

COMMERCIAL LAW & BANKRUPTCY SECTION NEWSLETTER

IDAHO STATE BAR - MARCH 2017



CONTENTS

PAGE 2 - HONORS AND AWARDS

PAGE 3 - STRUCTURE OF SECTION 362

PAGE 4 - LEGAL PRINCIPLES REGARDING THE AUTOMATIC STAY

HONORS AND AWARDS



Randy French and J. Bart Green were honored at the annual meeting of the Commercial Law and Bankruptcy section of the Idaho State Bar in Coeur d'Alene on February 10, 2017. Randy, of Boise, was honored for his seven years of service on the section board. Bart, of Meridian, was honored with the section's Professionalism Award for Southwestern Idaho. Pictured above from left to right are Teresa Noble (Randy's wife), Randy, Mary Helen Green (Bart's wife), and Bart. Congratulations to all!



Sheila Schwager pictured above, was also honored in Coeur d'Alene. Chief Bankruptcy Judge Terry L. Myers thanked Sheila for her long-time service on the Local Rules Committee. Sheila is a partner at Hawley Troxell, in Boise.



Congratulations to Avery Law, which has offices in Meridian, Idaho Falls, and Pocatello, for being awarded the Employer Support of Guard and Reserve Patriot Award. The Patriot Award, conferred by the Office of the Secretary of Defense, honors the efforts made by employers of Reserve and National Guard members through a wide range of measures including flexible schedules, time off prior to and after deployment, caring for families, and granting leaves of absence if needed. Staff Sergeant Christopher Hughes, a member of the Army Reserve and a paralegal at the firm, nominated his employer for the award. Staff Sergeant Hughes was called to duty in Fort Lee, Virginia, for ten weeks starting in August 2017 to attend the Judge Advocate General's Paralegal Specialist Training Course. Everyone in the office carried an extra burden to make up for Staff Sergeant Hughes's absence. Pictured above at the Coeur d'Alene Resort on February 10, 2017 are (back row from left to right) Mark Avery and Ryan Farnsworth, and (front row from left to right) Cheryl Avery, John Avery, Catie Williams, Christine Harrop, Suzanne Smiley, Staff Sergeant Christopher Hughes, and Crystal Robertson.

Fred Cooper, whose practice is based in Pocatello, was also honored at the annual meeting of the section. Fred was both the winner of the Professionalism Award for Eastern Idaho and was honored for his service on the Local Rules Committee.

STRUCTURE OF SECTION 362

362 (a) Establishes the stay and identifies its components and parts

- (a)(1) - protects the debtor
- (a)(2) - protects the debtor and property of the estate
- (a)(3) - protects the property of the estate
- (a)(4) - protects the property of the estate
- (a)(5) - protects the property of the debtor
- (a)(6) - protects the debtor
- (a)(7) - protects the debtor
- (a)(8) - protects the debtor with respect to tax liabilities

362 (b) Exceptions to the stay (28 different exceptions)

362 (c) Extent and duration of the stay absent stay relief

- (c)(1) - as to property of the estate, the stay ends when the property is no longer property of the estate
- (c)(2) - as to the debtor and property of the debtor, the stay ends upon the first of these to occur:
 - A - the case is closed
 - B - the case is dismissed
 - C - the discharge is granted or denied

362 (d) Stay Relief

- (d)(1) - for cause
- (d)(2) - if the debtor lacks equity and the property is not necessary for an effective reorganization
- (d)(3) - as to single asset real estate
- (d)(4) - when debtor has engaged in abusive conduct

362 (e) (f) (g) } Procedures associated with obtaining or resisting stay relief

362 (h) (i) } Issues arising in individual bankruptcy cases

362 (j) If the stay has ended under 362(c), the court must enter an order to that effect at the request of a creditor

