1978

Automatic Stays Under the New Bankruptcy Law

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# AUTOMATIC STAYS UNDER THE NEW BANKRUPTCY LAW

## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. INTRODUCTION AND GENERAL OBSERVATIONS</td>
<td>3</td>
</tr>
<tr>
<td>II. THE STAY OF SECTION 362</td>
<td>10</td>
</tr>
<tr>
<td>A. Scope of the Stay</td>
<td>10</td>
</tr>
<tr>
<td>1. Proceeding Against the Debtor on Prepetition Cause of Action</td>
<td>10</td>
</tr>
<tr>
<td>2. Enforcement of Prepetition Judgment</td>
<td>14</td>
</tr>
<tr>
<td>3. Dispossession of Property of or from the Estate</td>
<td>15</td>
</tr>
<tr>
<td>4. Creation, Perfection, and Enforcement of a Lien</td>
<td>17</td>
</tr>
<tr>
<td>5. Collection of Prepetition Claims</td>
<td>21</td>
</tr>
<tr>
<td>6. Setoff</td>
<td>22</td>
</tr>
<tr>
<td>7. Proceeding Before the United States Tax Court</td>
<td>23</td>
</tr>
<tr>
<td>B. Limitations on the Stay: Section 362(b)</td>
<td>24</td>
</tr>
<tr>
<td>1. Criminal Actions and Proceedings</td>
<td>24</td>
</tr>
<tr>
<td>2. Collection of Alimony, Maintenance, or Support</td>
<td>25</td>
</tr>
<tr>
<td>3. Perfection of Liens and Other Interests</td>
<td>26</td>
</tr>
<tr>
<td>4. Governmental Enforcement of Police or Regulatory Power</td>
<td>27</td>
</tr>
<tr>
<td>5. Setoff of Claims and Debts Involving Commodity Contracts</td>
<td>30</td>
</tr>
<tr>
<td>6. Foreclosure of Insured Mortgages of Multiple Housing Units by HUD</td>
<td>30</td>
</tr>
<tr>
<td>7. Issuance of Notice of Tax Deficiency</td>
<td>31</td>
</tr>
<tr>
<td>8. Application by SIPC for Protective Decree</td>
<td>33</td>
</tr>
<tr>
<td>9. Repossession of Transportation Equipment by Purchase-Money Creditors</td>
<td>34</td>
</tr>
<tr>
<td>C. Duration of the Stay</td>
<td>37</td>
</tr>
<tr>
<td>D. Reliefrom the Stay</td>
<td>40</td>
</tr>
<tr>
<td>1. Procedure</td>
<td>40</td>
</tr>
<tr>
<td>2. Grounds for Relief</td>
<td>43</td>
</tr>
<tr>
<td>E. Availability of Other Relief</td>
<td>47</td>
</tr>
<tr>
<td>III. THE AUTOMATIC STAY IN CHAPTER 9 CASES</td>
<td>48</td>
</tr>
</tbody>
</table>
IV. STAY OF ACTIONS AGAINST CODEBTORS IN CHAPTER 13 CASES .......................... 49
   A. The Scope of the Stay ......................... 51
   B. Duration of the Stay; Statute of Limitations .......... 53
   C. Relief from the Stay ........................... 54
   D. Constitutional Considerations ..................... 58
   E. Enforcement and Sanctions ........................ 60

V. SUMMARY AND CONCLUSIONS ....................... 61
AUTOMATIC STAYS UNDER THE NEW BANKRUPTCY LAW

Frank R. Kennedy*

I. INTRODUCTION AND GENERAL OBSERVATIONS

In *Mueller v. Nugent*,1 decided shortly after the enactment of the Bankruptcy Act of 1898, the United States Supreme Court declared that a petition in bankruptcy is "a caveat to all the world, and in effect an attachment and injunction." This judicial gloss, much quoted and applied since, was an early recognition that a stay of creditors from collecting their claims against the debtor and his property from and after the filing of a petition under the Bankruptcy Act is indispensable to bankruptcy administration. Unless the creditors are stayed, the debtor’s estate will be dismembered and the objective of equality of distribution defeated. The fresh start sought by the bankrupt in invoking the bankruptcy laws is likely to be compromised by permitting the continuation of actions against him. All the property of the bankrupt in his possession is brought into the custody of the bankruptcy court by the filing of the petition, and no interference with that custody can be countenanced without the court’s permission. The bankruptcy court’s control has been buttressed with statutory power and inherent power as a court of equity to enjoin litigation and acts of creditors and others insofar as necessary to effectuate bankruptcy objectives.2

When Congress exercised its bankruptcy power by amendment

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1 184 U.S. 1, 14 (1901).

2 See §§ 2a(15) and 11a of the Bankruptcy Act, 11 U.S.C. §§ 11(a)(15), 29(a) (1976). This is the last time that citation to 11 U.S.C. will be made in this article when the intended reference is to the Bankruptcy Act. The numbering of the sections of the Bankruptcy Act differs from their numbers in 11 U.S.C., and the numbering of the Bankruptcy Act, which corresponds to the original numbering in the legislation as enacted in the Statutes at Large, is that generally used in judicial opinions, briefs, treatises, and the literature about the bankruptcy laws. See note 7 infra in regard to subsequent references in this article to 11 U.S.C.
of the Bankruptcy Act of 1898 during the decade of the thirties to
authorize reorganization of financially distressed debtors, it ex-
tended the bankruptcy court’s protection of the debtor and its
property by granting exclusive jurisdiction of both to the bank-
ruptcy court from the filing of the petition\(^3\) and by supplementing
the injunctive powers of the bankruptcy court.\(^4\) In two reorganiza-
tion chapters, the court provided for automatic stays.\(^5\) Congress
thus recognized that continuation of the debtor’s enterprise during
the pendency of the reorganization case was crucial to any realistic
hope for rehabilitation. In actual practice under the reorganization
chapters, counsel for petitioners routinely sought and obtained
comprehensive injunctions at the threshold of the case against ac-
tions of creditors and others and against acts enforcing liens or
otherwise interfering with the estate of the debtor.

