3. PROPERTY OF THE ESTATE AND THE AUTOMATIC STAY

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BY

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A. **Property of the Estate** – Upon the filing of a bankruptcy petition, the bankruptcy estate is created from the Debtor's property. The bankruptcy estate is the pool of assets that is subject to the jurisdiction of the bankruptcy court and from which creditors' claims are paid. Section 541 of the Bankruptcy Code defines what property is included in and excluded from a debtor's bankruptcy estate. *See* 11 U.S.C. § 541(a)-(f).

1. What is included in the Bankruptcy Estate - Property of the estate is broadly defined in Section 541(a) of the Bankruptcy Code.

   a. Section 541(a) provides that property of the estate is comprised of all of the following, "whenever located and by whomever held:"

      i. all legal and equitable interests of the debtor in property as of the commencement of the case.

      ii. certain interests of the debtor and the debtor's spouse in community property as of the commencement of the case.

      iii. any interest in property that the trustee recovers under enumerated provisions of the Bankruptcy Code.

      iv. any interest in property preserved for or transferred to the estate under Section 510(c) (equitable subordination) or Section 551 (preservation of avoided transfer).

      v. certain interests in property acquired by the debtor or to which an entitlement arises, within 180 days after filing, by bequest, devise inheritance, property settlement, divorce decree, life insurance policy or death benefit plan.

      vi. proceeds of any of the above, except for postpetition wages in a

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Chapter 7 case.

vii. property that the estate acquires after commencement of the case.

viii. This excludes property acquired by an individual debtor after the commencement of the case. *See, e.g., Bell v. Bell (In re Bell)*, 225 F.3d 203 (2d 2000); *Casey v Hochman*, 963 F. 2d 1347 (10th Cir. 1992) (postpetition patent belonged to the individual debtor, not the estate); Massillon v. Riley (In re Massillon), 2011 Bankr. LEXIS 83 (1st Cir. B.A.P. 2011).

b. Although what constitutes property of the estate is a federal question, whether and to what extent a debtor has any legal or equitable interest in property is determined by state or otherwise applicable federal law.

c. This concept is expressed in section 541(d) of the Bankruptcy Code, which provides that "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold."

d. For example:

i. Contracts – Generally, the estate receives all rights and obligations of the debtor under pre-petition contracts, including leases. *Kane v. Town of Harpswell (In re Kane)*, 284 B.R. 216 (B.A.P. 1st Cir. 2000) aff'd, 254 F.3d 325 (1st Cir. 2001); *see also Cohen v. Drexel Burnham Lambert Group*, 128 B.R. 687, 701 (Bankr. S.D.N.Y.) ("Accordingly, we hold that executory contracts are property of the estate within the meaning of § 541.")

ii. Letters of Credit – Letters of credit and their proceeds are not property of estate. *In re Papio Keno Club, Inc.*, 247 B.R. 453, 459 (8th Cir. B.A.P. 2000) ("It is well settled that a letter of credit and the proceeds therefrom are not property of the debtor's bankruptcy estate." (*citing In re Matter of Compton Corp.*, 831 F.2d 586, 589 (5th Cir. 1987)); *see also Ace Am. Ins. Co. v. Bank of the Ozarks*, 2012 U.S. Dist LEXIS 110891 (S.D.N.Y. 2012). *But see Redback Networks, Inc. v. Mayan Networks Corp. (In re Mayan Networks Corp.)*, 306 B.R. 295, (B.A.P. 9th Cir. 2004) (where letter of credit operates as security deposit it can be considered part of the estate).

iii. Security Deposits – Security Deposits given by a debtor to a third party are property of the bankruptcy estate. *Redback Networks, Inc. v. Mayan Networks Corp. (In re Mayan Networks Corp.)*, 306 B.R. 295, (B.A.P. 9th Cir. 2004).

iv. Escrow Accounts – Funds held in escrow are generally not considered property of the estate. *Dzikowski v. NASD Regulation, Inc. (In re Scanlon*), 239 F.3d 1195, 1198 (11th Cir. 2011) ("funds that are deposited into an escrow account by a debtor, for the benefit of others, cannot be characterized as property of the estate." (*quoting In re S.E.L. Maduro*, 205 B.R. 987, 990-91 (Bankr. S.D. Fla. 1997)); *see also In re AGSY, Inc.*, 120 B.R. 313, 317-20 (Bankr. S.D.N.Y. 1990). While escrow accounts are generally not considered part of the bankruptcy estate, parties must determine whether the escrow account was properly established under state law. *See Affiliated Computer Systems, Inc. v. Sherman (In re Kemp)*, 52 F.3d 546, 551 (5th Cir. 1995) (escrow account was not properly set up under state law and, therefore, funds were considered part of bankruptcy account.).

v. Life Estate – Life estates become property of the estate. *In re Hilsen*, 405 B.R. 49 (Bankr. E.D.N.Y. 2009). *But see* 11 U.S.C. § 541(c)(2) ("A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a case under this title.").

vi. Tax Attributes – Tax refunds, net operating loss carryovers, charitable contributions carryovers, recovery of tax benefits items, capital loss carryovers, basis, holding period and character of assets, and method of accounting are all considered property of the estate. *See, e.g., Marvel Entm't Grp., Inc. v. Mafco Holdings, Inc. (In re Marvel Entm't Grp., Inc.) ("Marvel")*, 273 B.R. 58, 83-85 (D. Del. 2002); *Parker v. Saunders (In re Bakersfield Westar, Inc.)*, 226 B.R. 227, 232-34 (B.A.P. 9th Cir. 1998); In re Phar-Mor, Inc., 152 B.R. 924, 926-27 (Bankr. N.D. Ohio 1993).

vii. Causes of Action – Any cause of action the debtor might have had pre-petition is property of the estate. *In re Arana*, 456 B.R. 161 (Bankr. E.D.N.Y. 2011).

viii. Right of Redemption – The bankruptcy estate includes any right to redeem personal property subject to a security interest and real property subject to a mortgage the debtor may have had prior to the petition. *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983).

ix. Rights to Mortgage Debtor is Assigned for Purposing of Servicing Only – Underlying mortgage is not part of the debtor's estate. Rather, the estate only has the right to service the mortgage and the right to earn contractual fees for doing so. 11 U.S.C. § 541(d).

x. Property from chapter 5 avoidance actions are included in the estate.

xi. Lease properly terminated pre-petition – A lease that is properly

terminated under state law prior to the petition is not property of the estate.

e. In the reorganization chapters of the Bankruptcy Code, special provision is made to include an individual debtor's postpetition earnings in property of the estate. *See* Sections 1115 (added in 2005), 1207 and 1306.

i. These sections also provide that all postpetition property of the kind specified in Section 541 that the debtor acquires while the case is pending is included in property of the estate in Chapters 11, 12 and 13.

2. Exclusions from property of the estate are specified in Section 541(b).

a. The following exclusions were added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("the 2005 Act"):

i. certain contributions to a Coverdell Education Savings Account, Section 541(b)(5);

ii. certain contributions to a Section 529 College Savings Plan, Section 541(b)(6);

iii. certain amounts withheld from the debtor's wages for employee benefit plans, deferred compensation plans and tax deferred annuity plans, Section 541 (b)(7), and

iv. certain tangible personal property pledged to pawnbrokers, Section 541 (b)(8).

b. The 2005 Act was enacted on April 20, 2005 and was generally applicable to cases filed on or after October 17, 2005.

3. Invalidation of provisions restricting property of the estate, Section 541(c).

a. Section 541(c) invalidates restrictions on conditions to the transfer of property to the bankruptcy estate. It also invalidates default provisions conditioned on the debtor's insolvency, financial condition or bankruptcy filing that effect a forfeiture or termination of the debtor's interest in property. These latter provisions are referred to as "ipso facto clauses."

i. The exception to these invalidation clauses is a restriction on the transfer of a debtor's interest in a trust that is enforceable under applicable non-bankruptcy law. Section 541(c)(2). *See, e.g., In re Wilcox*, 233 F. 3d 899 (6th Cir. 2000), cert. denied 533 U.S. 929

ii. In *Begier v United States*, 496 U.S. 53 (1990), the Supreme Court held that funds withheld from the wages of the debtor's employees

for payment of federal taxes are held by the debtor in trust and are not property of the estate.

4. Turnover Proceedings

   a. Sections 542 and 543 deal with a problem frequently encountered by bankruptcy trustees: compelling a third party in possession of property of the estate to deliver such property to the trustee.

      i. Section 542 applies to all entities other than custodians. It compels turnover to the trustee and an accounting for the property or its value. Bankruptcy Rule 7001 provides that a turnover proceeding is an adversary proceeding initiated by summons and complaint.

      ii. The leading case on turnover is *United States v Whiting Pools, Inc.*, 462 U.S. 198 (1983), in which the Court held that the Internal Revenue Service could be compelled to return property recovered by prepetition tax seizure, provided that the debtor supplies adequate protection for the government's interest in property of the estate.

      iii. Section 542 is more commonly applied to recover motor vehicles repossessed from the debtor prior to the bankruptcy filing. *See, e.g., In re Rozier*, 376 F. 3d 1323 (11th Cir. 2004).

      iv. A custodian is generally an official appointed under state law, such as a sheriff or receiver, to take actual or constructive possession of the debtor's property pursuant to creditor enforcement provisions of state or other applicable nonbankruptcy law. *See* Section 101(11) of the Bankruptcy Code. Section 543 imposes the same turnover obligations on the custodian and empowers the Bankruptcy Court to provide for payment of compensation to custodians acting within their authority, and to surcharge custodians acting outside their authority. It also gives the Court discretion to leave the custodian in possession of property of the estate if the interests of creditors "would be better served by permitting a custodian to continue in possession . . ."

5. Exempt Property

   a. Only an individual debtor may claim property as exempt in a bankruptcy case. Section 522 of the Bankruptcy Code permits debtors to choose either federal or state law in determining exempt property in bankruptcy, unless state law precludes the federal exemptions.

   b. The look-back periods to determine domicile are in Section 522(a)(3)(A):

> debtor's domicile for the 730 days preceding the filing, or if the debtor's domicile has not been in a single state for such period, the debtor's domicile for the 180 days preceding the 730 day period, or for a longer portion of the 180 day period than in any other place.

a. If the domicile requirement results in the debtor being ineligible for any exemption, then the debtor is given the federal exemptions, Section 522(b)(3), trailing paragraph.

b. In 2011, New York amended its laws to allow debtors to choose between the New York or federal exemptions. Exemptions available to New York domiciliaries, choosing to use the New York exemptions, are primarily found in Article 10-A of the Debtor and Creditor Law, although there are other exemptions in state law and federal non-bankruptcy law. *See, e.g.*, New York Insurance Law Section 3212, the exemption for life insurance proceeds, and 42 U.S.C. Section 407, the exemption for social security payments.

c. The Bankruptcy Code was amended in 1984 to prohibit exemption stacking, *i.e.* the practice of choosing federal exemptions for one spouse and state exemptions for the other on a joint petition filed pursuant to Section 302. Section 522(m).

d. Despite the fact that CPLR 5206 provides that New York's homestead exemption applies to the property, not the owner(s), a husband and wife filing a joint petition may each claim a full homestead exemption. *Mather Memorial Hospital v Pearl*, 723 F. 2d 193 (2d Cir. 1983).

e. Of greater significance is the increase in the New York homestead exemption from $50,000 to between $75,000-150,000, depending on where the homestead is located, in value above liens and encumbrances, effective August 30, 2005. Thus, a husband and wife filing a joint petition can now exempt $100,000 of equity in a homestead.