362 (k) An individual can recover damages for willful stay violations

362 (l) (m) (n) (o) } Miscellany of special exceptions from the stay

LEGAL PRINCIPLES REGARDING THE AUTOMATIC STAY

TABLE OF CONTENTS

Actions Taken in Violation of the Automatic Stay are Void..	4
Actions Taken In the Bankruptcy Court Do Not Violate the Stay	4
Duration of the Stay	4
Scope of the Stay: it Does Not Protect Non-Debtor Co-Defendants	5
Federalism and Stay Relief; State Court Criminal Proceedings and Stay Relief.....	5
Divorce and the Automatic Stay.....	6
Judicial Proceedings and the Automatic Stay	6
Retroactive Stay Relief.....	7
Stay Relief for Cause.....	7
Postponement of Foreclosure Sale	7
Damages for a Stay Relief Violation under Section 362(k) ..	7
Attorney's Fees Under Bankruptcy Code Section 362(k)	8
Recovering Damages for Violation of Automatic Stay Other than By an Individual – Sanctions under Section 105(a).....	8
Recovering Damages for Violation of Automatic Stay Other than By an Individual Under Section 362(k) – Sanctions under the Court's Inherent Authority.....	9
Knowing Refusal to Remedy an Existing Stay Violation is a Further Stay Violation, and Can Constitute a Willful Violation, Subjecting the Creditor to Sanctions	9
Knowing Retention of Estate Property Violates the Automatic Stay	9
In Rem Relief from Stay Under 362(d)(4) is Available Only to Secured Creditors	9
Eviction of Debtor-Holdover Tenant Does Not Violate the Automatic Stay & the Ministerial Act Exception	10
Bankruptcy Code Section 362(c)(3)(A)	10
Waivers of the Stay Are Unenforceable.....	11

Actions Taken in Violation of the Automatic Stay are Void

Schwartz v. United States (In re Schwartz), 954 F.2d 569 (9th Cir. 1992)

Ung v. Boni (In re Boni), 240 B.R. 381 (9th Cir. BAP 1999)

In re Somerset, Inc., 2013 WL 3788510 (Bankr. D. Idaho 2013)

Actions Taken In the Bankruptcy Court Do Not Violate the Stay

It has been held in numerous contexts that actions taken by a creditor in the bankruptcy case itself do not violate the stay. "The stay does not operate against the court with jurisdiction over the bankruptcy." *In re Teerlink Ranch, Ltd.*, 886 F.2d 1233, 1237 (9th Cir. 1989).

"[A] non-dischargeability action in the bankruptcy court where the bankruptcy case is pending does not violate the stay." *Rein v. Provident Fin. Corp.*, 270 F.3d 895, 904 (9th Cir. 2001). *Arneson v. Farmers Ins. Exchange (In re Arneson)*, 282 B.R. 883, 893 (Bankr. 9th Cir. 2002).

The filing of a proof of claim in a bankruptcy case does not violate the stay. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 356 (5th Cir. 2008);

Duration of the Stay

The stay protecting property of the bankruptcy estate ceases when the property ceases being property of the estate. Section 362(c)(1).

The stay protecting the debtor ends when the discharge is granted or denied, or, if earlier, when the case is closed or dismissed. Section 362(c)(2)(A), (B), (C); *Ellis v. Yu (In re Ellis)*, 523 B.R. 673 (9th Cir.

BAP 2014) (Pappas, J.); *Bigelow v. Cook*, 65 F.3d 1276 (9th Cir. 1995).

Severo v. Comm'r, 586 F.3d 1213 (9th Cir. 2009) concerned an effort by the IRS to collect a prepetition, nondischargeable claim against chapter 7 debtors many years after the bankruptcy case had closed. The Ninth Circuit noted that the automatic stay no longer protects chapter 7 debtors after their discharge has been granted or denied. Hence, there was nothing that prevented the IRS from collecting its non-discharged prepetition claim from the debtors.

Cal. Franchise Tax Bd. v. Kendall (In re Jones), 657 F.3d 921 (9th Cir. 2011) concerned a taxing authority's collection of delinquent post-petition taxes from a chapter 13 debtor. The court held that because the debtor's confirmed plan provided that the property of the bankruptcy estate re-vested in the debtor after confirmation, the taxing authority's recovery efforts directed against the debtor did not violate the automatic stay. The stay of actions against property of the estate was not implicated because the creditor was seeking recovery from property of the debtor, not property of the estate. The stay of actions against the debtor was not implicated because the creditor's claim was a post-petition claim, not a prepetition claim.

In re Matthews, 2017 WL 149939 (Bankr. D. Idaho 2017) states the following:

When property ceases to be property of the bankruptcy estate, it ceases to be protected by the automatic stay, under section 362(c)(1). In a chapter 13 case, the property of the estate reverts in the debtor upon confirmation, unless the plan or confirmation order

provides otherwise. Section 1327(b); *Cal. Franchise Tax Bd. v. Jones (In re Jones)*, 420 B.R. 506, 514 (9th Cir. BAP 2009), *aff'd on other grounds*, 657 F.3d 921 (9th Cir. 2011). When the confirmed chapter 13 plan expressly states that the estate's property will not vest in the debtor at confirmation, but does not say when the property reverts in the debtor, the property reverts in the debtor when the case closes.