The Rules of Bankruptcy Procedure promulgated during the
years 1973 to 1976 formalized prevailing practice in bankruptcy and
reorganization cases by providing an automatic stay of most ac-
tions and proceedings against the debtor and the enforcement of
liens against the property of the debtor from the filing of the peti-
tion.\(^6\) The Rules made a significant procedural change, however,
by requiring the person objecting to the stay to file a complaint
seeking relief from the stay, though the burden of justification for
continuing the stay after the filing of such a complaint rests on the
party seeking its continuation where the stay operates against lien
enforcement.

The automatic stay rules have generated extensive litigation in
the bankruptcy courts. They appropriately bring before the court
early in any bankruptcy or reorganization case the clash between
secured creditors and others seeking to establish a right to prefer-
ential treatment as against other creditors and claimants against the
debtor and his property. Nevertheless, the automatic stay rules
have been given sympathetic application, and Congress has with
passage of a new bankruptcy law\(^7\) conferred statutory status on the

\(^3\) See §§ 77(a), 111, 311, 411, and 611 of the Bankruptcy Act, discussed in Kennedy, The
as Automatic Stay I].

\(^4\) See §§ 77(j), 113, 116(4), 314, 414, 614 of the Bankruptcy Act, discussed in Automatic Stay
I, supra note 3, at 189 n.66.

\(^5\) See §§ 148 and 428 of the Bankruptcy Act, discussed in Automatic Stay I, supra note 3,
at 192-94.

\(^6\) See Automatic Stay I, supra note 3, at 190 n.78.

\(^7\) Pub. L. No. 95-598, 92 Stat. 2549 (1978). Section 401(a) repeals the Bankruptcy Act. For
most purposes the repeal is effective as of October 1, 1979. The Bankruptcy Act is the title
given to the act “to establish a uniform system of bankruptcy throughout the United
States,” approved July 1, 1898, as amended many times before and since 1950. 64 Stat. 1113
(1950). The new law contains four titles. Section 101 of the new law enacts Title I, which is a
codification and enactment of Title 11 of the United States Code, entitled “Bankruptcy.”
automatic stay for all classes of cases commenced under the bankruptcy laws.\(^8\)

The provisions for stays in the new law follow recommendations of the Commission on the Bankruptcy Laws of the United States.\(^9\) At the time the Commission submitted its Report five of the automatic stay rules had been proposed, but none of the Rules of Bankruptcy Procedure had become effective. The derivation of the Commission's proposal for a general automatic stay from the automatic stay rules that had been published for study and comment by the bench and bar was obvious and was acknowledged in the Commission's Report.\(^11\) The Commission proposed no change in the grant of rule-making authority to the Supreme Court respecting \(^6\)

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\(^8\) The relevant sections of the new law are 11 U.S.C.A. §§ 362, 922, 1301 (West Supp. 1979).


The Commission proposed no special provision for a stay in the chapter for adjustment of debts of public agencies and instrumentalities and political subdivisions, since it recommended that the general stay provisions of § 4-501 should apply in cases under that chapter. COMMISSION REPORT II § 8-101, at 263. There was thus no counterpart of 11 U.S.C. § 922 in the Commission's Bankruptcy Act of 1973.

The Commission's proposal for an automatic stay of creditors' collection from codebtors was set out in § 6-208. COMMISSION REPORT II at 214. It is discussed in the text accompanying notes 210-13 infra.


\(^11\) COMMISSION REPORT II, supra note 9, at 118.
the practice and procedure under the Bankruptcy Act, and the proposals of the Commission for statutory provisions for stays were not intended to restrict the Supreme Court's power to prescribe new and different rules respecting stays in cases arising under the bankruptcy laws.

While sections 362 and 922 of the new law at least bear the imprint of the automatic stay rules that have been promulgated and applied during the last half-dozen years, the new law significantly changes the role of the Supreme Court in developing the law governing stays. The enabling section, 28 U.S.C. § 2075, as it has been amended, now restricts the authority of the Court by the deletion of a provision that heretofore annulled statutory law in conflict with the rules duly promulgated by the Court pursuant to the congressional grant. The Court retains rule-making authority respecting practice and procedure in cases and proceedings commenced under Title 11, and the draftsmen of Public Law 95-598 have been careful to avoid elaborating procedural detail. Nevertheless, the statutory provisions dealing with stays cover several pages. If the Supreme Court undertakes to promulgate any rules affecting stays, they can only supplement the statute in ways that do not conflict with it.

12 COMMISSION REPORT II, supra note 9, at 42. The Commission's proposed § 2-204(a) read as follows: "Rules of Bankruptcy Procedure to govern practice and procedure in the bankruptcy courts may be prescribed by the Supreme Court as provided in Title 28, United States Code, § 2075."

13 The rule making authority of the Supreme Court in respect to bankruptcy procedure as heretofore prescribed by 28 U.S.C. § 2075 (1976), read as follows:

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure under the Bankruptcy Act.

Such rules shall not abridge, enlarge, or modify any substantive right.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Pub. L. No. 95-598, § 247, 92 Stat. 2549 (1978), amends § 2075 in two ways. First, it strikes out "under the Bankruptcy Act" in the first paragraph and inserts in lieu thereof "in cases under Title II"; and second, it strikes out the last sentence of the section. The amendment became effective on enactment of Pub. L. No. 95-598, § 402(d), 92 Stat. 2549 (1978).