2. How exemptions are claimed and objected to:

a. Section 522(l) provides that the debtor shall file a list of property that the debtor claims to be exempt. Bankruptcy Rule 1007 requires the list to be filed with the petition, or within 15 days thereafter. Schedule C to Official Form 6 (Bankruptcy Schedules) specifies the form of the debtor's exemption claims.

b. Section 522(l) further provides that "unless a party in interest objects, the property claimed on such list is exempt." Rule 4003 provides that an objection must be filed within 30 days after the meeting of creditors, subject to exceptions stated therein.

c. In *Taylor v Freeland & Kronz*, 503 U.S. 638 (1992), the Supreme Court held that the trustee's failure to file an objection to the debtor's exemption claim within the time provided by Rule 4003(b) means that the debtor's exemption claim is final, regardless of whether the debtor has a colorable basis for the claim. *Taylor* involved an employment discrimination claim of "unknown" value for which the debtor subsequently received a substantial settlement. Had an objection been filed, only a small portion of the settlement would have been exempt.

3. Domicile

i. The debtor's domicile determines the substantive exemptions available to the debtor. The 2005 Act extends the period for determining the debtor's domicile from 180 days to 730 days. Section 522(b)(3)(A). If the debtor had more than one domicile during the 730 days preceding the filing of the petition, then the debtor's domicile for the 180 days preceding the 730 day period is determinative. These provisions are intended to discourage debtors from moving to states (like Florida and Texas) with more generous exemptions. *See, e.g., In re Coplan*, 156 B.R. 88 (Bkcy. M.D. Fla. 1993).

ii. Does section 522(b)(3)(A) apply to debtors moving to a state that does not allow for choice between state and federal exemptions? *Compare In re McNabb*, 326 B.R. 785 (Bankr. D. Ariz. 2005) (holding that because debtor moved to state that did not allow for election between federal and state exemptions and, accordingly, the 522(b)(3)(A) does not apply because higher homestead exemption was not "as a result of electing") *with In re Kaplan*, 331 B.R. 483 (Bankr. S.D. Fla. 2005) (522(b)(3)(A) applies regardless of whether debtor moves to opt out state).

4. Exemption Planning

a. The legislative history to the Bankruptcy Code is clear to the effect that debtors may convert nonexempt property into exempt property as a legitimate bankruptcy planning strategy. House Report No. 95-595, 95th Cong., 1st Sess. 360-1 (1977). Nevertheless, twice-stiffed creditors sometimes attack such conduct as fraudulent.

i. In *Havoco v Hill*, 790 So. 2d 1018 (Fla. 2001), the Florida Supreme Court, on certified questions from the Eleventh Circuit Court of Appeals (*see* 197 F. 3d 1135 and 255 F. 3d 1321), held that conversion of nonexempt assets into an exempt Florida homestead with fraudulent intent on the eve of bankruptcy does not defeat the Florida homestead exemption.

ii. *Havoco* has been legislatively overruled by the 2005 Act. Section 522(o) now provides that, in such circumstances, the exemption is reduced to the extent that the value of the homestead is attributable to the fraudulent conversion of nonexempt assets during the ten year period preceding the bankruptcy filing.

b. A debtor who employs "sharp practices" or appears to be attempting to defraud his or her creditors risks losing the ability to receive discharge. *See In re Reed*, 700 F.2d 986 (5th Cir. 1983) (court denied discharge to debtor who obtained an agreement from creditors to postpone collection and then proceeded to transfer his non-exempt assets into exempt assets). *Compare Hanson v. First National Bank in Brookings*, 848 F.2d. 866 (8th Cir. 1988) *with Norwest Bank Nebraska v. Tveten*, 848 F.2d 866 (8th Cir. 1988).

5. Qualified Retirement Accounts

a. Under the 2005 Act, the bankruptcy exemptions for retirement accounts, both qualified and non-qualified, were substantially rewritten.

i. Section 522(b)(3)(c) was added to assure the debtor an exemption for qualified retirement plans in opt-out states, including New York.

ii. Section 522(b)(4) was added to assure that all debtors receive an exemption for certain non-qualified retirement plans that meet the criteria specified therein.

iii. Section 522(d)(12), which tracks the language of subdivision (b)(3)(c), was added to assure the debtor an exemption for qualified retirement plans in those situations where the federal exemptions are available and the debtor elects to take them.

i. Section 522(n) was added to cap the exemption for individual retirement accounts at $1,000,000, subject to carve-outs specified therein and subject further to increase "if the interests of justice so require."

iv. The legislative history to the 2005 Act states that these changes "ensure that the specified retirement funds are exempt under state as well as Federal law." House Report No. 109-31, Pt. 1, 109th Cong., 1st Sess. 63-64 (2005).

b. Supreme Court precedent on retirement plans

i. *Patterson v Shumate*, 504 U.S. 753 (1992): anti-alienation provisions of ERISA exclude a debtor's rights in those assets from becoming property of the estate under section 541(c)(2).

ii. *Rousey v Jacoway*, 544 U.S. 320 (2005): an IRA qualifies as one of

the plans that may be exempted under Section 522(d)(10)(E).

B. **The Automatic Stay** – The automatic stay, as codified in section 362 of the Bankruptcy Code, operates as an injunction against any party attempting to liquidate, collect, enforce or otherwise pursue a debtor on account of a pre-petition claim. The stay is an essential protection for debtors as it provides debtors with "breathing room" to address issues pertinent to their reorganization or orderly liquidation.

1. Effect of the Automatic Stay – The automatic stay immediately prevents nearly all collection attempts on account of prepetition debts by creditors against either the debtor or the estate.

a. The reach of the automatic stay is intended to be broad, as it is designed to shield debtors from financial pressure. *In re Stringer*, 847 F.2d 549 (9th Cir. 1988).Thus, any exceptions to the automatic stay should be read narrowly to secure the broad grant of relief. *Id.*; *accord In re Shamblin*, 878 F.2d 324 (9th Cir. 1989) ("any equitable exception ... should be narrow and applied only in extreme circumstances").

b. The automatic stay protects a debtor from efforts to collect money over a specified time period, but it does not extinguish or discharge any debt. *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 110 S. Ct. 2126, 109 L. Ed. 2d 588 (1990). The automatic stay creates no greater rights for a debtor than those it has outside of bankruptcy. *In re Synergy Development Corp.*, 140 B.R. 958 (Bankr. S.D.N.Y. 1992).

c. Bankruptcy Courts cannot enforce a mortgage note or order a foreclosure sale, but can vacate the stay to permit a mortgagee to proceed in state court to enforce its rights and remedies. *In re Inge*, 158 B.R. 326 (E.D.N.Y. 1993).

d. The automatic stay does not deprive a court of jurisdiction over an action commenced prior to a bankruptcy filing, the stay serves to suspend the prosecution of the case. *City of Middletown v. Holiday Syrups, Inc.*, 523 N.Y.S.2d 717, 138 Misc. 2d 169 (Sup. Ct. 1987).

e. The continuation of litigation and collection efforts are stayed, even on account of a claim that is excepted from discharge under the Bankruptcy Code. *In re Taylor*, 216 B.R. 366 (Bankr. S.D.N.Y. 1998), reversed on other grounds, 232 B.R. 639 (S.D.N.Y. 1999); *In re Maloney*, 204 B.R. 671 (Bankr. E.D.N.Y. 1997); *In re Newman*, 196 B.R. 700 (Bankr. S.D.N.Y. 1996).

f. The equitable distribution of marital property is stayed. *See Taylor v. Taylor*, 233 B.R. 639 (S.D.N.Y. 1999).

g. The automatic stay did not prevent creditor from proceeding against guarantor, nor were debtor's shareholders, as guarantors, relieved from liability as a result of the principal obligor's bankruptcy filing. *Milliken & Co. v. Stewart*, 582 N.Y.S.2d 127, 182 A.D.2d 385 (1st Dep't 1992).

h. Even "mere technical" violations of the automatic stay are enjoined. *In re Operation Open City, Inc.*, 148 B.R. 184 (Bankr. S.D.N.Y. 1992), *aff'd*, 170 B.R. 818 (S.D.N.Y. 1994).

2. Purpose of the Automatic Stay – The stay is intended to give debtors the opportunity to conduct a reorganization or orderly liquidation without collection attempts from creditors, and to prevent a "race to the courthouse" and piecemeal disposition of debtors' assets.

a. The automatic stay provides the debtor with a breathing spell from creditors. *See Koolik v. Markowitz*, 40 F.3d 567 (2d Cir. 1994). It protects the estate from being dismembered by creditors' lawsuits and seizures of property before the trustee has had a chance to marshal estate assets and distribute them equally among creditors. *In re Financial News Network Inc.*, 158 B.R. 570 (S.D.N.Y. 1993).

b. The automatic stay promotes the orderly administration of a debtor's case. *See In re Colonial Realty Co.*, 980 F.2d 125 (2d Cir. 1992) (automatic stay is a procedural rule designed to provide for orderly bankruptcy administration).

c. The legislative history evidences a clear congressional intent in favor of the broad application of the automatic stay to preserve the *status quo ante* as of a bankruptcy petition date, to insure the orderly administration of the estate and prevent a race among creditors to seize assets. *In re Chateaugay Corp.*, 87 B.R. 779 (S.D.N.Y. 1988), *aff'd*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds, remanded*, 496 U.S. 633 (1990). An excellent discussion of the effect of the automatic stay and the policies underlying it is set forth in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir. 1990), *cert. denied, Air Line Pilots Ass'n, Intern., AFL-CIO v. Shugrue*, 502 U.S. 808, 112 S. Ct. 50, 116 L. Ed. 2d 28 (1991). *See In re AP Industries, Inc.*, 117 B.R. 789 (Bankr. S.D.N.Y. 1990) (The automatic stay halts the continuation of judicial and other actions, proceedings or claims that were commenced against debtor prior to bankruptcy filing; prevents creditors from reaching assets of debtor's estate piecemeal; and preserves debtor's estate so that all creditors and their claims can be assembled in bankruptcy court in a single organized proceeding).

3. Effective Date of the Automatic Stay – The stay arises immediately upon the filing of a bankruptcy petition under sections 301, 302 or 303.

a. The automatic stay is effective upon the filing of a bankruptcy petition. *In re Delta Resources, Inc.*, 54 F.3d 722 (11th Cir. 1995), *cert. denied, sub nom., Orix Credit Alliances, Inc. v. Delta Resources, Inc.*, 516 U.S. 980 (1995).

b. The stay applies upon the filing of an involuntary case. *Kommanditselskalb Supertrans v. O.C.C. Shipping Lines*, 79 B.R. 534 (S.D.N.Y. 1987).

c. The automatic stay applies without formal service or notice upon non-debtor parties. *Constitution Bank v. Tubbs*, 68 F.3d 685 (3d Cir. 1995); *Morgan Guar. Trust Co. v. Hellenic Lines Ltd.*, 38 B.R. 987 (S.D.N.Y. 1984); *see also In re Eisenberg*, 7 B.R. 683 (Bankr. E.D.N.Y. 1980).