Scope of the Stay: it Does Not Protect Non-Debtor Co-Defendants

The automatic stay does not protect non-debtors, including non-debtor co-defendants of the debtor. *Boucher v. Shaw*, 572 F.3d 1087, 1092 (9th Cir. 2009); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1492 (9th Cir. 1993); *Meer v. Dennis Dillon Auto Park & Truck Ctr.*, 2012 WL 5285893 (D. Idaho 2012).

Federalism and Stay Relief; State Court Criminal Proceedings and Stay Relief

Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074 (9th Cir. 2000) (en banc)

A state court lacks the power to modify the automatic stay. "Thus, if [a state court] proceeds without obtaining bankruptcy court permission, a state court risks having its final judgment declared void." For a bankruptcy court or district court to declare void a state court judgment that is violative of the stay does not violate the *Rooker-Feldman* doctrine, which generally provides that federal district courts have "no authority to review the final determinations of a state court in judicial proceedings." Nor does such a declaration violate the full faith and credit clause.

Section 362(b)(1) excepts from the automatic stay “the commencement or continuation of a criminal action or proceeding against the debtor.” Hence, state courts need not worry about adjudicating such an action, regardless of whether the criminal proceeding might to some extent be motivated by a debtor’s failure to pay a debt.

If a debtor wants to challenge a state court criminal proceeding, he can avail himself of a writ of *habeus corpus* or an injunction under section 105 of the Bankruptcy Code.

Gruntz overruled *Hucke v. Oregon*, 992 F.2d 950 (9th Cir. 1993). *Hucke* had held that section 362(b)(1)—which exempts criminal actions from the stay—did not necessarily apply to all criminal actions. *Hucke* held that the subsection did not except criminal proceedings from the stay if collection of a debt was the principal aim of the criminal proceeding. By overruling *Hucke*, *Gruntz* held that criminal proceedings were excepted from the stay under section 362(b)(1) regardless of the extent to which the criminal proceeding involved, or was motivated by, the collection of a debt.

Nash v. Clark County District Attorney’s Office (In re Nash), 464 B.R. 874 (9th Cir. BAP 2012) (Pappas, J.)

Nash applies the *Gruntz* rationale in the context of the discharge injunction under 524. A post-discharge state law criminal proceeding does not violate bankruptcy law, even where the state law criminal proceeding concerns, or is even designed to recover, a discharged debt.

Griffin v. Wardrobe (In re Wardrobe), 559 F.3d 932 (9th Cir. 2009)

Continuation of a stayed state court proceeding can derive legitimacy only from the bankruptcy court order granting relief from stay (citing *Gruntz*).

Where a bankruptcy court grants stay relief for cause in order to allow a state court proceeding to continue, that doesn’t grant stay relief to the broadening of the state court complaint thereafter. Stay relief exists only for the causes of action set forth in the complaint at the time when stay relief was granted.

A creditor can’t send the debtor’s mother a letter threatening criminal prosecution of the debtor. *Weary v. Poteat*, 627 Fed. App’x 475 (6th Cir.2015).

Divorce and the Automatic Stay

“[W]hile the divorce decree was effective to dissolve the couples’ marriage, because of the automatic stay, it could not divide their property interests. See § 362(a)(3), (b)(2)(A)(iv) (providing an exception to the automatic stay for the dissolution of marriage, but not for the division of estate property.)” *In re Herter (Hopkins v. Idaho State Univ. Credit Union)*, 464 B.R. 22, 28 (Bankr. D. Idaho 2011).

Judicial Proceedings and the Automatic Stay

There is nothing that excepts judicial proceedings from the automatic stay. In other words, judicial proceedings are subject to the automatic stay and a judicial action that violates the state is void.