The scope of the rule-making power of the Supreme Court under 28 U.S.C. § 2075 before the amendment is discussed in Automatic Stay I, supra note 3, at 192-94.

14 The House Report accompanying H.R. 8200 explained: "With the extensive revision and modernization of the bankruptcy law proposed by this bill, in which nearly all procedural matters have been removed and left to the Rules of Bankruptcy Procedure, the need that currently may exist to permit the Supreme Court's rules to supersede the statute disappears." BANKRUPTCY LAW REVISION, H.R. REP. No. 595, 95th Cong., 1st Sess. 449 (1977) [hereinafter cited as HOUSE REPORT]. See also id. at 292-93; S. REP. No. 989, 95th Cong., 2d Sess. 158 (1978) [hereinafter cited as SENATE REPORT].
To a considerable extent, though not entirely, the amendment of the rule-making grant represents a regression to the law under which the old General Orders were promulgated by the Supreme Court. Until 1964, section 30 of the Bankruptcy Act authorized the Court to prescribe "[a]ll necessary rules, forms, and orders as to procedure and for carrying the provisions of this title into force and effect." That authority, however, was read to require all such rules, forms, and orders to conform to the statute. Thus, there were judicial rulings that some of the orders and forms promulgated by the Court pursuant to former section 30 exceeded its authority. When Congress finally was persuaded in the early thirties to vest authority in the Supreme Court to make rules for civil procedure in the federal district courts, it was recognized that significant procedural reform would not be accomplished if the Court was not freed from the constraints imposed by the procedural law in the statute books. Accordingly, the enabling acts under which the Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Admiralty Procedure were promulgated contained provisions nullifying all statutory and other laws in conflict with the rules. When Congress was persuaded to enact a comparable rule-making grant for practice and procedure under the Bankruptcy Act in 1964, the limited authority of section 30 was superseded by section 2075 of Title 28 with a provision giving the same paramount effect to the Rules of Bankruptcy Procedure vis-a-vis "laws in conflict" as are given to the Federal Rules of Civil Procedure. The amendment of section 2075 of Title 28 effected by the new bankruptcy law does not restore the law that prevailed under former section 30 of the Bankruptcy Act, because the Bankruptcy Act bristles with procedural provisions in practically every section and subdivision. As previously noted, the new

15 See, e.g., Meek v. Centre County Banking Co., 268 U.S. 426, 434 (1926) (General Order 8 and former Official Form No. 2 invalidated as not warranted by the Bankruptcy Act); Damon v. Damon, 283 F.2d 571, 572 (1st Cir. 1960) (the scope of General Order 30 restricted by reference to § 9 of the Bankruptcy Act).
16 The first enabling act, pursuant to which the Federal Rules of Civil Procedure were originally promulgated, was enacted by Congress in 1934. Pub. L. No. 73-415, 48 Stat. 1064 (1934). This grant has been extended by numerous amendments and now appears in 28 U.S.C. § 2072 (1976). The rule-making grant for cases under the Bankruptcy Act came thirty years after the original enabling act. 28 U.S.C. § 2075 (1976).
17 See 2 MOORE’S FEDERAL PRACTICE ¶ 1.02[5] (2d ed. 1978). In identical language, sections 2072, 2073, and 2075 of Title 28 of the United States Code as originally enacted, provided that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." These sections were the enabling acts under which the Federal Rules of Civil Procedure, the Admiralty Rules, the Federal Rules of Appellate Procedure, and the Rules of Bankruptcy Procedure were promulgated. Section 2076 of Title 28 of the United States Code, which prescribes the Supreme Court’s power respecting the Federal Rules of Evidence, is more guarded in its delegation of authority to the Supreme Court. The history of this section is discussed in 10 MOORE’S FEDERAL PRACTICE §§ 45-67 (2d ed. 1976).
law leaves ample room for the exercise of the Court's rule-making authority. 18

The withdrawal from the Supreme Court of the power to modify any procedural provision of the statute is nevertheless a serious defect of the new law. The House Report declared that "[s]ince the Rules [of Bankruptcy Procedure] have become effective, there has been continual controversy." 19 If so, the controversy has been little noted in published commentaries. 20 While the House Report asserted that the "Rules' authors interpreted that grant [of rulemaking authority] very liberally," 21 the most extended critique of the Rules found the greater fault to be the narrowness of the authors' construction of the scope of their authority. 22 A staff report of the Securities and Exchange Commission criticized a preliminary draft of the Chapter X Rules for their numerous departures from the Act and noted that many of the Rules dealt with matters of administration quite different from the kinds of procedure and practice found in the Federal Rules of Procedure and other rules promulgated by the Supreme Court under the several enabling acts. 23 The body of rules formulated and promulgated under each congressional grant has distinctive characteristics, but that fact may be acknowledged without conceding that only rules that follow the familiar mold of previously promulgated rules of procedure are valid. The House Report noted that several of the Rules have been challenged in the courts, and that "some have been declared beyond the scope of the rulemaking authority." 24 The correctness of these rulings need not

