine); *In re Mallinckrodt Plc*, No. AP 20-50850-JTD, 2021 WL 523625, at *8 (D. Del. Feb. 11, 2021) (no mention of res judicata); *In re Bestwall LLC*, 606 B.R. 243, 256 (Bankr. W.D.N.C. 2019), *aff'd*, No. 3:20-CV-105-RJC, 2022 WL 68763 (W.D.N.C. Jan. 6, 2022) (mentioning the term "res judicata" but citing to case law that analyzed risk of prejudice based on collateral estoppel only); *In re W.R. Grace & Co.*, 386 B.R. 17, 24 (Bankr. D. Del. 2008) (no mention of res judicata); *In re Am. Film Techs., Inc.*, 175 B.R. 847, 850 (Bankr. D. Del. 1994) (discussing only doctrine of collateral estoppel); *In re Sudbury, Inc.*, 140 B.R. 461, 464 (Bankr. N.D. Ohio

attention to this doctrine, mentioning the term only a few times without development. It appears to this Court that parties in situations similar to Debtor—and courts addressing issues similar to those facing this Court—reference both doctrines in the interest of completeness, but do not adequately acknowledge their different applications or develop their arguments. Nevertheless, this Court acknowledges that res judicata "is an affirmative defense, and 'the party asserting [the doctrine] bear[s] the burden of showing that it applies.' " *Edwards v. U.S. Dep't of H.U.D.*, 799 F. App'x 113, 114 (3d Cir. 2020) (quoting *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984)). It is, therefore, unnecessary for this Court to explore in detail the potential preclusive effect of final judgment against the Protected Parties. *See, e.g. In re Harang*, No. 21-8003, 2021 WL 6128992, at *5 (B.A.P. 6th Cir. Dec. 28, 2021) (noting that the preclusive effect of a ruling is an "open question for another court in a collateral proceeding"). Rather, it suffices to acknowledge that there *exists a risk* that the doctrine of res judicata could adversely impact Debtor in future litigation. This risk weighs in favor of extending the stay under § 362(a)(1). *See In re W.R. Grace & Co.*, 115 F. App'x 565 (holding that risk of future preclusive consequences was enough to weigh in favor of extending the stay).

c. Record Taint

Finally, Debtor asserts that continued litigation could create an evidentiary record that would negatively impact subsequent litigation—a concept otherwise known as "record taint." In

1992) (finding that extension of stay was warranted where debtor had legitimate indemnity and collateral estoppel concerns and not discussing res judicata); *In re Johns-Manville Corp.*, 26 B.R. 420, 429 (Bankr. S.D.N.Y. 1983), *aff'd*, 40 B.R. 219 (S.D.N.Y. 1984), and *appeal allowed, decision vacated in part*, 41 B.R. 926 (S.D.N.Y. 1984) (using the term "res judicata" only once without analysis and instead finding basis to extend stay where debtor "could be collaterally estopped in subsequent suits from relitigating issues determined against its officers and directors").

deciding whether to extend the stay, the Third Circuit has considered the risk of record taint as part of its "broad[] view of the potential impact on the debtor." *See, e.g.*, *In re W.R. Grace & Co.*, 115 F. App'x 565, 569 n.4 (3d Cir. 2004) (citing *In re Johns-Manville Corp.*, 40 B.R. 219, 225 (S.D.N.Y. 1984) and acknowledging a risk that the evidentiary record created in a case against a nondebtor could later be used in a case against the debtor); *In re Mallinckrodt PLC*, Adv. Pro. No. 20-50850-JTD, 2021 WL 5275781, at *2 (D. Del. Nov. 10, 2021) (denying leave to file interlocutory appeal of order extending preliminary injunction because bankruptcy court appropriately performed "unusual circumstances" test and held that continued proceedings created "significant risk" of, among other thing, record taint); *In re W.R. Grace & Co.*, 386 B.R. 17, 35 (Bankr. D. Del. 2008) ("Under this 'broader view of the potential impact on the debtor,' this court takes into account the risks of collateral estoppel and record taint."). The Original TCC acknowledges that the possibility of record taint has been cited as a basis for extension of the automatic stay. *See Objection of Original TCC* 73 n.34, ECF No. 142). Nevertheless, the Original TCC asserts that the factors supporting such a finding are not present in the instant case. The Court disagrees. Because the talc-related claims against the Debtor and the Protected Parties implicate the same product, the same time period, the same alleged defect and the same alleged harm, it is possible that the evidentiary record developed in continued litigation against the Protected Parties could prejudice Debtor—especially considering that Debtor would be absent from the continued litigation. As stated previously, the risk that litigation against the Protected Parties could result in adverse consequences for Debtor—such as record taint—weighs in favor of extending the automatic stay.