- *Griffin v. Wardrobe (In re Wardrobe)*, 559 F.3d 932 (9th Cir. 2009).
- *Gruntz v. County of Los Angeles (In re Gruntz)*, 202 F.3d 1074 (9th Cir. 2000)
- *Phoenix Bond & Indem. Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123 (9th Cir. 1989)
- *In re Herter (Hopkins v. Idaho State Univ. Credit Union)*, 464 B.R. 22, 28 (Bankr. D. Idaho 2011)

It is important to note that the stay only applies to judicial proceedings against the debtor. Judicial proceedings being prosecuted by the debtor are not subject to the automatic stay. *Johnson v. Bank of America, N.A.*, 2014 WL 6686622 (D. Idaho Nov. 25, 2014); *Phillips v. World Publ'g Co.*, 822 F. Supp. 2d 1114 (W.D. Wash. 2011).

Just because a judicial proceeding is a noncore proceeding governed by state law, or just because a state court judicial proceeding was subject to mandatory abstention, does not mean that the bankruptcy court's denial of stay relief was an abuse of discretion. For example, if creditor never intended to file a claim against the bankruptcy estate, denial of the stay relief motion was within the bankruptcy court's discretion. *Benedor Corp. v. Conejo Enters. (In re Conejo Enters.)*, 96 F.3d 346 (9th Cir. 1996).

Retroactive Stay Relief

A court can retroactively grant stay relief, making valid an action that would otherwise be void. The courts sometimes apply a 12 factor test.

- *Kvassay v. Kvassay (In re Kvassy)*, 652 Fed. App'x 546 (9th Cir. 2016)
- *Nat'l Envtl. Waste Corp. v. City of Riverside (In Nat'l Envtl. Waste Corp.)*, 129 F.3d 1052 (9th Cir. 1997).
- *Mataya v. Kissinger (In re Kissinger)*, 72 F.3d 108 (9th Cir. 1995).
- *Lone Star Sec. & Video, Inc. v. Gurrola (In re Gurrola)*, 328 B.R. 158 (9th Cir. BAP 2005).
- *In re Fjeldsted*, 293 B.R. 12 (9th Cir. BAP 2003)
- *In re Am. Spectrum Realty*, 540 B.R. 730 (C.D. Cal. 2015).

In some cases, retroactive relief from stay is identified as action to "annul" the stay. See, e.g., *Lone Star*, *supra*, 328 B.R. at 172.

Stay Relief for Cause

Often, creditors seek stay relief for cause under section 362(d)(1) to continue prepetition dispute resolution proceedings against the debtor in a different forum, such as in a prepetition state court action. The courts often apply a 12 part test. See, e.g., *In re Am. Spectrum Realty*, 540 B.R. 730, 737 (C.D. Cal. 2015) (citing *In re Plumberex Specialty Prods., Inc.*, 311 B.R. 551, 559 (Bankr. C. D. Cal. 2004)).

Postponement of Foreclosure Sale

A creditor's postponement of a foreclosure sale to a new date during a bankruptcy does not violate the automatic stay.

- *Mason-McDuffie Mortgage Corp. v. Peters (In re Peters)*, 101 F.3d 618 (9th Cir. 1996)
- *First Nat'l Bank v. Roach (In re Roach)*, 660 F.2d 1316 (9th Cir. 1981)
- *Martir Lugo v. De Jesus Saez (In re De Jesus Saez)*, 721 F.2d 848 (1st Cir. 1983)
- *Perez v. Deutsch Nat'l Trust Co. (In re Perez)*, 556 B.R. 527 (1st Cir. BAP 2016)

Damages for a Stay Relief Violation under Section 362(k)

Section 362(k)(1) provides that an individual injured by any willful violation of the automatic stay "shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages."

A chapter 7 trustee is not an "individual" entitled to recover under section 362(k). *Dyer v. Lindblade*

(*In re Dyer*), 322 F.3d 1178 (9th Cir. 2003); *State of California v. Taxel (In re Del Mission Ltd.)*, 98 F.3d 1147 (9th Cir. 1996).

"For injured debtors to recover under § 362(h) [now 362(k)], the creditors' stay violations must be willful. Under the case law, it is clear that once a creditor or actor learns or is put on notice of a bankruptcy filing, any actions intentionally taken thereafter are 'willful' within the contemplation of § 362(h) [362(k)]. The question is thus whether the actor intended the action, not whether the actor intended to violate the stay." *In re Risner*, 317 B.R. 830, 835 (Bankr. D. Idaho 2004) (citing *Iskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214 (9th Cir. 2002) (internal citations omitted)).