4. The Effect of the Stay on Statutes of Limitation

a. Pursuant to section 108(c) of the Bankruptcy Code, Statutes of limitation are tolled while the automatic stay is in effect until the later of (1) the expiration of the statute of limitation under state law or (2) thirty days after the automatic stay is expires or is terminated. See 11 U.S.C. § 108(c).

5. Scope of Automatic Stay – The stay applies to almost any type of formal or informal action against the debtor or the property of the estate.

a. The automatic stay prohibits any action that would inevitably have an adverse effect on property of the estate. *In re Prudential Lines, Inc.*, 119 B.R. 430 (S.D.N.Y.), *aff'd*, 928 F.2d 565 (2d Cir.), *cert. denied, PSS S.S. Co., Inc. v. Unsecured Creditors*, 502 U.S. 821 (1991).

b. The stay applies worldwide and is effective with regard to a debtor's property situated outside the United States.6 *In re Nakash*, 190 B.R. 763 (Bankr. S.D.N.Y. 1996).

c. The prosecution of claims that were or could have been asserted before the filing of a bankruptcy case are automatically stayed. *In re Johns-Manville Corp.*, 57 B.R. 680 (Bankr. S.D.N.Y. 1986). The automatic stay, however, does not stay actions on claims arising against a debtor after commencement of a bankruptcy case. *In re A. Tarricone, Inc.*, 77 B.R. 430 (S.D.N.Y. 1987); *see also In re Chateaugay Corp.*, 86 B.R. 33 (S.D.N.Y. 1987).

d. The stay applies even with regard to property of the estate that a debtor fails to schedule. *In re D'Alfonso*, 211 B.R. 508 (Bankr. E.D. Pa. 1997).

e. Family Law Cases.

i. Debtor's divorcing wife's contingent interest in separately titled property of the non-debtor spouse was property of the estate and subject to the automatic stay. *In Re Greer*, 242 BR. 389 (Bankr.

N.D. Ohio, 1999).

ii. In a chapter 12 case, the county social services department garnished the debtor's wages, and it was held that there was no stay violation as long as the department's levy reached only those earnings of the debtor not needed to fund payment to the Trustee in the Debtor's confirmed Chapter 12 case. *Id*.

6. Limits to Scope of Automatic Stay – The automatic stay only applies to property in which the debtor or the estate has an interest. If neither the debtor nor the estate has any legal or equitable rights to property then the automatic stay does not restrict creditors collection attempts as to that particular piece of property.

a. Proceeds of letters of credit issued by Chapter 11 debtor's banks, collateralized with debtor's property, did not constitute "property of the estate," and the automatic stay did not preclude surety from drawing on proceeds of the letters of credit. *In re Keene Corp.*, 162 B.R. 935 (Bankr. S.D.N.Y. 1994). The letters of credit were an independent third-party obligation, and the proceeds were not debtor's property, even if the letters of credit were secured by debtor's property. *Id*.

b. Stay was not violated when IRS levy reached only the personal interest of debtor's president. *U.S. v. Hemmen*, 51 F.3d. 883 (9th Cir. 1995).

c. A debtor, as a general partner, "owned" an interest in partnership property, but not the property itself. As the debtor exercised too few rights with regard to the property to qualify it as owner, the bankruptcy trustee had no power to reach transactions involving the property, nor did the automatic stay halt legal action against it. Ml Media Partners v. Century/Ml Cable Venture (In re Adelphia Communs. Corp.), 285 B.R. 127, 138 (Bankr. S.D.N.Y.) ("[P]roperty of a partnership in which a debtor has an interest is not property of the debtor itself."); *Conti v. Blau*, 234 B.R. 627 (S.D.N.Y. 1999); *In re Minton Group, Inc.*, 46 B.R. 222 (S.D.N.Y. 1985).

d. The automatic stay does not operate to enjoin actions respecting property in which debtor no longer has interest when the petition is filed. *In re Family Showtime Theatres, Inc.*, 72 B.R. 38 (E.D.N.Y. 187). *But see Marine Midland Bank, N.A. v. Venton*, 428 N.Y.S.2d 615, 104 Misc. 2d. 599 (Sup. Ct. 1980) (a stay in a bankruptcy action continues as to property abandoned by the debtor).

e. The automatic stay does not operate to toll the running of time to perform under a contract. If a contract expires under its own terms after the bankruptcy petition, the debtor loses its rights under the contract notwithstanding the stay. *In re Empire Equities Captial Corp.*, 405 B.R. 687, 289 (Bankr. S.D.N.Y. 2009); *In re Compass Development*, 55 B.R. 260, 262 (Bankr. D.N.J. 1985); *see also Moody v. Amoco Oil Co.*, 734 F.2d

1200, 1212-13 (7th Cir. 1984).

f. Debtor/lessee is not entitled to the protection of the automatic stay if a lease terminated prepetition. See Bell v. Alder Owners, Inc., 199 B.R. 451 (S.D.N.Y. 1996). To determine debtor's interest in leased property, the bankruptcy court must review the finding of the state court in a lease termination/eviction case. In re Reinhardt, 209 B.R. 183 (Bankr. S.D.N.Y. 1997).

g. Tax Court Proceedings:

i. Prior to the 2005 Act, the automatic stay applied to the commencement or continuation of all Tax Court proceedings.

ii. Under the 2005 Act, Section 362(a)(8) was amended to limit the stay of Tax Court proceedings to corporate liabilities for a period the bankruptcy court may determine, and individual liabilities for a tax period ending prepetition. .

iii. Tax Court proceedings after discharge did not violate automatic stay, as the proceedings were not an "act against the property of the estate" within the meaning of the Bankruptcy Code. *Bigelow v. Commissioner*, 65 F.3d 127 (9th Cir. 1995).

h. Only litigation against the debtor designed to seize or exercise control over property of the estate is stayed, but the statute does not protect entities against whom a debtor proceeds in an offensive posture, e.g., by initiating judicial or adversary proceedings, from protecting their legal rights. *Park Nat'l Bank*, 2007 U.S. Dist. LEXIS 12237, 2007 WL 604936, at *3 ("[A]s the plain language of the statute suggests, and as no less than six circuits have concluded, the Code's automatic stay does not apply to judicial proceedings, such as this suit, that were initiated by the debtor.") (*quoting Brown v. Armstrong*, 949 F.2d 1007, 1009-10 (8th Cir.1991))

i. The stay will not apply when debtor's liability is being established as a prerequisite for plaintiff to obtain a recovery solely from debtor's insurer. *Green v. Welsh*, 956 F.2d 30 (2d Cir. 1992).

j. Chapter 7 discharge of debtor/mortgagor did not discharge mortgage lien, only personal liability of debtor on mortgage note, and, therefore, the stay did not apply to a post-discharge foreclosure action. *Drew v. Chase, Manhattan Bank, N.A.*, 185 B.R. 139 (S.D.N.Y. 1995).

7. Exceptions and Exclusions From the Automatic Stay: Generally

a. Automatic stay is not to serve as a sword to prevent the state from enforcing its police or regulatory powers. 11 U.S.C. § 362(b)(4); *see also In re Synergy Development Corp.*, 140 B.R. 958 (Bankr. S.D.N.Y. 1992);

In re Blunt, 210 B.R. 626 (M.D. Fla. 1997) (city was enforcing police power when it razed debtor's property as a fire hazard, therefore the automatic stay was inapplicable pursuant to §362(b)(4) of the Bankruptcy Code).

b. Criminal prosecutions arising from a debtor's failure to pay child support are exempt from the stay pursuant to § 362(b) of the Bankruptcy Code. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000) ("it [was] not for the bankruptcy court to disrupt that sovereign determination [find criminal conduct] because it discerne[ed] an economic motive behind the criminal stature or its enforcement").

c. City's actions under CERCLA to recover costs expended in response to completed environmental violations are not stayed by violator's bankruptcy filing. *City of New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991). Such action to effect recovery falls within the city's police and regulatory power to deter would-be polluters. *Id.*

d. Collection efforts to recover upon any nondischargeable debt listed in Sec. 362(b) of the Bankruptcy Code are not automatically stayed by the filing of a bankruptcy petition, and the burden is upon the debtor or trustee to affirmatively seek injunctive relief from enforcement efforts regarding such debts. *Boatmen's Bank v. Embry (In re Embry)*, 10 F.3d 401 (6th Cir. 1993). *But see Parker v. Boston Univ. (In re Parker)*, 334 B.R. 529, 536 (Bankr. E.D. Ma. 2005) ("There is simply no provision in the bankruptcy code that suggest that debts declared or presumed nondischargable are no longer subject to the automatic stay."); *Cardillo v. Moore-Handley, Inc. (In re Cardillo)*, 172 B.R. 146 (Bankr. N.D. Ga. 1994).

e. An action brought by a debtor's neighbor to enjoin the debtor from playing her stereo late at night and from otherwise harassing the non-debtor was not stayed, but enforcement of an award of costs by the non-debtor was stayed. *Grant v. Clampitt*, 65 Cal.Rep.2d 727, 56 (C.A. 4th 586 2d Dis.1997).

f. The non-economic aspects of a matrimonial action, including marital status, custody and visitation of children, are not subject to the automatic stay. *In re Taylor*, 216 B.R. 366 (Bankr. S.D.N.Y. 1997) (citations omitted). Proceedings to establish paternity are not stayed. 11 U.S.C. Section 363(b)(2)(A)(i) (1978, as amended); *In re Campbell*, 185 B.R. 628 (Bankr. S.D. Fla. 1995).

g. Where signing an order is substantially a ministerial act to memorialize a state court justice's oral decision, signing the order may not be prohibited by the stay. *In re Papatones*, 143 F.3d 623 (1st Cir. 1998); Taylor, 216 B.R. 366. However, enforcing the judgment to effect collection is stayed.

Id.; *compare Bonilla v. Trebol Motors Corp.*, 150 F.3d 77 (1st Cir. 1998) (exception to the automatic stay for ministerial actions of nonbankruptcy court did not apply to postpetition entry of judgment against debtors in class action under RICO).

h. Maintaining Perfection – Generally the stay is not violated by a creditors act to maintain its prepetition perfected security interest.

   i. The automatic stay does not prohibit acts to extend, continue or renew otherwise valid statutory liens, therefore, judgment lien creditor could extend lien on debtor's real property. *In re Morton*, 866 F.2d 561 (2d Cir. 1989).

   ii. The automatic stay does not work to prohibit any act to perfect, maintain, or continue perfection of a security interest acquired prior to the bankruptcy filing under §546(b) of the Code, as set forth in §362(b)(3). *In re Eaton*, 220 B.R. 629 (E.D. Ark. 1998) (a repair shop's continued possession of the debtor's vehicle, after the debtor demanded its return, in order to maintain repairman's perfected lien, did not violate the automatic stay).

   iii. The automatic stay did not apply to prevent service mark holder from filing affidavit required to maintain valid registration of mark, where the holder was seeking to cancel a debtor's own similar mark, as filing only preserved the *status quo*. *Checkers Drive-In Restaurants, Inc. v. Commissioner of Patents and Trademarks*, 51 F.3d 1078 (D.C. Cir.), *cert. denied*, 516 U.S. 866, 116 S. Ct. 183, 133 L. Ed. 2d. 120 (1995).

   iv. The stay was not violated when mechanics' lienors served a notice of lien that related back to pre-filing date period, as New York law permits perfection of filed mechanics' liens after another party acquired rights in the encumbered property. *In re Lionel Corp.*, 29 F.3d 88 (2d Cir. 1994) (construing the relationship between Bankruptcy Code §§ 362(b)(3) and 546(b) and N.Y. McKinney's Lien Law §§ 10 subd. 1 and 13(5)).

i. The National Labor Relations Board (NLRB) may proceed to obtain prejudgment writ of garnishment against funds owed debtor's successor in enforcing back pay award against debtor, as the automatic stay does not apply, pursuant to § 362(b)(4) and (b)(5). *N.L.R.B. v. E.D.P. Medical Computer Systems, Inc;*, 6 F.3d 951 (2d Cir. 1993).

j. Under the 2005 Act, the limitations of the automatic stay stated in Sections 362(b)(6), (7) and (17) were amended to apply the new term "financial participant," which is now defined in Section 101(22A).