D. § 362(a)(3)

Debtor also looks to § 362(a)(3) as a basis for staying proceedings against the Protected Parties. Subsection (a)(3) of the statute directs a stay of any action against an entity from obtaining possession of or exercising control over the property of the bankruptcy estate. 11 U.S.C. § 362(a)(3). "It has long been the rule in this Circuit that insurance policies are considered part of the property of a bankruptcy estate." *ACandS, Inc. v. Travelers Cas. & Sur. Co.*, 435 F.3d 252, 260 (3d Cir. 2006) (collecting cases); *see also In re W.R. Grace & Co.*, 475 B.R. 34, 148–49 (D. Del. 2012), *aff'd sub nom. In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013), and *aff'd*, 532 F. App'x 264 (3d Cir. 2013), and *aff'd*, 729 F.3d 311 (3d Cir. 2013), and *aff'd sub nom. In re WR Grace & Co.*, 729 F.3d 332 (3d Cir. 2013).

Here, Debtor states that "J&J and the Debtor are both covered for talc-related claims under various shared insurance policies" and that "[t]he Retailers are named as insureds in many such policies." *Debtor's Supp. Mem.* 45, ECF No. 128. Thus, Debtor asserts that prosecution of claims against J&J or the Retailers would deplete insurance proceeds available to Debtor, thereby diminishing the bankruptcy estate. The Original TCC concedes that insurance policies are estate property. Nevertheless, the Original TCC maintains that § 362(a)(3) does not apply because "[e]ither no coverage exists or, if it does, it has been exhausted." *Objection of Original TCC* 76, ECF No. 142. With respect to the existence of coverage, the Original TCC points out that the insurance carriers are currently disputing coverage. In the Original TCC's view, it remains uncertain whether Debtor is entitled to coverage which, in turn, casts doubt on whether actions against co-insureds would actually deplete the policies and affect the bankruptcy estate. The

Original TCC further argues that J&J and its affiliates have already exceeded the limits of coverage as the result of past litigation and exhausted any coverage to which Debtor may have been entitled. Thus, the Original TCC contends that continued litigation against the co-insureds would not affect estate property because there can be no further depletion of exhausted policies.

Ultimately, it is unquestionable that shared policies exist. Admittedly, certain coverage is disputed, and no definitive determination has been made as to exhaustion. However, these uncertainties do not change the fact that that the policies are estate property. *See In re W.R. Grace & Co.*, 475 B.R. at 81 (collecting cases). Moreover, as Debtor points out, and contrary to the Original TCC's assertions, the insurance policies have not yet been exhausted because "only payments made by the policyholder's insurers erode or exhaust the limits of the policies." *Omnibus Reply* 37, ECF No. 146. Although Old JJCI and J&J have incurred significant losses from the underlying talc claims, no agreement has been reached—nor has a court ruling been issued—regarding the allocation of those talc losses across the policy periods in question. Thus, nearly the entire policy coverage of $2 billion is potentially still available to Debtor and J&J.

Furthermore, that there are tens of thousands of talc-related actions pending with potential indemnity and that these claims far exceed the $2 billion policy limit are facts well-established in the record.[10] *See A.H. Robins Co.*, 788 F.2d at 1008 (4th Cir. 1986) ("That there are thousands of Dalkon Shield actions and claims pending is a fact established in the record and

[10] As detailed in Dr. Bell's expert report, at the time of filing, Debtor faced nearly 40,000 pending tort claims, with thousands of additional claims expected annually for decades to come. *Expert Report of Gregory K. Bell, Ph.D.* ("*Bell Report*") at 10. Additionally, as of the petition date, Debtor anticipated billions of dollars in talc-related liability and defense costs. *Id.* Indeed, in the first nine months of 2021, more than 12,300 new lawsuits were filed. *Id.*

the limited fund available under Robins' insurance policy is recognized in the record."). To the extent suits are permitted to proceed against additional insureds, those parties will incur costs that will undoubtedly deplete the insurance potentially available to Debtor for the talc claims.

This Court acknowledges that that—prior to finding "related to" jurisdiction over a nondebtor for purposes of extending the stay under § 105(a)—the Third Circuit has instructed that a court must make factual findings regarding the terms, scope or coverage of the allegedly shared insurance policies. *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 232 (3d Cir. 2004), *as amended* (Feb. 23, 2005). As an initial matter, this Court presently is analyzing whether extension of the automatic stay is appropriate under § 362(a)(3) and, thus, is not yet invoking its equitable powers under § 105(a). However, regardless of the basis for extension of the stay, the message from *In re Combustion* is that a court must make adequate factual findings before staying proceedings against nondebtor co-insureds on the theory that asbestos-related personal injury claims against the nondebtors will automatically deplete the insurance proceeds available to the debtor and, thus, reduce the assets available to the bankruptcy estate. *See id.*, 391 F.3d at 232–33 ("Courts finding 'related to' jurisdiction over claims against non-debtors based in part on shared insurance policies have relied not only on extensive record findings regarding the terms and operation of the subject policies, but also on additional evidence of automatic liability against the debtor."); *see also In re Imerys Talc Am., Inc.*, No. 19-MC-103 (MN), 2019 WL 3253366, at *5 (D. Del. July 19, 2019) ("Here, Johnson & Johnson also fails to offer a sufficient record that the terms and operation of the policies establish subject matter jurisdiction."); *Kleiner v. Rite Aid Corp.*, 604 B.R. 1, 8 (E.D. Pa. 2019) ("We, like our Court of Appeals in *In re*