18 See note 14 supra.
19 HOUSE REPORT, supra note 14, at 292.
20 There has been a plethora of recent commentary regarding the rule-making process as exercised by the Supreme Court pursuant to Congressional enabling acts. See, e.g., J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES xii, 64 (1977); C. WRIGHT, FEDERAL COURTS §§ 62-63 (3d ed. 1976); Freidenthal, The Rule Making Power of the Supreme Court: A Contemporary Crisis, 27 STAN. L. REV. 673 (1975); Hazard, Book Review, 87 YALE L.J. 1284 (1978); Lesnick, The Federal Rule-Making Process: A Time for Re-examination, 61 A.B.A.J. 579 (1975); Weinstein, Reform of Federal Rulemaking Procedures, 76 COLUM. L. REV. 905, 919 (1976). In none of these comments is there any indication that controversy has arisen in regard to the Rules of Bankruptcy Procedure.
23 HOUSE REPORT, supra note 14, at 292, citing only Wolff v. Wells Fargo Bank (In re Moralez), 1 Bankr. Ct. Dec. 1210 (N.D. Cal. 1974). This ruling by Bankruptcy Judge Hughes
be debated here. The Rules have been generally accorded a cordial reception and application by the courts.\textsuperscript{25} A hyperbolic reference was made in the House Report to a raging controversy "on the issue of the propriety of the Supreme Court action undoing Acts of Congress, on the objectivity of the Supreme Court should it be required to rule on the validity of a Rule that it promulgated, and over the confusion for practitioners resulting from inconsistent laws and Rules."\textsuperscript{26} The enabling legislation explicitly reserved to Congress the opportunity to review any rules before they become effective,\textsuperscript{27} and there is no serious doubt about its power to repeal any rule that it finds objectionable.\textsuperscript{28} So long as any rulemaking authority is vouchsafed to the Supreme Court,\textsuperscript{29} question may arise as to its objectivity in interpreting its own rules.\textsuperscript{30} It is appropriate for the new bankruptcy legislation to contain, as does the prior Act, statutory authority for stays of proceedings in other courts. It is regrettable that Congress has set in concrete many features of the procedure for obtaining relief from the stay.\textsuperscript{31}

\textsuperscript{25} The case law construing the Rules is already extensive. Six volumes of the Collier treatise are devoted exclusively to the Rules of Bankruptcy Procedure (Volumes 12, 13, 13A, 14, 14A, and 15). Most of the cases appearing in the 18 volumes of Collier Bankruptcy Cases, which commenced publication in 1974, involve an application of one or more of the Rules of Bankruptcy Procedure. The Collier treatise is now in its fourteenth edition, and its looseleaf feature permits continual updating as well as the publication of annual supplements for insertion at the front of each of its 27 volumes. Publication of the fourteenth edition started in 1940, and some portions of the text and footnotes have undergone numerous changes since. Hereinafter the Collier treatise on Bankruptcy will be cited as COLLIER with a reference to the volume, the pertinent section or page, and, to the extent practicable, the date of the publication of the material cited.

\textsuperscript{26} \textit{HOUSE REPORT}, supra note 14, at 292.

\textsuperscript{27} Rules proposed for promulgation by the Supreme Court must be reported to Congress not later than the first day of May of the year in which they are to become effective and generally cannot become effective until the expiration of 90 days after being reported to Congress. 28 U.S.C. §§ 2072, 2075 (1976). The waiting period for amendments to the Federal Rules of Evidence is 180 days after being reported, and any amendment dealing with a privilege must be approved by Congress before it becomes effective. 28 U.S.C. § 2076 (1976).


\textsuperscript{29} As the House Report made clear, the Supreme Court's rulemaking authority is extensive under Public Law No. 95-598 by virtue of the deliberate effort of the draftsmen to restrict the number of procedural provisions in the new law. \textit{See note 14 supra.}

\textsuperscript{30} \textit{See J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 96-104 (1977).}

\textsuperscript{31} The authors of a recently published commentary on automatic stays are also oblivious to the objections to freezing procedure into a statutory mold. Indeed, they proposed to elabo-
II. THE STAY OF SECTION 362

A. Scope of the Stay

A petition filed under Title 11 triggers an automatic stay under section 362, just as the filing of a petition does under the previous Act and the Rules of Bankruptcy Procedure. As under prior law, the stay becomes operative immediately whether the petition is voluntary or involuntary. When a petition is filed by husband and wife in a joint case, the stay takes effect with respect to both debtors and their property and the property of their estates. Unlike prior law, section 362 does not recognize or permit any different effect to be given the stay because of the chapter under which the case was commenced. Any rule that would prescribe a different procedure for enforcing or obtaining relief from a stay by reference to the chapter under which the case was brought would be vulnerable to challenge as in conflict with Title 11.

While the new bankruptcy legislation imposes some limitations on the stay not found in the previous law, section 362 is notable for enlarging the scope of the stay as it applies in liquidation cases so that it generally is given the same effect as the stay now has in debtor relief cases.

32 See Automatic Stay I, supra note 3, at 178 & nn. 5 & 6.
33 11 U.S.C.A. § 302 (West Supp. 1979). A single petition may be filed by a husband and wife to commence a joint case, and it is a matter of judicial discretion how far the debtors' estates shall be consolidated.
34 See note 6 and the accompanying text supra.
35 Rule 401, applicable in liquidation cases, operates as a stay only of actions against the...
The automatic stay operates in the same way against all entities, including governmental units, except as provided in section 362(b). The exception is a substantial limitation. A governmental unit is explicitly protected against the stay by two paragraphs of subsection (b) that apply when the unit is suing to enforce the unit's police or regulatory power. Clearly, the purpose of these paragraphs is to overrule decisions applying the automatic stay to proceedings to enforce state environmental control laws.36 On the other hand, the statutory stay is explicitly made applicable to an administrative proceeding by section 362(a)(1).37 This paragraph resolves a conflict among opinions construing the automatic stay rules in debtor rehabilitation cases.38

There are eight paragraphs of section 362(a) setting forth the kinds of matters subject to the statutory stay. The stay operates against