8. Other exceptions to the automatic stay included in the 2005 Act.

   a. Section 362(b)(19) was added to permit the withholding and collection of income from the debtor's wages to pay a loan made on a tax-exempt retirement plan.

   b. Section 362(b)(20) was added to permit foreclosure of a mortgage following entry of an order under subsection (d)(4). Subsection (d)(4) is the new provision that allows the court to issue in rem stay relief for real property affected by fraudulent schemes to transfer title or to engage in serial filings.

   c. Section 362(b)(21) was also added to address abusive filings. It permits foreclosure of a mortgage on property owned by a debtor who is ineligible to file a petition, but who does so nonetheless.

   d. Section 362(b)(24) was added to allow a postpetition transfer that is not avoidable under Sections 544 and 549. This amendment was made to insulate mortgages given as part of a transfer to a good faith purchaser that is not avoidable by the trustee. The amendment is in response to a series of Ninth Circuit decisions in *In re McConville*, which are reported at 84 F.3d 340, 97 F.3d 316 and 110 F.3d 47.

   e. Section 362(b)(25) was added to permit certain activities by a "securities self-regulatory organization," which is now defined in Section 101(48A).

   f. Section 362(b)(26) was added to permit a taxing authority to setoff a prepetition refund against a prepetition liability.

   g. Section 362(b)(27) was added to permit setoff under a master netting agreement, which is now defined in Section 101(38A).

   h. Section 362(b)(28) was added to permit the United States to exclude a debtor from participation in Medicare or any other federal health care program.

9. Landlord / Tenant and the Automatic Stay

   a. Under the 2005 Act, Section 362(b)(22) was added with new subsection (l) to allow enforcement of a warrant of eviction when the landlord has obtained a prepetition judgment for possession of the property. Subsection (l) is discussed in more detail below. See Section 12(h)

   b. Under the 2005 Act, Section 362(b)(23) was added to allow, under certain circumstances specified therein and in new subsection (m), eviction of a debtor tenant based upon endangerment of the leased property or the illegal use of controlled substances on the property.

c. Recently, a New York court held that the automatic stay did not void a postpetition notice not to renew a stabilized lease. *Evans v. Schneider*, 183 Misc. 2d 114 (NY Civ. Ct., 1999), *aff'd.*188 Misc. 2d 193 (App. Term 1st Dept. 2001). Thus, the Court held that debtor/tenant was not entitled to the dismissal of a holdover proceeding commenced by the landlord after the tenant was discharged. *Id.* The Court provided four reasons for its holdings:

d. The debtor held no legally cognizable equity in the contingent leasehold interest, and the Court concluded that as such, the landlord's notice did not affect an income producing asset and it did not sufficiently affect the administration of the debtor's estate to trigger the automatic stay. Id.

e. Lease renewal bore little relationship to the administration of the Debtor's estate, as the issue of lease renewal related to future conduct on the part of the debtor and the landlord.

f. The statutory scheme providing for rent stabilization emanates from the exercise of the police power by the governing state and local entities.

g. The landlord lacked notice of the debtor's bankruptcy and gave notice of intent not to renew the rent stabilized lease during the limited time period required for notice under the applicable non-bankruptcy statutes and regulations. Thus, the landlord could not have moved for relief from the stay at the appropriate time. To void the effect of the statutory notice given by the landlord would violate the landlord's due process rights. being a stay violation if the order on the record is sufficiently being detailed.

10. Injunctive Power of the Bankruptcy Court: Section 105

a. Bankruptcy Code § 105 empowers bankruptcy judges to issue orders necessary or appropriate to carry out provisions of the Bankruptcy Code. See 11 U.S.C. § 105(a).

b. Section 105 authorizes bankruptcy court to issue injunctions, broader than the automatic stay, to ensure the orderly reorganization of a debtor's business affairs. *In re Keene Corp.*, 164 B.R. 844 (Bankr. S.D.N.Y. 1994).

c. Bankruptcy judges should be granted as broad authority as is constitutionally permissible to allow them to serve as effective custodians of the Bankruptcy Code. *In re Axona Int'l. Credit & Commerce Ltd.*, 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed*, 924 F.2d 31 (2d Cir. 1991); *accord HBE Leasing Corp. v. Frank*, 48 F.3d 623 (2d Cir. 1995)

(bankruptcy court's broad equitable power to disallow and reorder claims derives from bankruptcy court's role as arbiter of debtor's estate for equal benefit of all creditors); *see also Pepper v. Litton*, 308 U.S. 295 (1939).

d. By its terms, § 362 of the Bankruptcy Code is limited to debtors and does not encompass non-debtor co-defendants. *Teachers Ins. and Annuity Ass'n of America v. Butler*, 803 F.2d 61 (2d Cir. 1986); But see B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996) ("'[a]s the automatic stay protecting North Penn necessarily protects its subsidiary, Lombard Brothers . . . ."). In limited circumstances, § 105 enables the court to enjoin a party from proceeding against a non-debtor. *Queenie, Ltd. v. Nygaard Int'l*, 321 F.3d 282 (2d Cir. 2003).

e. In *Celotex Corp. v. Edwards*, 514 U.S. 300, 115 S. Ct. 1493 (1995), the Supreme Court held that a bankruptcy court has jurisdiction to issue an injunction prohibiting judgment creditors from proceeding against a debtor's sureties on a supersedeas bond. The Court concluded that the injunction had to be obeyed unless it was reversed on direct appeal.

f. In *In re Third Eighty-Ninth Associates*, 138 B.R. 144 (S.D.N.Y. 1992) (citations omitted), the court concluded that the power to enjoin under § 105 should be used "sparingly," as such power expands the scope of the automatic stay. Thus, the debtor will bear the burden of proving the entitlement to the extraordinary and drastic remedy of injunctive relief. *Id.*

g. Section 105 of the Bankruptcy Code authorizes bankruptcy courts to issue any order necessary to aid their jurisdiction, however, § 105 does not create substantive rights that do not exist or are otherwise unavailable under applicable law. *In re Deltacorp, Inc.*, 111 B.R. 419 (Bankr. S.D.N.Y. 1990).

h. Power granted to a bankruptcy court to enter any necessary or appropriate order does not confer on judges any authority to circumvent restrictions on the authority contained in the Bankruptcy Code. *In re 1820-1838 Amsterdam Equities, Inc.*, 191 B.R. 18 (S.D.N.Y. 1996).

i. Co-debtor stay can be imposed pursuant to Bankruptcy Code § 105 to protect co-defendants in pending litigation until resolution of the bankruptcy case, if extending the stay would be in the interests of justice and efficiency. *Cashman v. Montefiore Medical Center*, 191 B.R. 558 (S.D.N.Y. 1996). However, the fact that solvent co-defendants would have to defend the case without the debtor was not by itself sufficient to stay proceeding against non-debtors. *Id.*

j. Courts will generally grant an injunction extending the automatic stay only

if the following four part test is satisfied: 1) there is danger of imminent, irreparable harm to the estate or the debtor's ability to reorganize; 2) there is a reasonable likelihood of a successful reorganization; 3) the relative harm to the debtor is not outweighed by the harm to the entity to be restrained; and 4) the public interest in a successful bankruptcy reorganization balances other competing societal interests. *Maxicare Health Plans, Inc. v. Centinela Mammoth Hosp.*, 105 B.R. 937, 943 (Bankr. C.D. Cal. 1989); *In re Guy C. Long, Inc.*, 74 B.R. 939, 944 (Bankr. E.D. Pa. 1987).

k. Courts have refused to extend the automatic stay when action against debtor's officers would reduce insurance coverage available to the debtor. *In re Granite Partners, L.P.*, 194 B.R. 318 (Bankr. S.D.N.Y. 1996).

l. Courts have issued injunctions under § 105 to enjoin litigation against non-debtors when an adverse judgment in that litigation will collaterally estop the debtor in subsequent litigation. *In re Barney's, Inc.*, 200 B.R. 527, 531 (Bankr. S.D.N.Y. 1996) (citations omitted).

m. The stay has not been extended under § 105 where debtor's principal officers neither have pledged assets for use in the chapter 11 plan of reorganization nor have they threatened to resign their positions with the debtor. *Barney's*, 200 B.R. at 533 (citations omitted), *partial summary judgment entered*, 206 B.R. 328, (Bankr. S.D.N.Y. 1997)

n. "Courts issue § 105 injunctions when they find that litigation against a non-debtor will defeat or impair their jurisdiction of the underlying bankruptcy cases." *Id.* (citations omitted).

o. FDIC is subject to the automatic stay as it arises directly from the operation of a statute. *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106 (1st Cir. 1994). However, once the stay is lifted, a § 105 injunction is unavailable to the debtor as against the government, as the FDIC has immunity from injunctions under Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA). *Id.*

p. Bankruptcy court has authority to enjoin appointment of receiver for state chartered and insured savings and loan subsidiary of a debtor. *In re Deltacorp., Inc.*, 111 B.R. 419 (Bankr. S.D.N.Y. 1990). However, in *Deltacorp.*, the court refused to issue the injunction, as the debtor failed to show that issuing the injunction would result in both the sale of the savings and loan and a successful reorganization. Id.

q. No injunction would be issued in favor of debtor-mortgagor discharged under § 524 of the Bankruptcy Code against a mortgagee seeking to foreclose its mortgage lien but not seeking a deficiency judgment, as the debtor's discharge did not void the lien. *Drew v. Chase Manhattan Bank, N.A.*, 185 B.R. 139 (S.D.N.Y. 1995).

r. Bankruptcy court was authorized to enjoin school board from pursuing action in Ohio courts pending a determination by the bankruptcy court of whether the automatic stay applied to school board's action to collect taxes from the debtor, where the taxes were alleged to have arisen after the bankruptcy filing. *In re Chateaugay Corp.*, 93 B.R. 26 (S.D.N.Y. 1988).

s. Under the 2005 Act, in an apparent effort to assure that Section 105 injunctions are not used to interfere with certain transactions in or related to securities, Section 362(o) was added to provide that the exercise of rights pursuant to the stay exceptions contained in Sections 362(b)(6), (7), (17) or (27) may not be stayed by order of a court or administrative agency.

Practice Pointer: As a § 105 injunction by its very nature is based upon a subjective test and the discretion of the judge, it is important to know a particular judge's tendencies and past history when requesting or opposing a request for a Sec. 105 injunction.