"In the context of awarding damages under § 362(h) [now § 362(k)], we have stated that a party with knowledge of the bankruptcy proceedings is charged with knowledge of the automatic stay." *Dyer*, 322 F.3d at 1191 (citing *Pinkstaff v. United States (In re Pinkstaff)*, 974 F.2d 113, 115 (9th Cir. 1992) and *Carroll v. Tri-Growth Ctr. City, Ltd. (In re Carroll)*, 903 F.2d 1266, 1272 (9th Cir. 1990)). While that holding may be consistent with the congressional intent behind 362(h) [362(k)], we hesitate to extend that principle to the contempt context." *Dyer, supra*, 322 F.3d at 1191.

Thus, it appears that the principal advantage of an individual prosecuting a stay violation under section 362(k) as compared to a non-individual prosecuting a stay violation under section 105(a) (see below), is that the former must only prove that the actor had knowledge of the bankruptcy while the latter must prove that the actor had knowledge of the automatic stay.

Attorney's Fees Under Bankruptcy Code Section 362(k)

Under prior Ninth Circuit law, an individual debtor could recover attorney's fees under section 362(k) only to the extent the fees were incurred in ending the stay violation, and not to the extent that the fees were incurred in recovering damages. That was the law of *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010). *Sternberg* was overruled in *America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095 (9th Cir. 2015) (en banc), *affg*, 473 B.R. 340 (9th Cir. BAP 2012) (Pappas, J.). Now, under *Schwartz-Tallard*, a debtor prosecuting a willful stay violation against the creditor can recover all of her reasonable fees incurred in prosecuting the willful stay violation, regardless of whether the fees were incurred in ending the violation or recovering damages.

Recovering Damages for Violation of Automatic Stay Other than By an Individual – Sanctions under Section 105(a)

A non-individual who does not have a statutory right to recover damages for a willful violation of the automatic stay under section 362(k) can nonetheless recover damages under Bankruptcy Code section 105(a) as a sanction for ordinary civil contempt. "For a bankruptcy court to find civil contempt, the party requesting sanctions must show, by clear and convincing evidence, that the other party violated a specific and definite order of the court. The automatic stay is such a specific and definite court order." *In re 1601 W. Sunnyside Dr. # 106, LLC*, 2010 WL 54810809, at *4 (Bankr. D. Idaho 2010) (citing *Knupfer v. Lindblade (In re Dyer)*, 322 F.3d 1178, 1190-91 (9th Cir. 2003)) (internal citations omitted).

The threshold for imposing contempt sanctions turns not on a finding of "bad faith" or subjective

intent, but rather on a finding of “willfulness,” where willfulness has a particularized meaning in this context:

Willful violation does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the [creditor] knew of the automatic stay and that the defendant’s actions which violated the stay were intentional.

Dyer, supra, 322 F.3d at 1191 (quoting *Havelock v. Taxel (In re Pace)*, 67 F.3d 187, 191 (9th Cir. 1995)). Whether the creditor believed in good faith that it had a right to the property is irrelevant.

The party seeking sanctions must show that the offending party knew of the automatic stay. Knowledge of the bankruptcy itself is not sufficient. *Zilog, Inc. v. Corning (In re Zilog, Inc.)*, 450 F.3d 996 (9th Cir. 2006); *In re Somerset, Inc.*, 2013 WL 3788510 (Bankr. D. Idaho 2013).

The bankruptcy court has only the power to impose civil sanctions, designed to compensate and to coerce compliance. The bankruptcy court does not have the power to impose punitive (criminal) sanctions, designed to punish. *Dyer v. Lindblade (In re Dyer)*, 322 F.3d 1178 (9th Cir. 2003). Attorney’s fees are an appropriate component of a civil contempt award.

Recovering Damages for Violation of Automatic Stay Other than By an Individual Under Section 362(k) – Sanctions under the Court’s Inherent Authority

A bankruptcy court can also sanction a creditor for violating the automatic stay under its inherent

authority to sanction “bad faith” conduct. Before sanctioning a party under this power, the court must make an explicit finding of bad faith or willful misconduct. Willful misconduct must consist of something more egregious than mere negligence or recklessness. This authority does not authorize significant punitive damages. *Dyer v. Lindblade (In re Dyer)*, 322 F.3d 1178 (9th Cir. 2003).