1. a judicial, administrative, or other proceeding against the debtor, including the issuance or employment of process;
2. the enforcement of a judgment against the debtor or the property of the estate;
3. any act to obtain possession of property of or from the estate;
4. any act to create, perfect, or enforce a lien against property of the estate;
5. any act to create, perfect, or enforce a lien against the debtor's property securing a prepetition debt;
6. any act to collect, assess, or recover a prepetition claim against the debtor;
7. setoff of any prepetition debt owing to the debtor against any claim of the debtor; and

bankrupt on provable claims. The automatic stays applicable under the chapter rules, on the other hand, operate generally to bar proceedings against the debtor without regard to the provability of the claims on which the proceedings are based. The automatic stay of § 362 of Title 11 operates, in liquidation and rehabilitation cases alike, against proceedings on claims against the debtor irrespective of their provability. A case illustrative of the difference in the scope of the stay under the rules and under the statute is Moshier v. Brown, 4 Bankr. Ct. Dec. 119 (Ref., N.D. Cal. 1978). There the automatic stay of Rule 401 was dissolved (and should have been held inoperative) as against an action for assault and battery pending at the time of the alleged tortfeasor's bankruptcy because the underlying claim was not provable. Under Title 11, as under the chapter stay rules, the nonprovability of the underlying claim would be irrelevant to the operation of the automatic stay.

36 See Automatic Stay I, supra note 3, at 207 n.162 and notes 110-11 infra.
37 11 U.S.C.A. § 362(a)(1) (West Supp. 1979). The House Report explains: "All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings. Proceedings in this sense encompasses civil actions as well, and all proceedings even if they are not before governmental tribunals." HOUSE REPORT, supra note 14, at 340. Insofar as the reference to "civil actions as well" suggests that criminal proceedings may be stayed, the implication is explicitly negated in § 362(b)(1), discussed in the text accompanying notes 102-03 infra.
38 See Automatic Stay I, supra note 3, at 209 n.172.
(8) a proceeding by the debtor before the United States Tax Court.

I. Proceeding Against the Debtor on Prepetition Cause of Action—Like the automatic stay rules, the statutory stay of section 362(a)(1) bars the continuation of any pending proceeding as well as the commencement of a postpetition proceeding against the debtor. The statute limits applicability of the stay to a proceeding that could have been commenced, or that seeks recovery on a claim that arose, before the filing of the petition. Thus, unlike the chapter stay rules, section 362 does not affect an action brought against a debtor on a postpetition claim or any proceeding involving postpetition transactions or conduct of the debtor.

A premise of the automatic stay rules applicable in chapter cases is that any proceeding against the debtor is potentially injurious to the effort to reorganize or rehabilitate the debtor, irrespective of the nature of the claim or cause underlying the proceeding. If the proceeding involves postpetition matters that cannot be dealt with in the plan, the court may grant relief from the stay. The premise of the statutory stay, on the other hand, is that a proceeding against the debtor based on a postpetition claim or cause is so unlikely to interfere with the successful conduct and completion of a case pending under Title 11 that it should not be automatically stayed.

39 Section 362 of Title 11 does not make any particular reference to other cases or proceedings under Title 11, but the broad stay of the commencement of a judicial proceeding against a debtor, including the issuance or employment of process, presumably precludes the filing of any involuntary petition against the debtor under Title 11. Like the chapter automatic stay rules discussed in Automatic Stay I, supra note 3, at 209 n.159, 362 also appears to preclude the continuation of any previously initiated case pending under Title 11 or any other law, and there is no exception for the continuation of a reorganization or other rehabilitation case. The stay section does not purport to restrict the filing of any voluntary petition by a debtor by or against whom a petition has previously been filed under Title 11. There is no provision in the statute authorizing consolidation or other disposition of competing cases involving the same or a related debtor. The draftsmen have left matters of this nature to be dealt with by rules of procedure. See HOUSE REPORT, supra note 14, at 294.

40 See Automatic Stay I, supra note 3, at 209 n.159.

41 The House and Senate Reports do not explain or comment on this restriction on the scope of the stay, but it goes well beyond the exception in the Commission's proposed § 4-501(a)(1)(A) for an action authorized by 28 U.S.C. § 959(a) (1976). The latter provision authorizes a person dealing with a trustee, receiver, or debtor operating a business under the Bankruptcy Act, or injured by such operation, to sue in any court of competent jurisdiction without the consent of the bankruptcy court. Such a suit would nevertheless be within the jurisdiction of the bankruptcy court. See 28 U.S.C. § 1471(b), as amended by Pub. L. No. 95-598, § 241(a), 92 Stat. 2549 (1978).

Therefore, a stay is appropriate only if the debtor's trustee can persuade the bankruptcy court to enjoin the other proceeding.

The limitations on the application of paragraph (1) may raise questions as to the operation of the stay against certain actions that are now subject to the automatic stay of the Rules. Consider, for example, an action by a codebtor entitled to reimbursement or subrogation who has paid a creditor after the filing of the petition under Title 11,\(^{42}\) or an action on a note or other obligation of the debtor that did not mature or on which there had been no default until after the filing of the petition. Since the word "claim" is defined in section 101(4) to include a "contingent" or "unmatured" claim, there should be no doubt of the intent to bring these types of actions within the sweep of the stay.