11. Duration and Termination of the Automatic Stay: The Effect of Dismissal, Discharge, Plan Confirmation and Other Bankruptcy Code Provisions

a. Upon dismissal of a case, the stay dissolves. *ICC v. Holmes Transp., Inc.*, 931 F.2d 984 (1st Cir. 1991); *Browning v. Navarro*, 743 F.2d 1069, 1083 (5th Cir. 1984); *but see In re Wytch*, 203 B.R. 190 (9th Cir. B.A.P. 1998), *rev'd without opin.* 213 F.3d 645 (9th Cir. 2000) (inadvertent dismissal of a chapter 7 case as a result of a clerical error did not serve to vacate a prior bankruptcy Court order annulling the stay).

b. A debtor's discharge turns the automatic stay, a temporary injunction, into a permanent injunction preventing creditors from collecting monies on those debts discharged. *Green v. Welsh*, 956 F.2d 30 (2d Cir. 1992).

c. Upon confirmation of a Chapter 11 plan of reorganization, the stay is terminated. *In re Brady Texas Municipal Gas Corp.*, 936 F.2d 212 (5th Cir.), *cert. denied*, 502 U.S. 1013 (1991). However, claims dealt with by the plan of reorganization are subject to the provisions of the plan. *Hillis Motors, Inc. v. Hawaii Auto Dealer's Assoc.*, 997 F.2d 581 (9th Cir. 1993).

12. Serial Filings – In BAPCPA, Congress imposed new limitations on the application of the automatic in cases filed by debtors that have filed multiple bankruptcy cases in a single year.

    a. Section 362(c)(3) limits the duration of the automatic stay to 30 days, under certain circumstances, in a case filed by an individual debtor who had a prior case dismissed in the year preceding the filing.

        i. This provision does not apply in a Chapter 12 case filed by a family farmer.

        ii. This provision does not apply to a Chapter 11 or Chapter 13 case filed following the dismissal of a Chapter 7 case under Section 707(b).

        iii. The debtor may move within the 30 day period to extend the stay on the ground that the filing of the later case was made in good faith. The subsection contains guidance on what constitutes good faith.

    b. Under the 2005 Act, Section 362(c)(4) was added to prevent the automatic stay from taking effect at all in a case filed by an individual debtor who had two or more prior cases dismissed in the year preceding the filing.

        i. This provision applies to cases filed "under this title," and therefore includes Chapter 12.

        ii. This provision also does not apply to a case filed following the dismissal of a Chapter 7 case under Section 707(b). *Collier* points out that, due to a drafting error, the language on this is less than clear. 3 Collier on Bankruptcy, Sec. 362.05[4], p.362-84.13 and 84.14 (15th Ed., 2005).

        iii. On request of a party in interest, the court is directed to "promptly" enter an order confirming that no stay is in effect.

        iv. Like Section 362(c)(3), subsection (c)(4) allows the debtor to make application to impose a stay on a showing that the filing of the later case is in good faith. If the court does so, the stay is effective on the date of the entry of the order allowing the stay to go into effect.

    c. Operation of Sections 362(c)(3) and (4):

        i. The year time period is measured from the date of the order dismissing a debtor's bankruptcy and not the date the debtor's case was closed. *In re Moore*, 337 B.R. 79 (Bankr. E.D.N.C. 2005).

        ii. Section 362(c)(3) only affects formal actions that were taken prior to

the time of the bankruptcy filing. *In re Harris*, 342 B.R. 274 (Bankr. N.D. Ohio 2006).

iii. Section 362(c)(3) only applies to property of the debtor and not property of the estate. Id.; But see In re Kane, 336 B.R. 447 (Bankr. D. Nev. 2006).

iv. Party in interest must file and serve a motion to extent the stay under section 362(c)(3) and (4) must be filed and served within 30 days of filing. In re Berry, 2006 WL 1015963 at *2 (Bankr. M.D.Ala., April 14, 2006) ("As motions to extend the automatic stay under 362(c)(3)(B) and motions to impose an a stay pursuant to § 362(c)(4)(B), both contain thirty-day periods of limitation, this strongly suggests that motions filed after the thirty-day period has expired are not timely.").

v. Movant must affirmatively establish that the case was filed in good faith. In re Galanies, 344 B.R. 685 (Bankr. D. Utah 2005). Factors relevant to proving good faith include: "1) the timing of the petition; 2) how the debt(s) arose; 3) the debtor's motive in filing the petition; 4) how the debtor's actions affected creditors; 5) why the debtor's prior case was dismissed; 6) the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to properly fund a plan; and 7) whether the Trustee or creditors object to the debtor's motion." *Id.* at 693.

13. Under the 2005 Act, Section 362(h) is added. It provides, on terms specified, for the termination of the automatic stay upon the debtor's failure to timely file the statement of intention required by Section 521, failure to indicate in such statement which of the Section 521 options the debtor has elected, or failure to timely take the action specified in such statement.

a. Termination of the stay under Section 362(h) is limited to the personal property covered by the statement of intention, which under Section 521(a)(2) is limited to "debts which are secured by property of the estate."

b. Section 362(h)(2) further provides for continuation of the automatic stay upon the timely application of the trustee in situations where the property in question is of value or benefit to the estate. This generally applies where there is equity in the property over the secured claim that the trustee can liquidate for the benefit of unsecured creditors.

c. In cases covered by Section 362(h)(2), the secured creditor must be given adequate protection in exchange for continuation of the automatic stay, and the property in question must be delivered to the trustee for liquidation.

d. Under the 2005 Act, Section 362(i) is added. In an attempt to promote voluntary debt repayment outside bankruptcy, it provides that, if a Chapter

7, 11 or 13 case is dismissed due to the creation of a debt repayment plan, any subsequent filing by the debtor "shall not be presumed to be filed not in good faith."

14. Landlord / Tenant Provisions:

    a. Under the 2005 Act, Section 362(l) is added and is intended to give the debtor tenant and dependents some protection against postpetition eviction from residential property on the basis of a prepetition judgment. It must be read with the new stay exception contained in subsection (b)(22), and discussed above.

    b. Essentially, subsection (l) allows a debtor to file a certification with the petition to the effect that the debtor has the legal right and financial ability to effect a cure. If the debtor does so, the application of the subsection (b)(22) stay exception is postponed for 30 days. During the 30 day period, the debtor or dependent can then preclude the application of subsection (b)(22) to the case by effecting the cure.

    c. Under subsection (l), if the landlord files and serves an objection to the debtor tenant's certification, the court must hold a hearing within 10 days to determine if the certification is true.

    d. New Section 362(m) works like subsection (l), but instead with regard to the landlord's certification under Section 362(b)(23) based on endangerment or unlawful use of controlled substances on the residential property

        i. Since subsection (m) applies to a landlord's certification, the debtor tenant files and serves the objection that triggers the hearing to determine if the certification is true.

        ii. When a lease was rejected under § 365 of the Bankruptcy Code, the automatic stay was terminated as to the leasehold interest. *In re Salzer*, 52 F.3d 708 (7th Cir. 1995), *reh'g denied*, *cert. denied*, *sub nom. Salzer v. Stinson*, 517 U.S. 1204, 116 S. Ct. 1273, 134 L. Ed. 2d 219 (1996).

15. Under the 2005 Act**,** Section 362(n) is added as the small business debtor corollary to the various amendments in Section 362 that restrict or preclude the application of the automatic stay to abusive filings by individual debtors.

    a. It applies in four situations:

        i. Another small business case with the same debtor is pending when the petition is filed;

ii. Another small business case with the same debtor was dismissed within two years preceding the filing;

iii. Another small business case with the same debtor was confirmed within two years preceding the filing, or

iv. The Debtor in the applicable case acquired its assets or business from a small business debtor described in any of the foregoing situations, unless the new debtor proves that the assets or business were acquired in good faith and not to evade subsection (n).

b. Subsection (n) does not apply to a non-collusive involuntary filing or to a filing in which the debtor establishes unforeseeable circumstances beyond its control and a likelihood that the court will confirm a non-liquidating plan within a reasonable period of time.

c. "Small business debtor" is defined in Section 101(51D). A "small business case" is a Chapter 11 filed by a small business debtor. Section 101(51C).

16. Concurrent Jurisdiction of State and Federal Courts

a. The Legal Standard

i. The Second Circuit has determined that the court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction, but also, the more precise question of whether the proceeding pending before it is subject to the automatic stay. *Erti v. Paine, Webber, Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.)*, 770 F.2d 328 (2d Cir. 1985); *see also Brock v. Morysville Body Works, Inc.*, 829 F.2d 383 (3d Cir. 1987); *Department of Envtl. Resources v. Ingram*, 658 A.2d 435 (Pa. Commw. Ct. 1995) (citations omitted)("The Third Circuit also considered whether it had jurisdiction to determine the applicability of the automatic stay and determined that it had, citing for support a number of cases from the Second, Third, Fifth and Sixth Circuit Courts of Appeal").

ii. Bankruptcy courts and state courts exercise concurrent jurisdiction over question of whether particular obligation is dischargeable, and once dischargeability has been fully and fairly litigated in one forum, parties are collaterally estopped from relitigating issue in another forum. *In re Bereziak*, 160 B.R. 533 (E.D. Pa. 1993).

iii. Creditor with maritime lien did not violate the automatic stay where federal marshall served arrest warrant on vessel, thereby halting loading of lumber that was property of the estate. *In re Chugach Forest Prods., Inc.*, 23 F.3d 241 (9th Cir. 1994). The bankruptcy court did not have exclusive jurisdiction over all controversies that

in some way affected a debtor's property. *Id*. The lien creditor arrested the vessel to foreclose its lien, and the foreclosure was not directed against the debtor's property. *Id*.

b. Whether a state court action is stayed may be decided by the bankruptcy court presiding in a debtor's case or by the state court where a case regarding the debtor's estate property is pending. *Baldwin-United*, 765 F.2d 343, 347 (2d Cir. 1985). State courts retain jurisdiction to determine whether or not they have jurisdiction. *Id*.

c. Under *Rooker-Feldman* doctrine, lower federal courts lack jurisdiction to sit in appellate review of state court decisions; they do not have the power to modify or reverse state court judgments. *Matter of Reithauer*, 152 F.3d 341, 343 (5th Cir. 1998)(citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 and 482 (1983).

d. The *Rooker-Feldman* doctrine does not apply to collateral challenges to the automatic stay, as federal courts have the final authority to determine the scope and applicability of the automatic stay. *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000). ("A bankruptcy court simply does not conduct an improper appellate review of a state court when it enforces an automatic stay that issues from its own federal statutory authority. In fact, a reverse *Rooker-Feldman* situation is presented when state courts decide to proceed in derogation of the stay, because it is the state court which is attempting impermissibly to modify the federal court's injunction").