Combustion Engineering, Inc., lack a sufficiently developed record of the relevant policies. And we decline to rest subject matter jurisdiction solely upon counsel's or a corporate representative's say-so."). Admittedly, the record in the instant case is not as sufficiently developed with respect to the insurance policies as in some of the other cases that have extended the stay on this basis. However, the existence of shared insurance coverage and tens of thousands of lawsuits that could exhaust that coverage is established. *See Bell Report* at 10. As an illustration of this point, while the trial in this matter was ongoing, a group of insurers filed a motion (ECF No. 1491) seeking relief from the automatic stay to proceed with litigation on the very issue of coverage in New Jersey state court. Moreover, this Court is mindful that the insurance policies are not Debtor's sole basis for extension of the stay to the Protected Parties in the instant case. Finally, the court heeds the advice given by the Third Circuit in *In re W.R. Grace & Co.*, discussed *supra.* 115 F. App'x 565 (3d Cir. 2004). In that case, the Third Circuit cautioned that a party's theory that a debtor would not be later adversely affected by collateral estoppel should not be tested at the debtor's peril. *Id.* at 569. Likewise, the Original TCC's theory that Debtor's insurance will not be affected—because Debtor is not entitled to it or because it has already been exhausted—will not be tested at Debtor's peril. Just as the risk of future preclusive consequences to the debtor in *W.R. Grace* was enough to weigh in favor of extending the stay, the chance that Debtor in this case could later prevail with respect to its insurance coverage demands weighs in favor of extending the stay.

E. § 105(a) Injunction

Pursuant to § 105(a) of the Bankruptcy Code, "[t]he court may issue any order, process,

or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). "The issuance of an injunction under section 105(a) is governed by the standards generally applicable to the issuance of injunctive relief in non-bankruptcy contexts." *In re Philadelphia Newspapers, LLC*, 423 B.R. at 105. To qualify for injunctive relief, a litigant must demonstrate a likelihood of success on the merits, that it will suffer irreparable harm if the injunction is denied, that the granting of preliminary relief will not result in even greater harm to the non-moving party and that the public interest favors such relief. *Kos Pharmaceuticals Inc. v. Andrex Corp*., 369 F.3d 700 (3d Cir. 2004); *In re G-I Holdings Inc.*, 420 B.R. 216, 281 (D.N.J. 2009) (citing *In re Phila. Newspapers, LLC*, 407 B.R. 606, 617 (E.D. Pa. 2009); *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 157 (3d Cir. 2002)). However, "[a] preliminary injunction is an 'extraordinary remedy, which should be granted only in limited circumstances.' " *Kos Pharm., Inc.,* 369 F.3d at 708 (quoting *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989)). In determining whether a preliminary injunction is appropriate, the Court considers the following factors:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

McTernan v. City of York, Pa., 577 F.3d 521, 527 (3d Cir. 2009) (quoting *United States v. Bell,* 414 F.3d 474, 478 n.4 (3d Cir. 2005)). "In considering a request for an injunction, these four factors are not weighed simultaneously against one another. Rather, the Court determines whether the first two threshold prongs are established, and if so, only then does it proceed to

consider the third and fourth factors." *In re Philadelphia Newspapers, LLC*, 423 B.R. at 106 n.11 (citing *Tenafly*, 309 F.3d at 157).

"In the bankruptcy context, reasonable likelihood of success is equivalent to the debtor's ability to successfully reorganize." *In re Union Tr. Philadelphia, LLC*, 460 B.R. 644, 660 (E.D. Pa. 2011) (quoting *In re Monroe Well Serv., Inc.*, 67 B.R. 746, 752 (Bankr. E.D. Pa. 1986) (explaining reasonable likelihood of success in terms of a successful reorganization)). Here—although the success of Debtor's reorganization is speculative at this early stage—there is nothing in the record to suggest that Debtor does *not* have a reasonable likelihood of reorganization. To the contrary, Debtor has explained its strategy for reorganization and has already executed a Funding Agreement which will aid in the reorganization process.[11] Moreover, to demonstrate a reasonable likelihood of success, a movant need only show the prospect or possibility that he or she will succeed, and need not prove same with certainty. *See Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 (3d Cir. 2013) (Jordan, J., dissenting) *rev'd and remanded sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 134 S. Ct. 2751, 189 L. Ed. 2d 675 (2014) (collecting cases). Debtor has met its burden here. The Original TCC's arguments in opposition are equally speculative