The purpose to reach a nonjudicial proceeding, whether governmental or nongovernmental, is made explicit, but a suggestion in the House Report\(^{43}\) that license revocation proceedings are stayed is hard to reconcile with the limitations previously noted in subsection (b). Such a proceeding is a classic example of one "to enforce [a] governmental unit's police or regulatory power," and there can be little doubt of the congressional intent to overrule contrary case law under the rules.\(^{44}\)

The issuance or employment of process is explicitly made subject to the statutory stay. Such a step in litigation seems to be otherwise covered by the references to "a judicial ... proceeding" and "the enforcement ... of a judgment" in paragraphs (1) and (2).\(^{45}\) The House Report ventures a laborious explanation of

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\(^{42}\) A surety's or codebtor's right of reimbursement or subrogation is not enforceable until he has paid at least a part of the debt for which he is liable to the creditor. L. SIMPSON, SURETYSHIP § 48 (1950). A similar situation is presented when a negotiable instrument on which a debtor is secondarily liable is dishonored by the drawee after the filing of the petition. See J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 412, 419 (1972). A contingent claim of a surety or an endorser of a negotiable instrument executed by a primary debtor is nonetheless a contingent claim prior to the debtor's default and payment by the surety or secondarily liable party. Maynard v. Elliott, 283 U.S. 273 (1931); J. McLACHLAN, BANKRUPTCY § 139 (1956).


\(^{44}\) But cf. Teledyne Industries, Inc. v. Eon Corp., 373 F. Supp. 191, 203 (S.D.N.Y. 1974), where a general stay of all proceedings against the debtor entered by a bankruptcy judge pursuant to § 314 of the Bankruptcy Act was held not to forbid compulsory production of documents by the debtor's officers. The production of the documents was sought in litigation instituted against a Chapter XI debtor and its officers and directors to recover damages for fraudulent misrepresentations, breach of fiduciary duty, and conversion, alleged to have occurred in connection with a subcontract entered into by the plaintiff with the debtor as a government contractor. The court concluded that compulsory production of the documents
the reference to the issuance of process, stating that the provision is designed "to prevent the issuance of a writ of execution by a judgment creditor of the debtor to obtain property that was property of the debtor before the case, but that was transferred, subject to the judgment lien, before the case." Enforcement of the judgment lien against the transferred property is said not to be prohibited by the other paragraphs of section 362(a), because they prohibit only the pursuit of property of the debtor or of the estate. Arguably, however, paragraphs (1), (2), and (6) stay the enforcement of a judgment against the debtor by the issuance or employment of any process or by any act, without regard to whose property is affected. It is not apparent why special language was designed for the case put in the House Report explanation, since the fact situation presented appears to be one appropriate for the grant of relief from the stay to permit enforcement of the lien against the transferred property. In any event, the situation arises too infrequently to require any special provision for it in the statute.

2. **Enforcement of Prepetition Judgment**—The statutory stay of paragraph (2) is directed against the enforcement of only a prepetition judgment, whereas the automatic stay rules generally operate against the enforcement of a judgment whether obtained before or after the filing of the petition. Insofar as the stays apply to judgments on causes of action existing prior to the filing of a petition, it is unlikely that any different result was intended or will be found by the courts to follow from the statutory limitation of the stay to enforcement of prepetition judgments. A postpetition judgment would be the result of the continuation of a judicial proceeding in violation of the statutory stay and therefore could not be effective or enforceable against the debtor or the

would not defeat the purpose of the stay to "prevent interference with, or diminution of, the debtor's property during the pendency of the Chapter XI proceeding." *Id.* at 203. While relief from the stay insofar as it interfered with the prosecution of the action against the officers might well have been appropriate, the court took too restrictive a view of the scope of the stay entered by the bankruptcy judge.

*46* *HousE REPORT*, *supra* note 14, at 341. The House Report suggests that in the supposed case the judgment creditor is allowed to proceed by foreclosure against the property but not by a general writ of execution. Foreclosure is not the usual method of enforcing a judgment lien. 1 G. Glenn, *Fraudulent Conveyances and Preferences § 17c* (rev. ed. 1940); S. Risenfeld, *Cases and Materials on Creditors' Remedies and Debtors' Protection* 103 n.5 (2d ed. 1975). Presumably the Report is suggesting that, in states authorizing foreclosure of judgment liens, the judgment creditor may avoid the necessity of obtaining relief from the stay by commencing a foreclosure action solely against the transferee without seeking a personal judgment against him. It might be simpler to obtain relief from the stay.

*47* See subdivision (a) of each of Rules 401, 8-501, 10-601, 11-44, 12-43, and 13-401.

*48* A judicial proceeding resulting in a postpetition judgment on a prepetition cause of action might be commenced against the debtor before or after the filing of the petition. It is immaterial under the Rules and it should be immaterial under the statute when the action was commenced if the judgment is entered during the pendency of the case.
property of the estate without the consent or permission of the bankruptcy court.\footnote{49} The reference to property of the estate in paragraphs (2), (3), (4), and (5) of section 362 requires examination of section 541, which defines the term. The property of the estate is intended to be more comprehensive than the property to which the trustee takes title under section 70 of the prior law.\footnote{50} In particular, the new term is intended to free the courts of the necessity of consulting the law of a state respecting the transferability or leviability of a particular asset.\footnote{51} With respect to certain kinds of property, the new estate is larger than that to which the trustee now has title. A notable example is the undivided interest of the debtor in a tenancy by the entirety, which may be unavailable to the trustee under the prior law.\footnote{52} The new statute also resolves doubts arising under the prior law as to the nature and extent of the interest of the trustee of a partnership in the property of the general partners. A provision of the statute recognizes as property of the estate only the trustee's right of recovery for a deficiency in the partnership estate to pay claims against it.\footnote{53} No provision speaks to the nature of a partner's interest in the partnership property.\footnote{54}

3. Dispossession of Property of or from the Estate—Section 362(a)(3) of Title 11 protects property of the estate from any act that would deprive the debtor or trustee of possession. The word “act” is presumably used here as elsewhere in subsection (a) to include judicial and nonjudicial actions. The statutory stay also operates against any party's effort to obtain possession of property of the estate from any other person, and that literally appears to preclude any act by the debtor or trustee to obtain property of the estate from any adverse claimant, whether rightfully or wrongfully in possession. Stultifying constructions of the language will presumably be avoided by the courts by looking to the purpose to protect the estate. The stay also purports to operate against any act to obtain possession of "property from the estate."\footnote{55} This language is