17. Miscellaneous Cases

i. A New York court correctly determined that an answer in an action pending before it and asserting a counterclaim against a plaintiff that subsequent to the commencement of the suit became a debtor under the Bankruptcy Code, is an "action or proceeding against the Debtor" and subject to the automatic stay, even though the Debtor commenced the suit. *Howell v. Brozzetti*, 240 A.D. 2d 794 (3rd Dep't1997).

ii. When a debtor was incarcerated by a New Jersey court (capias writ) and the New Jersey court determined that the automatic stay did not apply, "the New Jersey Court had concurrent jurisdiction with the bankruptcy court to determine the applicability of the automatic stay," and, therefore, the debtor, "having litigated this claim in state court is barred from relitigating it [in the bankruptcy court]." *In re Bona*, 124 B.R. 11 (S.D.N.Y. 1991).

iii. However, the bankruptcy court may enjoin state court actions brought in contravention of the bankruptcy court's orders. *In re*

Trump Taj Mahal Assoc., 156 B.R. 928 (Bankr. D.N.J. 1993); *But see In re Si Yeon Park, Ltd.*, 198 B.R. 956 (Bankr. C.D. Cal. 1996) (bankruptcy court refused to enjoin state court from proceeding further with contempt motion against trustee even though the underlying state action had been removed to the bankruptcy court).

iv. In contrast, certain ministerial acts by state or federal courts may not be stayed. *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1994) (the clerk of the court may enter judgment notwithstanding the automatic stay, where a judge has ordered judgment for a party before a bankruptcy was filed). This was also the outcome in *Taylor*, where the Supreme Court judge presiding in the case issued an order on the record and did not sign a written order until after the bankruptcy filing. 216 B.R. 366 (Bankr. S.D.N.Y. 1998).

v. The bankruptcy court lifted the automatic stay allowing the mortgagee to foreclose under applicable non-bankruptcy law, and later reimposed the stay and vacated a foreclosure sale. The district court reversed and held, among other things, "there is a strong interest in promoting comity between state and federal courts and in protecting the finality of jurisdictionally sound judgments." *Piccolo v. Dime Sav. Bank of New York*, 145 B.R. 753, 757 (N.D.N.Y. 1992).

vi. The automatic stay held inapplicable to protect two non-debtor defendants who were under no obligation to indemnify the debtor. See *Central Buffalo Project Corp. v. Edison Bros. Stores, Inc.*, 619 N.Y.S.2d 890, 205 A.D.2d 295 (4th Dep't 1994).

18. Remedies Available Upon Entry of an Adverse State Court Decision Pertaining to the Automatic Stay

a. When a New York State court rules the stay inapplicable, the debtor has two remedies available:

> The debtor (i) "could have sought a stay of the decision pending appeal" (See CPLR 5519 [c]; cf. CPLR § 460.50), or (ii) "sought relief in the Bankruptcy Court in which he filed his petition." *Skripek v. Skripek, supra; see also In re AUFCMP Church*, 184 B.R. 207, 216 (Bankr. D. Del. 1995).

19. Obtaining Relief from the Automatic Stay: Statutory Requirements

a. Section 362(d) provides for relief from the stay in appropriate circumstances. Relief is available under subsections (d)(1), (d)(2) and

(d)(3). 11 U.S.C. § 362(d). Each of these subsections provides for relief from the stay on a different basis. *Id.*

b. The subsections of Section 362(d) are disjunctive, and the movant need satisfy only a single subsection to obtain relief. In re Touloumis, 170 B.R. 825 (Bankr. S.D.N.Y. 1994) (citing In re de Kleiman, 156 B.R. 131, 1363 (Bankr. S.D.N.Y. 1993); In re Diplomat Electronics Corp., 82 B.R. 688, 692 (Bankr. S.D.N.Y. 1988).

i. Section 362(d)(1) provides that on request of a party in interest, the stay may be lifted, "for cause, including the lack of adequate protection of an interest in property of such party in interest." *In re M.J. & K. Co.*, 161 B.R. 586 (Bankr. S.D.N.Y. 1993). A detailed discussion of adequate protection is set forth below.

ii. Section 362(d)(2) provides for the stay to be lifted against property where "(A) the debtor does not have an equity in such property; and (B) such property is not necessary for an "effective reorganization."

(1) For the stay to be lifted under § 362(d)(2), both prongs of the test must be satisfied. *In re New Era Co.*, 125 B.R. 725 (S.D.N.Y. 1991).

(2) In determining whether property is essential for effective reorganization, the court must determine whether an effective reorganization plan is in prospect. *In re Ritz- Carlton D.C., Inc.*, 98 B.R. 170 (S.D.N.Y. 1989). However, the court need not determine whether a plan is confirmable; only whether component of plan to be done after confirmation is practical. *Id.*

iii. Section 362(d)(3), which applies only to single asset real estate cases (as defined in the Bankruptcy Code) was added to the Bankruptcy Code in 1994, and it provides for relief from the stay.

(1) The 2005 Act amended Section 362(d)(3) to allow the court to provide relief from the stay if certain debtor actions were not taken within 90 days after the order for relief was entered "or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later."

(2) The purpose of the requirement that the plan be filed within 90 days in a single asset real estate case is (1) to impose an expedited time frame in this type of case, and (2) to provide that the stay be lifted without "further ado" if a plan is not filed within that time frame. *In re Kkemko, Inc.*, 181 B.R. 47 (Bankr. S.D. Ohio 1995); *see also In re Philmont Dev. Co.*,

181 B.R. 220 (Bankr. E.D. Pa. 1995) (concluding debtor's series of semidetached houses constituted "single project," and, thus, constituted "single asset real estate," and, accordingly, mortgagee was entitled to relief from automatic stay since debtor had not filed reorganization plan within 90 days of entry of orders for relief).

(3) Under the 2005 Act, the definition of "single asset real estate" in Section 101(51B) was amended to delete property that generates substantially all of the gross income of a family farmer, and to delete the limitation of its application to cases with secured debt not exceeding $4,000,000.

(4) Bankruptcy and district courts have the authority to annul the automatic stay, thereby reinstating and ratifying actions previously taken, however, such result is rare and is *probably* available only to creditors who had no knowledge of the bankruptcy filing. *Franklin Sav. Assoc. v. Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir. 1994).

c. Form and Content of Motion

i. Relief from the stay may be obtained by filing a motion with the bankruptcy court in accordance with Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P.") 4001 and 9014.

ii. The court charges a fee for filing each motion to terminate, annul, modify or condition the automatic stay. The fee currently is $150 (as of April 4, 2006).

iii. Rule 9013 of the Fed. R. Bankr. P. requires the motion to be in writing. Additionally, the moving party must state with particularity the grounds for the relief requested and set forth the relief sought.

iv. The motion for relief should establish:

(1) jurisdiction of the court (core proceeding under 28 U.S.C. § 157(b)(2)(G));

(2) the basis for proper venue;

(3) basis of debtor/creditor relationship;

(4) amount and evidence of debt (attach copy of debt instrument as exhibit);

(5) interest of the moving party in the debtor, its estate or any of

its assets (non-dischargeable debt); type of property subject to a security interest or lien in favor of the non-debtor party (realty, personalty, or both) (attach copy of security agreement or mortgage);

(6) proof of perfection (attach copy of UCC-1, recorded mortgage, separation agreement, divorce decree, etc.);

(7) evidence of amount and duration of default, if any; and

(8) grounds for relief under §§ 362(d)(1), 362(d)(2) or 362(d)(3) of the Bankruptcy Code (include allegation of value of collateral if alleging lack of equity, such as appraisal or Broker's Price Opinion).

Practice Pointer: The motion should request relief from the stay and in the alternative "adequate protection to protect the creditor's interest until the stay is lifted." (See discussion below regarding adequate protection).

d. Service of the Motion

i. Rules 4001, 9013, 9014 of the Fed. R. Bankr. P. and the local bankruptcy rules apply. Unless the court orders otherwise, service is to be made upon the debtor, debtor's attorney, trustee (if appointed by the U.S. Trustee), any committee, or if no committee has been appointed, upon the 20 largest unsecured creditors of the debtor, and the U.S. Trustee.

ii. Time to serve. See Fed. R. Bankr. P. 9006(d) and local bankruptcy rules.

e. Hearing by the Court: Procedural Aspects

i. Preliminary hearing. The stay of any act against property of the estate terminates 30 days after the filing of a motion to lift the stay unless the court, after notice and a hearing, orders the stay continued pending the conclusion of a final hearing. 11 U.S.C. § 362(e).

ii. At the preliminary hearing, the court can order the stay continued only if there is a reasonable likelihood that the party opposing relief will prevail at the final hearing. Id.

(1) It is the debtor's burden to have the preliminary hearing conducted within the 30 day period. Id.

(2) Failure of the court specifically to find that there is a "reasonable likelihood" that the creditor's motion will be

denied, results in the stay being lifted. Id.

iii. Under the 2005 Act, Section 362(e)(2) was added to compel prompt decisions on relief from stay applications. It provides that, unless extended by consent of the parties or by the court for good cause (as described in findings), the stay terminates in Chapter 7, 11 and 13 cases 60 days after application absent a final decision by the court.

Practice Pointer: As a practical matter this is unlikely to occur, as courts in most instances will not allow the stay simply to lapse by virtue of the passage of time during the pendency of litigation regarding the merits.

iv. Section 362(e) permits consolidation of the preliminary and final hearings. Thus, the hearing date may constitute both hearings, if proper notice is given in a timely manner. Id.; Fed. R. Bankr. P. 4001, 9006(d), 9013 and 9014.

v. Although the inadvertent failure to hold a preliminary hearing 30 days from filing of stay relief motion terminates the stay, the court may reimpose a stay pursuant to §§ 105(a), 362(d) and (e) of the Bankruptcy Code. *See Wedgewood Inv. Fund Ltd. v. Wedgewood Realty Group, Ltd. (In re Wedgewood Realty Group, Ltd.)*, 878 F.2d 693 (3d Cir. 1989).

vi. Section 362(f) allows *ex parte* relief from the stay, "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 ...." The procedural requirements for obtaining *ex parte* relief are found in Fed. R. Bankr. P. 4001(a)(2).

vii. The party moving for stay relief has the burden of proof on the issue of the debtor's equity in the property, 11 U.S.C. § 362(g)(1); the party opposing the relief requested has the burden of proof on all other issues. 11 U.S.C. § 362(g)(2).

viii. "Although the debtor bears the ultimate burden of disproving the existence of cause, the movant must initially produce evidence establishing `cause' for the relief he requests." *Toulmous*, 170 B.R. at 828, (*citing In re Sonnax Industries, Inc.*, 907 F.2d 1280, 1285 (2d Cir. 1990)); *In re M.J. & K. Co.*, 161 B.R. 586, 590 (Bankr. S.D.N.Y. 1993); *In re Pioneer Commercial Funding Corp.*, 114 B.R. 45, 48 (Bankr. S.D.N.Y. 1990). "If the movant fails to makean initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection." *Touloumis*, 170 B.R. at 828 (citing *Sonnax Industries*, 907 F.2d at 1285).

ix. The non-debtor party bears the burden of demonstrating unfairness of foreign bankruptcy proceedings, where the non-debtor seeks to vacate the stay imposed in those foreign proceedings involving the debtor. *Drexel Burnham Group v. Galadari*, 134 B.R. 719 (S.D.N.Y. 1991).

x. Only the court may lift the automatic stay; parties themselves are not entitled to engage in self-help in derogation of the automatic stay. *In re Fugazy Exp., Inc.*, 982 F.2d 769 (2d Cir. 1992).

xi. The lifting of the automatic stay is not an act that can be accomplished solely on consent. It must be accomplished through an affirmative act of the court, although such act may be given retroactive effect. *First Fiscal Fund Corp. v. Fishers Big Wheel, Inc.*, 36 B.R. 299 (Bankr. E.D.N.Y. 1984); *cf. In re Club Tower*, 138 B.R. 307 (Bankr. N.D. Ga. 1991); *In re Cheeks*, 167 B.R. 817 (Bankr. D.S.C. 1994).

f. Lifting the Stay under § 362(d)(1) "Cause Shown":

i. In *In re Sonnax Industries*, the Second Circuit adopted a twelve factor analysis to determine whether the stay should be vacated or modified to permit litigation to be continued in another forum. 907 F.2d 1280. *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. Utah 1984), first set forth the factors, which include: (1) whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for defending it; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interests of other creditors; (8) whether the judgment on the claim arising in the other action is subject to equitable subordination; (9) whether movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) what impact the stay has on the parties and the balance of harms. *Sonnax Industries*, 907 F.2d at 1286.

ii. Only the relevant *Sonnax* factors need be considered. *Touloumis*, 170 B.R. at 828 (citing *Sonnax Industries*, 907 F.2d at 1285). The court need not assign the factors equal weight. *Touloumis*, 170 B.R. 828 (citing *In re Anton*, 145 B.R. 767, 770 (Bankr. E.D.N.Y. 1992)).

iii. The stay was not vacated to permit a plaintiff alleging that a debtor was manufacturing, selling and/or renting an unauthorized copy of plaintiff's product. Upon consideration of the *Sonnax* factors, the Court found:

(1) The litigation was inextricably tried to the administration of the debtor's estate, as not only did the litigation involve the validity and amount of plaintiff's claim--but the viability of the debtor's attempt to reorganize under Chapter 11.