Knowing Refusal to Remedy an Existing Stay Violation is a Further Stay Violation, and Can Constitute a Willful Violation, Subjecting the Creditor to Sanctions

Dyer v. Lindblade (In re Dyer), 322 F.3d 1178 (9th Cir. 2003)

State of California v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996)

In re 1601 W. Sunnyside Dr. # 106, LLC, 2010 WL 54810809 (Bankr. D. Idaho 2010).

Knowing Retention of Estate Property Violates the Automatic Stay

State of California v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996)

In Rem Relief from Stay Under 362(d)(4) is Available Only to Secured Creditors

Section 362(d)(4) provides for stay relief by a creditor who holds a security interest in estate property on the grounds of debtor’s improper prepetition conduct. A creditor who is not a secured creditor, but instead contends that he owns the property in question, cannot avail himself of this section. *Ellis v. Yu (In re Ellis)*, 523 B.R. 673 (9th Cir. BAP 2014) (Pappas, J.).

Eviction of Debtor-Holdover Tenant Does Not Violate the Automatic Stay & the Ministerial Act Exception

The Ninth Circuit held that when a creditor had foreclosed its security interest in the debtor's home prepetition, and had obtained a writ of possession from the state court prepetition, the sheriff's post-petition eviction of the debtor did not violate the automatic stay. The court held that under California law, the debtor did not retain "any possessory interest of any kind following service of the writ of possession." *Eden Place, LLC v. Perl (In re Perl)*, 811 F.3d 1120, *rev'g*, 513 B.R. 566 (9th Cir. BAP 2014), *cert. denied*, 137 S.Ct. 39 (2016). The court held that the mere fact that the debtor was living in the residence was not a sufficient interest that it was protected by the automatic stay. The 9th Circuit BAP decision, which held that the stay had been violated, relied in part on the fact that the sheriff had locked the debtor's personal property inside the residence. The Court of Appeals acknowledged that fact but did not address it in its ruling.

No Idaho case has cited to *Perl*.

Tracht Gut, LLC v. County of Los Angeles Treasurer and Tax Collector (In re Tracht Gut, LLC), 503 B.R. 804 (9th Cir. BAP 2014) (Pappas, J.) concerned something conceptually similar. In *Tracht Gut, LLC*, the tax collector held a tax sale prepetition, but did not record the tax deeds until after the petition was filed. The BAP affirmed the bankruptcy court, which ruled that the taxing authority had not violated the stay. The basis of the ruling was California state law, which provided that once the sale had occurred, the debtor had no interest in the real property. And, moreover, the right of redemption had expired the day before the sale occurred. Accordingly, the debtor had no property interest on the petition date. The recording of the

deeds was a mere "ministerial act" that had no substantive significance.

The "ministerial act" exception was created in *McCarthy, Johnson & Miller v. North Bank Plumbing, Inc. (In re Pettit)*, 217 F.3d 1072, 1080 (9th Cir. 2000): "Ministerial acts or automatic occurrences that entail no deliberation, discretion, or judicial involvement do not constitute continuations of such a [judicial] proceeding" for purposes of possible violations of the automatic stay. In *Pettit*, the creditors had obtained, prepetition, a state court judgment in their favor, and an order from the state court directing the clerk of the court to distribute money in the court's registry to the creditor. The creditor obtained the check from the clerk post-petition. The Ninth Circuit held that the creditor had not violated the stay.

Bankruptcy Code Section 362(c)(3)(A)

Bankruptcy Code section 362(c)(3)(A) reads as follows:

(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, 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)--

(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;

Reswick v. Reswick (In re Reswick), 446 B.R. 362 (9th Cir. BAP 2011) concerned the meaning of the

italicized phrase. An automatic stay can exist with respect to three things—the debtor; property of the debtor; or property of the estate. Cases are split as to whether the italicized language means that the statute applies only to the debtor and his property, or, alternatively, whether the language is largely surplusage, such that the statute applies to the automatic stay as to the debtor; the property of the debtor; and the property of the estate. In *Reswick*, the BAP adopted the latter interpretation.

Waivers of the Stay Are Unenforceable

As a matter of public policy, prepetition prospective waivers of the benefits of the automatic stay by a debtor are generally viewed as unenforceable. *Harbor Ins. Co. v. Thorpe Insulation Corp. (In re Thorpe Insulation Co.)*, 671 F.3d 1011, 1026 (9th Cir. 2012); *Bank of China v. Huang (In re Huang)*, 275 F.3d 1173, 1177 (9th Cir. 2002).