\footnote{49} Cf. Automatic Stay I, supra note 3, at 258 & n.413.
\footnote{50} See House Report, supra note 14, at 367-69; Senate Report, supra note 14, at 82-84.
\footnote{51} In this respect the new law follows the recommendations of the Commission on Bankruptcy Laws. Commission Report II, supra note 9, at 147-52. These recommendations in turn followed proposals by Professor Countryman in Countryman, The Use of State Law in Bankruptcy Cases (pt. I), 47 N.Y.U.L. Rev. 407 (1972).
\footnote{52} The trustee may realize on this expansion of the estate to include an undivided interest in the entirety, however, only when the debtor opts for the federal package of exemptions provided by § 522 of the new law. See 11 U.S.C.A. §§ 363(h)-(j), 522(b)(2)(B), 541(a)(1) (West Supp. 1979).
\footnote{54} See also Automatic Stay I, supra note 3, at 212-13 & nn.192-97.
\footnote{55} A cryptic explanation of § 362(a)(3) in the House Report, supra note 14, at 341, suggests that "property of the estate" is "property of the debtor as of the date of the filing of
perhaps included to forestall a lienor or other adverse claimant from asserting as a justification for an exercise of self-help that the property taken from the debtor did not belong to the estate.\textsuperscript{56}

The statutory stay is broader than the automatic stay provided by any of the rules insofar as it extends to an act to obtain possession for a purpose other than the enforcement of a lien. The reason for trying to get possession is immaterial under section 362(a)(3). It is a well established principle of bankruptcy law that property in the possession of a debtor at the time of the filing of a petition by or against him is in the custody of the bankruptcy court,\textsuperscript{57} and any act that would tend to interfere with the availability of the property for the purposes of administration of the estate would be at least potentially contemptuous.\textsuperscript{58} All of the debtor rehabilitation chapters of the Bankruptcy Act contain sections vesting the bankruptcy court with exclusive jurisdiction of the debtor and his property from the filing of the petition,\textsuperscript{59} but no statutory provision purports to confer comparable jurisdiction or custody on the bankruptcy
court.\textsuperscript{64}

Another suggestive case in this connection is Schwartz v. A.J. Armstrong Co., 179 F.2d 766 (2d Cir. 1950), allowing the trustee in bankruptcy of a bulk vendee to avoid, under § 67a of the Bankruptcy Act, an execution lien obtained by a creditor of the bulk seller against assets transferred to the bankrupt in violation of the New York Bulk Sales Law. The execution lienor in such a situation would appear to be subject to the stay prescribed by § 362(a)(3). The decision was criticized as in conflict with the premises of both the New York Bulk Sales Law and the Bankruptcy Act. Weintraub & Levin, \textit{Bulk Sales Law and Adequate Protection of Creditors}, 65 \textit{Harv. L. Rev.} 989 (1950). Unlike § 67a of the Bankruptcy Act, § 547 of the newly enacted Title 11 enables the trustee to avoid a preferential lien only if obtained by a "creditor." The execution creditor of the bulk seller in the Schwartz case was also a creditor of the bankrupt bulk transferee by virtue of an assumption of the seller's liabilities, but the execution lien had not been obtained in pursuit of any remedy against the transferee or its property.

Neither paragraph (3) nor any other paragraph of § 362(a), however, supports an argument made during Senate Committee Hearings on S. 2266 that the automatic stay would operate to prevent a landlord of a debtor who has abandoned leased premises from trying to find another tenant. The \textit{Bankruptcy Reform Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary, 95th Cong., 1st Sess.} 728 (1977).\textsuperscript{69}
court in a straight bankruptcy case. The law that has elaborated the
notion of the custody of the bankruptcy court in straight bank-
ruptcy is thus a product of judicial interpretation and imagination.
The new law vests exclusive jurisdiction of the debtor’s property,
wherever located, in the bankruptcy court in which the debtor’s
case is pending, without any differentiation based on the chapter
that applies to the case. 60 Section 362(a)(3) of Title 11 provides an
additional statutory base for a concept of custody of the property
of the estate regardless of who has possession of it or where it is
located.

4. Creation, Perfection, or Enforcement of a Lien—In its opera-
tion against any act to create, perfect, or enforce any lien against
property of the estate, the statutory stay prescribed by section
362(a)(4) of Title 11 goes beyond the literal import of the automatic
stays imposed by the Rules against lien enforcement. Arguably an
act taken to create or perfect a lien is a step toward its eventual
enforcement and is therefore barred by the Rules that are directed
against lien enforcement. The case law construing the Rules on this
point is tentative, 61 and the new statute provides some clarifica-
tion. 62 Paragraph (3) of subsection (b) nullifies the operation of the
stay against postpetition perfection, however, when perfection
would be effective against the trustee under section 546(b). 63 Sec-
tion 546(b) permits perfection to be effective against the trustee
under sections 544, 545, 549 whenever such perfection would be effective under generally applicable law "against an entity that acquires rights in such property before the date of such perfection." If such perfection requires seizure or the commencement of an action to be effective, timely notice is prescribed as the mode of accomplishing the perfection after the filing of the petition. The stay against perfection thus appears to operate only when perfection would be ineffective or pointless anyway. The prohibition on postpetition perfection is apparently intended to deter efforts of creditors to improve their position vis-a-vis the trustee after the filing of the petition. Unless an act of postpetition perfection cannot conceivably operate to improve the position of the holder of an adverse interest vis-a-vis the trustee, the adverse claimant will undertake to perfect. A "lien" is defined broadly in section 101 to mean a "charge against or interest in property to secure payment of a debt or performance of an obliga-

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64 Section 544(a) enables the trustee to succeed to the rights of a hypothetical lien creditor, a hypothetical creditor with an execution return unsatisfied, and a hypothetical bona fide purchaser of real property as of the date of the filing of the petition. Section 544(b) gives the trustee the right to avoid any transfer or obligation that could have been avoided by an unsecured creditor. Section 544(a) is an extension of the rights and powers of a trustee under § 70c of the Bankruptcy Act, and § 544(b) is a codification of the rights of the trustee under § 70e of the Bankruptcy Act.