[11] The Original TCC asserts that Debtor has not demonstrated that § 524(g) is available to it because the statute requires that, as of the Petition Date, the "debtor" must "be named as a defendant in [a] personal injury" lawsuit. *Objection of Original TCC* 85, ECF No. 142 (quoting 11 U.S.C. § 524(g)(2)((B)(i)(I). Counsel for AWKO echoed this argument in closing statements on February 18, 2022. In the Objecting Parties' view, the term "debtor" in the statutory provision refers to LTL, who the Objecting Parties assert was *not* named in any lawsuit. Thus, the Objecting parties conclude that LTL cannot utilize § 524(g) and § 105(a) cannot be utilized to afford LTL a substantive right to which they are not entitled under the Code. However, the Original TCC's position ignores the fact that LTL assumed the liabilities of Old JJCI—who *was* the named defendant in personal injury lawsuits—and that Old JJCI ceased to exist. Thus, Debtor/LTL, as successor, is substituted under FED. R. CIV. P. 25(c). In any event, a successful plan in this case also can be bottomed on a trust established under § 105(a), apart from § 524(g).

and, in large part, are again rooted in its general objection to the bankruptcy for lack of good faith—an argument which this Court has rejected. *See Objection of Original TCC* 87, ECF No. 142.

As to the second factor, the Court determines that Debtor is likely to suffer irreparable injury without relief. As previously explained, continued litigation will have an adverse impact on the bankruptcy estate, will hinder reorganization efforts, and will serve as a constant drain on resources and time. In reaching this conclusion, the Court considers Debtor's liability as a result of the 2021 Corporate Restructuring, Debtor's contractual indemnification obligations, and the potential disruption that continued litigation against New JJCI and J&J could cause to funding of Debtor's trust. *See In re Union Tr. Philadelphia, LLC*, 460 B.R. 644, 660 (E.D. Pa. 2011) (affirming bankruptcy court's finding that debtor would suffer harm without preliminary injunction because, without "unfettered assistance," the debtor's "ability to reorganize is clearly diminished and [its] estate risks substantial harm if it is deprived of [nondebtor's] assistance in reorganizing"). For reasons previously discussed, the Original TCC's arguments in opposition are not persuasive.

The Court must next consider whether granting preliminary relief will result in even greater harm to the nonmoving party—here, the talc claimants. For reasons expressed in the Opinion Denying the Motions to Dismiss, the Court concludes that the talc claimants will not be prejudiced through the issuance of a preliminary injunction, and will—in fact—benefit from the extension of the automatic stay to the Protected Parties and the handling of their claims through the bankruptcy process. This method of dealing with claims also protects the interests of future

claimants, prevents a race for proceeds, and promotes equality in distribution. In the state and district courts, talc claimants struggle with the sluggish pace of litigation and face a legitimate possibility that they will not succeed in proving their claims. Should a judgment be awarded, claimants must then endure the appellate process, where—at worst—their judgment is overturned, and—at best—recovery is delayed. Extension of the automatic stay to the Protected Parties, on the other hand, ensures that all claims are reconciled through a bankruptcy trust, which would place reduced evidentiary and causation burdens on claimants. Resolution of claims and payments to claimants can be achieved at a far more expeditious pace in bankruptcy than through uncertain litigation in the tort system. A trust would establish a far simpler and streamlined process than currently available in the tort system. Indeed, the Multi-District Litigation ("MDL") has been ongoing since 2016, with only a handful of bellwether trials on the horizon. This Court is mindful that—as Professor Maria Glover acknowledges in her *amici curiae* brief—there is no perfect solution to the problems with mass tort litigation: "But no mechanism for handling the thorny challenges of mass torts is perfect, including bankruptcy. Indeed, it is the nature of mass torts to present different combinations of challenges, and those challenges follow mass torts wherever they go." *Glover* Brief at 25. However, this Court cannot ignore the reality that MDL is not meeting the needs of the claimants. The number of settlements reached in the talc-related lawsuits is dwarfed by the projected 10,000 new cases to be filed each year going forward. *See Expert Report of Charles H. Mullin, Ph.D.* at 5. And although MDLs may be a useful device to facilitate settlements, the MDL in the instant case is far from a global resolution and is ill-equipped to provide for future claimants. In short, a preliminary injunction

will not result in greater harm to the talc claimants. Instead, it will "remedy[] some of the intractable pathologies of asbestos litigation." *In re Federal-Mogul Glob., Inc.*, 684 F.3d at 362.