(2) The Bankruptcy Court provided the most expeditious forum for resolving plaintiff's claims.

(3) The preceding two factors outweighed the loss of plaintiff's right to an Ohio jury trial in a non-bankruptcy forum. *In re Vivax Medical Corp.*, 242 B.R. 211 (Bankr. Conn. 1999).

iv. The former owner of a nursery was entitled to stay relief for cause shown to attend to plants comprising the inventory of the Debtor, as:

(1) the debtor was not operating;

(2) the plants needed attention to survive and

(3) the former owner would be harmed if the plants died. *In re Tirey Distrib. Co.*, 242 B.R. 717 (Bankr. E.D. Okla.1999).

v. Creditor was entitled to stay relief for cause, consisting of debtor's bad faith filing of its petition. *In re Laguna Assoc. Ltd. Partnership*, 30 F.3d 734 (6th Cir. 1994) (debtor was created at the eleventh hour for purposes of filing for Chapter 11 relief).

vi. Where there existed probable cause to believe tax obligation was non-dischargeable debt, the stay was vacated. *In re McGaughey*, 24 F.3d 904 (7th Cir. 1994) (the court also found that the interest of the IRS was not "adequately protected" supporting relief for "cause").

vii. Absent extraordinary circumstances, an unsecured creditor is not entitled to relief from stay. *In re Tristar Automotive Group, Inc.*, 141 B.R. 41 (Bankr. S.D.N.Y. 1992).

viii. Where debtor has posted supersedeas bond to stay enforcement of a non-final judgment in a tort action, the judgment creditor was granted relief from the stay to continue prosecution of the action to the extent of the bond. *In re Keene Corp.*, 171 B.R. 180 (Bankr. S.D.N.Y. 1994).

ix. A bankruptcy court can "for cause" *sua sponte* modify the stay in order to allow litigation to proceed in another forum. *In re Laventhol & Horwath*, 139 B.R. 109 (S.D.N.Y. 1992); *In re Megan-Racine Assocs., Inc.*, 180 B.R. 375 (Bankr. N.D.N.Y. 1995) (sua sponte order modifying automatic stay was entered allowing utility to bring application/petition to FERC for determination of utility rate issues).

g. "Cause Shown": Family Law Cases - §362(d)(1)

i. Relief from the stay is routinely granted in cases involving:

(1) custody,

(2) domestic violence, or

(3) other matters that are unrelated, or remotely related, to a bankruptcy case. In re Cole, 202 B.R. 356 (Bankr. S.D.N.Y. 1996); In re Newman, 196 B.R 700 (Bankr. S.D.N.Y. 1996).

ii. The stay was vacated to permit the non-debtor former spouse to liquidate and enforce her claims against the debtor for prepetition and postpetition child support areas. *In re Kriss*, 217 B.R. 147 (Bankr. S.D.N.Y. 1998).

h. Adequate Protection of Secured Creditor's Interest in Debtor's Property: § 362(d)(1)

i. Bankruptcy Code §§ 362(d)(1), 363 and 364 all refer to the requirement of "adequate protection" of a non-debtor party's interest in a debtor's property. 11 U.S.C. §§ 362(d)(1), 363 and 364.

ii. Lack of adequate protection is grounds for relief from the automatic stay pursuant to § 362(d)(1). See discussion, supra,.

iii. "Adequate protection" requires that a creditor be protected from value loss. *United States v. Whiting Pools*, 462 U.S. 1918, 204 (1983); see *In re Elmira Litho, Inc.*, 174 B.R. 892 (Bankr. S.D.N.Y. 1994) (The most persuasive proof of declining value is quantitative; e.g., appraisal information showing that collateral is worth less at the date of the hearing on the lift stay motion than it was at the filing date).

iv. Failure to maintain insurance or failure to keep property in good repair are evidence of "threats of a decline in value" that may justify stay relief because of a lack of "adequate protection." *Id.*

v. Once a lack of adequate protection is alleged, the burden of proof on the issue of "adequate protection" is on the party opposing the motion for relief. *See In re Grant Assocs.*, 1991 U.S. Dist. LEXIS 1245 (S.D.N.Y. Feb. 5, 1991).

vi. Adequate protection is an issue of fact to be determined on a case-by-case basis. See *In re Pine Lake Village Apartment Co.*, 21 B.R. 395 (S.D.N.Y. 1982).

vii. "Cash collateral" (as defined and described below) represents a type of collateral that may be readily dissipated, and, because of its unique nature, it demands comprehensive protection. *See In re George Ruggiere Chrysler-Plymouth, Inc.*, 727 F.2d 1017, 1019 (11th Cir. 1984) ("Because security interests are `property rights' protected by the Fifth Amendment from public taking without just compensation ... the Bankruptcy Court cannot allow the secured interest to be threatened by improper use of cash proceeds.") (citation omitted).

viii. If a motion for modification of the automatic stay is denied, then a secured creditor or other entity having an interest in the debtor's property must receive adequate protection against further deterioration of its position. *In re Prudential Lines, Inc.*, 69 B.R. 439 (Bankr. S.D.N.Y. 1987).

ix. A secured creditor has the right to be protected against any decline in value that collateral could suffer if the automatic stay is in effect, as, absent the stay, the creditor could foreclose preventing any further loss in the value of its collateral. *In re Pine Lake Village Apartment Co.*, 21 B.R. 395 (S.D.N.Y. 1982).

x. In *United Savings Ass'n v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365, 108 S. Ct. 626 (1988), the Supreme Court rejected the concept of an undersecured creditor being entitled to recover lost opportunity costs, including the payment of postpetition interest.

xi. Alleged oversecured creditor was not entitled to receive periodic payments during the chapter 11 case for accruing post petition interest on its claim, as part of its adequate protection. *Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc.)*, 54 F.3d 722 (11th Cir.), cert. denied, 116 S. Ct. 488 (1995).

i. Examples of adequate protection

i. **Equity Cushion** – Equity exists in property only if its value exceeds all encumbrances against it. *In re Diplomat Electronics*

Corp., 82 B.R. 688, 692 (Bankr. S.D.N.Y. 1988); *In re St. Peter's School*, 16 B.R. 404, 408 (Bankr. S.D.N.Y. 1982). Thus, an "equity cushion" is the amount by which the value of collateral in question exceeds the value of all encumbrances against it.

ii. If an equity cushion exists, relief from the stay may not be granted. *In re Tucker*, 5 B.R. 180 (Bankr. S.D.N.Y. 1980); *In re Breuer*, 4 B.R. 499 (Bankr. S.D.N.Y. 1980). Conversely, where the mortgaged property was only worth $20,000 and the amount owing from debtor was $32,800, there was no equity cushion and no adequate protection, so relief from the stay was granted. *In re Pittman*, 7 B.R. 760 (Bankr. S.D.N.Y. 1980).

iii. Whether equity cushion provides adequate protection is question to be determined on case-by- case basis. *LNC Investments, Inc. and Charter National Life Insurance Company v. First Fidelity Bank, et al.*, 1995 U.S. Dist. LEXIS 5065 (S.D.N.Y. April 19, 1995).

iv. In determining whether there is equity in the property for the purpose of determining whether the stay should be modified, vacated or lifted, junior liens are relevant, whether or not the junior secured creditors have joined in the motion. However, junior security interests are irrelevant with respect to question of computing equity cushion, for purposes of determining if senior secured creditor lacks adequate protection. *In re Indian Palms Assoc.*, Ltd., 61 F.3d 197 (3d Cir. 1995).

v. An equity cushion may not provide adequate protection if the cushion is eroding by the accrual of interest or depreciation of the collateral's value. *In re Kost*, 102 B.R. 829 (D. Wyo. 1989); *but see Delta Resources*, 54 F.3d at 730 ("[A]n oversecured creditor's interest in property which must be adequately protected encompasses the decline in the value of the collateral only, rather than perpetuating the ratio of the collateral to the debt.")

vi. **Periodic Cash Payments** – Periodic cash payments in accordance with § 361(1) are allowed to compensate for any decrease in the value of the collateral (resulting from the stay). *In re East-West Assoc.*, 110 B.R. 675 (Bankr. S.D.N.Y. 1990).

vii. **Super-priority Claims** – Debenture holders, whose first lien on plant of debtor would be primed under § 364(d)(1) by a first lien of $10 million to be granted in favor of lenders who would provide additional financing to the debtor, were adequately protected so as to permit the granting of superpriority status to lender's debt, when replacement liens in favor of debenture holders on debtor's other facilities, valued at $52.4 million on a going concern basis, would

protect priming of debenture holders' lien by $10 million. *In re Beker Indus. Corp.*, 58 B.R. 725 (Bankr. S.D.N.Y. 1986).

viii. **Additional or Replacement Liens** – When debtor's helicopters, which were subject to creditor's security interest, crashed, security interest was adequately protected and relief from stay was not granted, as the debtor provided replacement liens on helicopters to be purchased with insurance proceeds. *In re Island Helicopter Corp.*, 63 B.R. 515 (Bankr. E.D.N.Y. 1986).

ix. **Indubitable Equivalent** – This is the "catch-all" provision of § 361(3), granting courts discretion to fashion the "adequate protection" provided to a secured party. *See In re Swedeland Dev. Grp., Inc.*, 16 F.3d 552 (3d Cir. 1994).

x. In real estate cases, adequate protection may include maintaining a receiver of rents appointed under non- bankruptcy law. *See In re CCN Realty Corp.*, 19 B.R. 526 (Bankr. S.D.N.Y. 1982). Section 543(d) of the Bankruptcy Code provides:

> After notice and a hearing, the bankruptcy court
>
> (1) may excuse compliance with subsection (a), (b) or (c) of this section [543], if the interest of creditors and, if the debtor is not insolvent, if equity security holders would be better served by permitting a custodian to continue in possession, custody, or control of such property....
>
> 11 U.S.C. § 543(d)(l). A receiver appointed prepetition by the state court is a "custodian," as the term is used in § 543. *In re CCN Realty Corp.*, 19
>
> B.R. at 528 (citation omitted).
>
> New York bankruptcy courts have identified three factors supporting the maintenance of a receivership during the pendency of a bankruptcy case, including
>
> -
>
> (1) insufficient income from the property to fund a reorganization;
>
> (2) the likelihood that the debtor will fail to manage the property for the creditors' benefit; and
>
> (3) prior debtor mismanagement. *Le Sannom Building Corp. v. Nathanson*, 1993 U.S. Dist. LEXIS 11677 (citations omitted); *see also In re Dill*, 163 B.R.