In this same vein, the Court finds that granting the preliminary injunction would be in the public interest. The Original TCC argues that this bankruptcy serves no interests other than J&J's own. The Court disagrees. As detailed in this Court's Opinion Denying the Motions to Dismiss, this Court holds no doubts that claim resolution through the bankruptcy process is in the public interest. First, as previously explained, a settlement trust benefits existing claimants—whose time is valuable and may be limited due to their illnesses—by streamlining the claim recovery process. Additionally, a bankruptcy trust protects the needs of future talc claimants—a class of individuals who have not yet developed symptoms or initiated litigation. These individuals will have very real injuries; however, their interests are largely unrepresented in the tort system. As noted by the court in *In re Bestwall LLC*, "a section 524(g) trust will provide all claimants—including future claimants who have yet to institute litigation—with an efficient means through which to equitably resolve their claims." 606 B.R. 243, 257 (Bankr. W.D.N.C. 2019). Through adopted procedures, these trusts establish fixed criteria and common parameters for payments to claimants, ensuring a level playing field for all present and future claimants while taking into consideration the significance of preserving all due process rights. *See In re W.R. Grace & Co*., 729 F.3d 311, 324 (3d Cir. 2013) ("Therefore, as long as a court correctly determines that § 524(g)'s requirements are satisfied, present and future claims can be channeled to a § 524(g) trust without violating due process."). Indeed, both present and future "claimant's interests are protected by the bankruptcy court's power to use future earnings to compensate

similarly situated tort claimants equitably." *In re Federal-Mogul Glob., Inc.*, 684 F.3d at 359.

The Original TCC asserts that "there is no logical stopping point to the Debtor's strategy." *Objection of Original TCC* 92, ECF No. 142. It posits that "any rich company facing liabilities could completely stymie them simply by allocating them to a new entity and putting the entity into bankruptcy." *Id.* at 92-93. This argument was repeated at trial and Counsel for TCC I cautioned that extending the stay would "open the floodgate" for other companies to spin their liabilities off into a new company and then send that new company into bankruptcy. This position ignores statutory requirements, existing case law, and the courts' role in overseeing bankruptcies. First, a company—like Debtor—must invoke, and comply with, a statutory authority when engaging in corporate restructuring. Here, Debtor utilized the Texas Business Organizations Code to effect its divisional merger. While other companies can also utilize this statute, or another like it, those other companies must likewise follow procedures and requirements set forth in those statutes. Accordingly, a "rich company's" ability to effectuate the type of divisive merger present in this case is not unchecked or unregulated. Similarly, a company's ability to file for bankruptcy and—more significantly—a company's ability to extend the automatic stay to an affiliate nondebtor company are subject to limitation. *See, e.g.*, *McCartney*, 106 F.3d 506 (noting that automatic stay can be extended to nonbankrupt codefendants where "unusual circumstances" exist); *Robins*, 788 F.2d 994 (same); *In re Irish Bank Resol. Corp. Ltd.*, No. BR 13-12159-CSS, 2019 WL 4740249, at *5 (D. Del. Sept. 27, 2019) (collecting cases stating same). Finally, to the extent a "rich company" seeks to enter the bankruptcy system in bad faith or without a valid reorganization purpose, the courts serve as

gatekeepers for this type of abusive practice.

Ultimately, this Court determines that all factors weigh in favor of Debtor's position. The Court determines that a preliminary injunction pursuant to § 105(a) that extends the stay to the Protected Parties is appropriate given the circumstances of this case.

F. Public Policy

At the heart of the Objecting Parties' argument is the allegation that Debtor and J&J have unclean hands. The Original TCC alleges both entities have engaged in bad faith and wrongful conduct that has caused further insult and injury to already-suffering talc claimants. The Court makes no determinations as to Debtor's, Old JJCI's, or J&J's conduct in other proceedings. However, as to the case before it, this Court finds no ill-intent or reprehensible behavior. The allegations of bad faith are insufficient to preclude Debtor from utilizing the bankruptcy system to achieve the goals it seeks—goals which this Court believes will ensure justice for existing and future talc claimants.

The Original TCC urges this Court not to use this case to "set new precedent." *Objection of Original TCC* 51, ECF No. 142. However, as discussed in this Court's Opinion Denying the Motion to Dismiss, corporate transactions similar to the 2021 Corporate Restructuring were effectuated pre-bankruptcy filing in several other mass tort bankruptcies—even apart from the other similarly structured filings currently pending in the Western District of North Carolina.[12]

[12] *See, e.g.*, *In re Garlock Sealing Tech., LLC,* 10-31607 (Bankr. W.D.N.C. 2017); *In re Mid Valley, Inc.,* No. 03-25592 (Bankr. W.D.Pa. 2003); *In re Babcock & Wilcox Co*. No. 00-10992-10995 (Bankr. E.D. La, 2002).

The existence of those cases suggests that a ruling in favor of Debtor will not set entirely new precedent.

Moreover, the Court determines that the Original TCC's concerns regarding the consequences of a ruling in Debtor's favor are unfounded. The Original TCC characterizes a ruling in Debtor's favor as providing "a blueprint to transform the Bankruptcy Code into a tool for unbridled corporate greed and manipulation." *Objection of Original TCC* 3, ECF No. 142. As discussed in this Court's Opinion Denying the Motions to Dismiss, the Court does not share the Original TCC's outlook. Congress implemented § 524(g) and granted the bankruptcy court broad equitable powers under § 105(a) to serve a purpose under a specific set of circumstances. When companies can utilize that statute for their benefit and the benefit of existing and future claimants, they should be permitted to do so. Admittedly, the bankruptcy system—like the mass tort system, or any tool in the proverbial "toolbox"—is susceptible to abuse. However, this Court does not believe that mere potential for abuse requires removal of a tool from the toolbox. Instead, the potential for abuse demands stronger scrutiny. Thus, courts must conduct a fact-specific inquiry in each case and determine—among other things—whether an appropriate set of circumstances are present, whether an entity is in compliance with statutory regulations, whether a valid reorganization purpose exists, and whether innocent third parties will be unduly prejudiced. After considering those factors in the context of this case, the Court determines that extension of the automatic stay to the Protected Parties is warranted. Given that this determination is limited to the unique facts of the case presently before the Court, this ruling will not open the floodgates to an unchecked, unregulated, or inherently abusive method of addressing liability.

IV. Conclusion

For the reasons set forth above, the Court concludes that "unusual circumstances" are present warranting an extension of the automatic stay to the Protected Parties under § 362(a)(1) and (3). To the extent § 362(a) does not serve as an independent basis for extension of the stay to nondebtor parties, the Court determines that a preliminary injunction under § 105(a) extending the automatic stay is appropriate. The Court, thus, grants Debtor's Motion and resolves the instant adversary proceeding in Debtor's favor. However, the Court concludes that taking measures in smaller steps will ensure that the parties progress in good faith towards mediation and plan formation. The Court will revisit continuation of the automatic stay and preliminary injunction in 120 days, on June 29, 2022, and similar periods thereafter.

The Court understands that all sides are pointing fingers and suggesting that their adversaries will take advantage of these shorter periods of review and will endeavor to "run out the clock." Let's be clear, the only clock of import sits on the Court's desk in Chambers and shows 1,869 days until retirement. The Court is confident that it can outlast either side's efforts to slow-walk the proceedings and will not countenance such conduct.

The Court will enter a form of Order consistent with this Opinion.

Michael B. Kaplan, Chief Judge
U.S. Bankruptcy Court
District of New Jersey

Dated: February 25, 2022

Ass'n of St. Croix Condominium Owners v. St. Croix Hotel Corp.

United States Court of Appeals for the Third Circuit

April 30, 1982, Argued ; July 6, 1982, Filed

Nos. 81-2992, 81-2993

Reporter
682 F.2d 446 *; 1982 U.S. App. LEXIS 17675 **; 7 Collier Bankr. Cas. 2d (MB) 137; 9 Bankr. Ct. Dec. 462

ASSOC. OF ST. CROIX CONDOMINIUM OWNERS v. ST. CROIX HOTEL CORP.; ASSOC. OF ST. CROIX CONDOMINIUM OWNERS v. THE ST. CROIX HOTEL CORP. ST. CROIX HOTEL CORPORATION, Appellant; ASSOC. OF ST. CROIX CONDOMINIUM OWNERS v. ST. CROIX HOTEL CORP.; ASSOC. OF ST. CROIX CONDOMINIUM OWNERS v. THE ST. CROIX HOTEL CORP. ASSOCIATION of ST. CROIX CONDOMINIUM OWNERS, Appellant

Subsequent History: [1]** As Amended July 9, 1982.

Prior History: APPEAL FROM the DISTRICT COURT of the VIRGIN ISLANDS, DIVISION of ST. CROIX.

Core Terms

automatic stay, proceedings, district court

Case Summary

Procedural Posture
A creditor and a debtor sought review of a judgment of the District Court of the Virgin Islands, Division of St. Croix, which vacated a territorial court order providing for the eviction of the debtor and remanded the questions of the debtor's continued possession of the leased premises and the debtor's attorney fees.

Overview

The creditor was awarded damages for past due rent in its action on a lease, and the debtor was ordered evicted for failure to maintain the leasehold premises. The debtor was also given an award for its counterclaim but given no attorney fees. On appeal, the district court vacated the eviction order and remanded questions concerning the debtor's continued possession and attorney's fees. Both parties appealed. The court discovered that the debtor had filed for bankruptcy, but no mention of bankruptcy was found in record, so the court stayed both appeals. The automatic stay provision in bankruptcy, 11 U.S.C.S. § 362, required actions against the debtor be stayed after the debtor had filed a petition for bankruptcy. Regardless of whether the debtor was an appellant or an appellee, and no matter what stage a case was at, it had to be stopped once the debtor filed for bankruptcy. Because no relief from the stay had been given, the court felt that it had to stay the appeals without prejudice to the rights of the parties to apply to the bankruptcy court for relief from the provisions of § 362 and for such additional relief as they deemed necessary.