221, 225 and 227 (E.D.N.Y. 1994); *In re CCN Realty Corp.*, 19 B.R. at 529 (receivership continued to preserve and protect rent proceeds); *In re Powers Aero Marine Services, Inc.*, 42 B.R. 540, 546 (Bankr. S.D. Tex. 1984) (receivership continued because of dim reorganization prospects); *In re WPAS, Inc.*, 6 B.R. 40, 4 (Bankr. M.D. Fla. 1980) (receivership continued because of prior debtor mismanagement).

j. Lifting the Stay under 362(d)(2) – "Lack of Equity in the Property"

i. Creditor was entitled to relief from the automatic stay, as debtor had no equity in the real property (subject to the lender's mortgage) and the rents from the property were not available for use in debtor's reorganization. *In re Jason Realty, Ltd. Partnership*, 59 F.3d 423 (3d Cir. 1995).

ii. Equity exists in property only if its value exceeds all encumbrances against it. *In re Diplomat Electronics Corp.*, 82 B.R. 688, 692 (Bankr. S.D.N.Y. 1988); *In re St. Peter's School*, 16 B.R. 404, 408 (Bankr. S.D.N.Y. 1982).

iii. In determining whether there is equity in the property for the purpose of determining whether the stay should be modified, vacated or lifted, junior liens are relevant, whether or not the junior secured creditors have joined in the motion. However, junior security interests are irrelevant with respect to question of computing equity cushion, for purposes of determining if senior secured creditor lacks adequate protection. *In re Indian Palms Assoc., Ltd.*, 61 F.3d 197 (3d Cir. 1995).

k. Lifting the Stay under 362(d)(2) – "Necessary" For Reorganization

i. When the debtor has no equity in the encumbered property, the debtor must prove by a preponderance of the evidence that the property is "necessary for an effective reorganization'." *United States Savings Assoc. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 375 (1988) (citations omitted).

ii. The debtor must prove that the encumbered property "is essential for an effective reorganization that is in prospect." *Timbers*, 484 U.S. at 375-76.

iii. Facts showed there was no prospect for an effective reorganization, as (a) debtor's projected cash flow was insufficient to satisfy mortgagee's secured claim, and (b) the deficiency claim of the undersecured lender could not be classified separately from other unsecured claims. *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552

(3d Cir. 1994).

iv. The stay was vacated where secured creditor was undersecured, and the debtor failed to show the existence of a reasonable possibility of a successful reorganization within a reasonable time. *See John Hancock Mut. Life Ins. v. Route 37 Business Park Assoc.*, 987 F.2d 154 (3d Cir. 1993).

v. "The Debtor's burden of establishing a `reasonable possibility of a successful reorganization within a reasonable time' increases as time passes over the course of the proceedings." *In re 160 Bleecker Street Associates*, 156 B.R. 405, 411 (S.D.N.Y. 1993); *accord In re Ritz-Carlton of D.C., Inc.*, 98 B.R. 170, 172 (S.D.N.Y. 1989). A good discussion of the debtor's growing burden is set forth in *In re Grand Traverse*, 150 B.R. 176, 183 (Bankr. W.D. Mich. 1993) aff'd, 151 B.R. 792 (W.D. Mich. 1993).

20. Violations of the Automatic Stay

a. Courts are sharply divided on the issue of whether acts taken in violation of the stay are void *ab initio* or merely voidable. *See In re Profile Systems, Inc.*, 193 B.R. 507, 511 (Bankr. D. Minn. 1996) (citing cases holding for each proposition).

b. The Courts of Appeals for the Second and Ninth Circuits found acts violating the stay to be void, rather than voidable. *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427 (2d Cir. 1987), *cert. denied*, 485 U.S. 1035 (1988); *Hillis Motors, Inc. v. Hawaii Auto Dealers Ass'n*, 997 F.2d 581 (9th Cir. 1993). Other courts have held stay violations to be voidable. *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994); *Easey v. Pettibone Mich.*, 990 F.2d 905 (6th Cir. 1993).

c. Postpetition foreclosure sale of debtor's residence in a chapter 13 was not void by virtue of the automatic stay when creditors lacked notice of debtor's second bankruptcy filing. *In re Jones*, 63 F.3d 411 (5th Cir. 1995). The bankruptcy court properly declined to void the sale pursuant to powers granted to it under § 362(d) of the Bankruptcy Code, as creditors were not commercial lenders and were good faith purchasers without notice of the chapter 13 filing. *Id.*

d. Conditional oral confirmation order in Chapter 12, later ratified by written order, impliedly banned non-debtor from proceeding with sheriff's sale. Held: The sale would be void, as creditor's conduct in proceeding with such sale with knowledge of the conditional confirmation order constituted bad faith. *In re Easton*, 882 F.2d 312 (8th Cir. 1989).

e. State court's postpetition execution of judgment violated the automatic stay. *In re Tornheim*, 181 B.R. 161 (Bankr. S.D.N.Y. 1995), *appeal dismissed*, 1996 W.L. 79333 and 1996 U.S. Dist. Lexis 1952 (S.D.N.Y.).

f. An attempt by residential lender to add a bankruptcy monitoring fee to a debtor's monthly mortgage invoice was a willful violation of the automatic stay. *In re Stack*, 1999 W.L. 1295835 (Bankr. W.D.N.C.)

g. The postponement and announcement of an adjourned date for a sheriff's foreclosure sale, under Pennsylvania law, did not violate the automatic stay. *In re Taylor*, 178 F.3d 698 (3d Cir. 1999), *cert. denied*, 528 U.S. 1079, 173 120 S.Ct. 797, 145 L. Ed. 2d 672 (2000). Postponement was consistent with the stay, and, although a new date was announced at the sale, no act occurred to prejudice the debtor, as the creditor, in the interim, properly moved for and obtained relief from the stay on notice to the Debtor. Id.

h. Remedies for Violation of Stay

i. Section 362(k) of the Bankruptcy Code, formerly Section 362(h), provides for damages to any "individual" injured by a willful violation of the stay. Thus, any act taken in violation of automatic stay, with knowledge that the stay had been imposed by a bankruptcy filing, justifies award of sanctions; additional finding of maliciousness or bad faith on part of the offender warrants the imposition of punitive damages. *In re Crysen*, 902 F.2d 1098 (2d Cir. 1990).

ii. Damages for willful violation of automatic stay under Section 362(h) [what is now Section 362(k)] are available only to natural persons, not corporate debtors. *See In re Pace*, 56 F.3d. 1170 (9th Cir. 1995).

iii. Under the 2005 Act, Section 362(k) was amended to limit stay violation sanctions against creditors that believe in good faith that (the new) subsection (h) applied. In such case, the recovery is limited to actual damages.

iv. A related amendment to Section 342(g)(2) provides that the court may not impose a monetary penalty for failure to turn over property to the estate (or to the debtor, if the property is exempt) unless the violation occurs after the creditor has notice of the bankruptcy filing.

v. Court may assess monetary sanctions for violations of stay, even when violations have been inadvertent. *In re Fugazy*, 124 B.R. 426 (S.D.N.Y. 1991).

vi. *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) and its progeny, would appear to stand for the

proposition that Congress lacks the authority to provide for damage suits against the states for violating the automatic stay.

vii. It was held that § 105 was the appropriate source of a court's power for sanctioning a violation of the automatic stay where the debtor was a corporation. *Jove Eng'g v. I.R.S.*, 92 F.3d 1539 (11th Cir. 1996) on remand at 1997 (N.D. Ala. Aug. 21, 1997).

viii. In contrast, most Courts find that the proper means for debtors who are not natural persons to obtain compensation and punishment for willful violation of automatic stay is through contempt proceedings. *In re Chateaugay Corp.*, 920 F.2d 183 (2d Cir. 1990); *In re Stockbridge Funding Corp.*, 145 B.R. 797 (Bankr. S.D.N.Y. 1992).

i. Remedies: Federal Permeation - The Relationship of the Automatic Stay to State Consumer Protection Laws

State law claims under the West Virginia Consumer Credit and Protection Act were available to a debtor and were not preempted by the fact that the conduct complained of violated the automatic stay as well as the West Virginia Statute. *Sturm v. Providian Nat'l Bank*, 242 B.R. 599 (S.D. W.Va. 1999) It was not impossible for the non-debtor to comply with federal bankruptcy law and applicable state law, and the state law did not create an obstacle to the non-debtor's compliance with the stay and the accomplishment of the underlying purpose of the stay. Id.

21. Pre-filing Date Waivers of the Automatic Stay.

a. Contractual

i. A number of courts have held that a debtor may not waive the automatic stay, as the purpose of the stay is to protect creditors as well as the debtor. *See, e.g., Ostano Commerzanstalt v. Telewide Systems Inc.*, 790 F.2d 206 (2d Cir. 1986); *Farm Credit v. Polk*, 160 B.R. 870 (M.D. Fla. 1993); *In re Pease*, 195 B.R. 431 (Bankr. Neb. 1996).

ii. Other courts have enforced waivers of the automatic stay contained in a prepetition "work-out" agreement. *In re Darrell Creek Assocs.*, 187 B.R. 908 (Bankr. D.S.C. 1995); *In re Powers*, 170 B.R. 480 (Bankr. D. Mass. 1994); *In re Cheeks*, 167 B.R. 817 (Bankr. D.S.C. 1994); *In re Club Tower*, 138 B.R. 307 (Bankr. N.D. Ga. 1991).

iii. Prepetition waivers are enforceable in appropriate circumstances where enforcement does not offend public policy and third-party

creditors are not bound. *In re Atrium High Point Ltd. Partnership*, 189 B.R. 599 (Bankr. M.D.N.C. 1995); *In re South East Financial Assoc., Inc.,* 212 B.R. 1003, 1005 (Bankr. M.D. Fla. 1997).

iv. A Pennsylvania bankruptcy court expressly rejected *Club Tower* and held that a pre-petition waiver of the automatic stay was unenforceable, as enforcing the waiver would approximate the result of a waiver of the right to file bankruptcy. *In re Jenkins Court Assocs. Ltd. Partnership*, 181 B.R. 33 (Bank. E.D. Pa. 1995). The *Jenkins* court reviewed the legislative history of § 362 and found that the automatic stay existed to protect all creditors (as well as the debtor itself) from dismemberment of the debtor. Id. To enforce a pre-petition waiver by the debtor would frustrate this purpose. Id.

v. Several cases have accorded weight to the existence of a prepetition waiver in determining whether "cause" existed under § 362(d)(1) for relief from the stay. *See, e.g., In re Growers Properties No. 56. Ltd.*, 117 B.R. 1015 (Bankr. N.D. Fla. 1990).

4. DISCHARGE, PLAN CONFIRMATION, CONVERSION AND DISMISSAL