Outcome
The court entered an order staying the appeals, without prejudice to the parties applying to the bankruptcy court for appropriate relief from the automatic stay in bankruptcy. The court directed the district court to also respect the automatic stay in bankruptcy.

LexisNexis® Headnotes

Bankruptcy Law > Administrative Powers > Automatic Stay > General Overview

HN1 **Administrative Powers, Automatic Stay**

See 11 U.S.C.S. § 362.

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > General Overview

Real Property Law > Bankruptcy > Automatic Stays

Bankruptcy Law > Administrative Powers > Automatic Stay > General Overview

HN2 **Automatic Stay, Relief From Stay**

11 U.S.C.S. § 362(d) provides that upon request of "a party in interest" the court can grant relief from the stay after notice and a hearing.

Business & Corporate Compliance > ... > Administrative Powers > Automatic Stay > Duration of Stay
Bankruptcy Law > Administrative Powers > Automatic Stay > Duration of Stay

Bankruptcy Law > Administrative Powers > Automatic Stay > General Overview

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > General Overview

HN3 **Automatic Stay, Duration of Stay**

Under the new Bankruptcy Code, relief from a stay must be authorized by the Bankruptcy Court to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor. Because it is the bankruptcy judge who is the most knowledgeable about the debtor's affairs, and about the effect that any judicial proceeding would have on the debtor's reorganization, it is essential that he make the determination as to whether an action against the debtor may proceed or whether the stay against such actions should remain in effect.

Business & Corporate Compliance > ... > Administrative Powers > Automatic Stay > Judicial Review
Bankruptcy Law > ... > Relief From Stay > Procedural Matters > Judicial Review

Bankruptcy Law > Administrative Powers > General Overview

Bankruptcy Law > Administrative Powers > Automatic Stay > General Overview

HN4 **Procedural Matters, Judicial Review**

11 U.S.C.S. § 362 by its terms only stays proceedings against the debtor. The statute does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate. The section does not indicate whether a stay becomes operative when the trial phase of a proceeding against a debtor has already concluded prior to the filing of the petition in bankruptcy, and the debtor or his adversary takes an appeal.

Bankruptcy Law > ... > Automatic Stay > Relief From Stay > General Overview

Civil Procedure > ... > Entry of Judgments > Stays of Judgments > Automatic Stays

Bankruptcy Law > Administrative Powers > Automatic Stay > General Overview

Business & Corporate Compliance > ... > Administrative Powers > Automatic Stay > Judicial Review
Bankruptcy Law > ... > Relief From Stay > Procedural Matters > Judicial Review

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN5[] **Automatic Stay, Relief From Stay**

11 U.S.C.S. § 362 should be read to stay all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.

Counsel: Warner Alexander (Argued), Christiansted, Attorney for Appellant-Cross Appellee St. Croix Hotel Corporation.

Joel H. Holt (Argued), Law Offices of Joel H. Holt, Christiansted, St. Croix, U.S. Virgin Islands, Attorney for Appellee-Cross Appellant Assoc. of St. Croix Condominium Owners.

Judges: Garth, Rosenn and Higginbotham, Circuit Judges.

Opinion by: GARTH

Opinion

[*447] OPINION of the COURT

GARTH, Circuit Judge.

This is an appeal from a final order of the district court affirming in part, and vacating and remanding in part, the judgment of the Virgin Islands Territorial Court. In an action on a lease by the Association of St. Croix Condominium Owners (the Association), the Territorial Court awarded the Association $2,147.31 in past due rent and water charges and ordered the eviction of St. Croix Hotel Corp. (Hotel) for its failure to comply with its obligation to maintain the leasehold premises. The Territorial Court, however, awarded the Hotel $1,800 on its counterclaim. After both parties made applications for attorneys' fees and costs, the Territorial **[**2]** Court awarded the Association $1,545.00 in fees and costs, but did not make an award to the Hotel.

On appeal, the District Court of the Virgin Islands vacated the order of eviction and remanded the question of the Hotel's continued possession for a determination as to whether the Hotel had remedied the breach of its maintenance obligation prior to judgment, so as to come within the protective provision of V.I. Code Ann. tit. 28, §

292(a). [1] In addition, since the Territorial Court did not set forth its reasons for denying attorney's fees to the Hotel, although the Hotel had prevailed on its counterclaim, *see* V.I. Code Ann. tit. 5, § 541(b), the District Court remanded that question for an articulation by the Territorial Court. Both parties then appealed to this court.

When the briefs of the parties were filed with this court, it was revealed **[**3]** in one brief that a petition for reorganization under chapter 11 of the Bankruptcy Code had been filed by the Hotel. There was no other mention of the bankruptcy proceedings in the record. We requested supplementary memoranda on the effect of the **[*448]** bankruptcy proceeding on the instant action, particularly in light of the automatic stay provision of section 362 of the Bankruptcy Code, 11 U.S.C. § 362 (Supp. II 1978). Such memoranda were filed by counsel. After reviewing the memoranda it remained unclear whether the bankruptcy judge had entered an order granting relief from any automatic stay that might have gone into effect pursuant to section 362. Upon inquiry to counsel, we were informed that no order of the Bankruptcy Court appears in the record.

Section 362 provides:

> **HN1**[↑] Automatic stay
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of --
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a **[**4]** *judicial*, administrative, or other *proceeding against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.
> > . . . .

11 U.S.C. § 362 (Supp. II 1978) (emphasis added). Section 362(d) **HN2**[↑] provides that upon request of "a party in interest" the court can grant relief from the stay after notice and a hearing. *Id*. § 362(d).

In explaining the purpose of the automatic stay, the House Report accompanying the Bankruptcy Reform Act of 1978 states:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain **[**5]** creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. . . .
> Subsection (a) defines the scope of the automatic stay, by listing the acts that are stayed by the commencement of the case. The commencement or continuation, including the issuance of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the bankruptcy case is stayed under paragraph (1). The scope of this paragraph is broad. All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings. Proceeding in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals.

H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6296-97.

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[1] Section 292(a) among other things provides that, if before judgment the lessee has performed all of its covenants, it may continue in possession under its lease.

Under the old Bankruptcy Act, a debtor apparently could waive a stay. HN3[] Under the new Code, relief from a stay **[**6]** must be authorized by the Bankruptcy Court to prevent certain creditors from gaining a preference for their claims against the debtor; to forestall the depletion of the debtor's assets due to legal costs in defending proceedings against it; and, in general, to avoid interference with the orderly liquidation or rehabilitation of the debtor. Because it is the bankruptcy judge who is the most knowledgeable about the debtor's affairs, and about the effect that any judicial proceeding would have on the debtor's reorganization, it is essential that he make the determination as to whether an action against the debtor may proceed or whether the stay against such actions should remain in effect.

Section 362 HN4[] by its terms only stays proceedings *against* the debtor. The statute does not address actions brought *by* the debtor which would inure to the benefit of the bankruptcy estate. The section does not indicate whether a stay becomes operative when the trial phase of a proceeding **[*449]** against a debtor has already concluded prior to the filing of the petition in bankruptcy, and the debtor **[**7]** or his adversary takes an appeal. It might be argued that whether an appeal is stayed by section 362 should be determined by whether the appeal is taken "by" or "against" the debtor, *i.e.*, whether the debtor is the appellant or appellee. We reject this approach. Its inadequacy is demonstrated by this case, in which both the debtor Hotel and the Association appealed from the district court judgment. Although the Hotel, in its appeal, ostensibly seeks to preserve assets for the bankruptcy estate by forestalling its eviction and the payment of a money judgment and attorneys' fees, the Association, in its cross-appeal, seeks to regain possession and thus in effect to divest the estate of those assets. The potential disruption of the administration of the bankruptcy estate that would be caused by the Association's success in its cross-appeal is precisely the result section 362 was designed to prevent. Since it would be unwise in the circumstances of this case, to stay only one of the two appeals before us, we thus stay both. [2]

[8]** In our view, section 362 HN5[] should be read to stay all appeals in proceedings that were *originally brought* against the debtor, regardless of whether the debtor is the appellant or appellee. Thus, whether a case is subject to the automatic stay must be determined at its inception. That determination should not change depending on the particular stage of the litigation at which the filing of the petition in bankruptcy occurs.

Under this test, the instant appeals, since they arise out of an eviction proceeding brought against the debtor Hotel, are subject to the automatic stay imposed by section 362. Since the Bankruptcy Court has not entered an order granting relief from the stay, we hold that section 362 prevents us from proceeding with this appeal. [3]

[9]** We will therefore enter an order staying the instant appeal in this court. We will also direct the district court to similarly respect the stay provision of section 362, by staying all proceedings in that court and by taking such further actions as it deems appropriate to implement our decision.

The order which we will enter staying this proceeding is without prejudice to the rights of the parties to apply to the Bankruptcy Court for relief from the provisions of section 362, and for such additional relief as they may deem necessary and consistent with this opinion.

End of Document

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[2] Difficulties with the "appellant-appellee" approach to section 362 would arise even if only one party appealed. We can hypothesize an appeal by a debtor from an adverse judgment rendered in an action brought against it by one of its creditors. If the appeal is permitted because it is an appeal "by" the debtor, and the debtor prevails on the appeal, we question the effect of such an interpretation if the creditor decides to bring the case to a higher court. Is this second level of appeal then stayed because the appeal is now one "against" the debtor? The unfairness of such an approach is obvious.

[3] Because we do no more than stay this action until the Bankruptcy Court has acted, if it does, we express no view whatsoever as to the merits of the appeal argued before us.