65 Section 545 authorizes the trustee to avoid certain statutory liens and corresponds to § 67c(1) of the Bankruptcy Act.

66 Section 549 enables the trustee to avoid postpetition transfers and corresponds to §§ 21g and 70d of the Bankruptcy Act.

67 It seems anomalous to allow a postpetition act of perfection to defeat the trustee if the same act of perfection accomplished before the petition would not have been effective against the trustee, but § 546(b) is susceptible of a reading that leads to that result. Thus, suppose that a statutory lien could be perfected so as to be effective against a prior judicial lien creditor but not against a prior bona fide purchaser. Section 546(b) appears to make the belatedly perfected statutory lien effective against the trustee, even though the trustee could have prevailed against the adverse interest if the act of perfection had occurred prior to the filing of the petition.

68 To whom or how notice should be given is not indicated in § 546(b). Presumably this is one of the matters to be dealt with by the Rules.

69 The stay thus appears not to operate against the filing of a financing statement within ten days of the delivery of collateral subject to a purchase-money security interest under Article 9 of the Uniform Commercial Code, since filing within the 10-day period is effective as against a lien creditor whose rights arise before the filing. See U.C.C. § 9-301(2). If the security interest in such a case is not of the purchase-money variety, perfection does not relate back under the Code or § 546(b), and, accordingly, the stay operates against such tardy perfection. A transfer may be deemed perfected by operation of law under § 547(e)(2)(C)(ii) for the purposes of the preference section if a petition is filed against a transferor within ten days after the transfer. The operation of the stay against any act to perfect in such a situation is thus of no consequence.

70 See note 62 supra.

71 If the act of perfection requires the taking of possession or the commencement of an action, the automatic stay of § 362(a) operates to preclude the taking of either of those steps but does not preclude the substitute act of "notice" unless the notice has no retroactive force whatsoever under "generally applicable law." The risk of suffering the imposition of any sanction for mistakenly trying to perfect a lien pursuant to § 546(b) does not appear to be a serious one.
The definition is consistent with the meaning given the term as used in the automatic stay rules, and section 362(a)(4) is consistent with the automatic stay rules for debtor relief insofar as lien enforcement is concerned. Neither the statutory language nor the Rules definitively answer the question whether the stay operates against postpetition receipt of rents and payments on account by a secured creditor or its agent pursuant to a prepetition arrangement that requires no affirmative act on the part of the creditor.

Under paragraph (5) of section 362(a), the automatic stay of the statute operates against the creation, perfection, or enforcement of a lien against the debtor's property insofar as it secures a prepetition debt. The critical difference between this paragraph and the preceding one is that this paragraph protects the debtor's interest in exempt property and property that never comes into the estate. The provision, along with two new sections, rejects the premise of Lockwood v. Exchange Bank that the jurisdiction of the bankruptcy court does not extend to property that is set apart as exempt. The stay does not, however, interfere with the enforcement of any lien against the debtor's property if the lienor is seeking enforcement of a postpetition debt.

11 U.S.C.A. § 101(28) (West Supp. 1979). The term includes a judicial lien, a statutory lien, a common-law lien, and a security interest. House Report, supra note 14, at 312; Senate Report, supra note 14, at 25. The varieties of liens other than the common-law lien are also defined in § 101 of Title 11.

See Automatic Stay I, supra note 3, at 203 & n.145.

Cf. Caribbean Food Products, Inc. v. Banco Credito y Ahorro Ponceno, 575 F.2d 961 (1st Cir. 1978) (upholding stay against collection of accounts receivable after the filing of a Chapter XI petition by the assignor, where secured creditor had written obligors on accounts after the filing); Flintridge Station Assoc. v. American Fletcher Mortgage Co., 438 F. Supp. 410 (N.D. Ga. 1977) (whether Rule 12-43 stays collection of assigned rents by mortgagee pursuant to a prepetition agreement held to require a hearing in an adversary proceeding); In re DeWitt, [1975-1976 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 66,194 (Ref., M.D. Fla. 1976) (postpetition receipt of wages by creditor pursuant to debtor's authorization held not violative of automatic stay of Rule 601, wages being after-acquired property not belonging to the debtor's estate).

Eli Silberfeld, General Counsel for the National Commercial Finance Conference, testified at the House Hearings that although existing law does not prevent a purchaser of accounts from collecting the accounts after the filing of a petition, the Commission's proposed § 4-501 needed to be clarified to enable a purchaser or assignee for security to collect accounts free from restraint by an automatic stay. House Hearings, supra note 23 at 1811, 1826. Leon Forman, testifying on behalf of the National Bankruptcy Conference, took the position that the Commission's proposal would not change the law and expressed doubt that present law interferes with collection of accounts by factors who purchase accounts, assume the credit risks, notify debtors on the accounts, and routinely collect from the debtors. Id. at 1829. The language of the automatic stay Rules, the Commission's proposed § 4-501, and § 362 cannot be distinguished insofar as the effect of the stay on collection of assigned accounts is concerned, and the House and Senate Reports do not discuss the question.

The House Report indicates that paragraph (5), in operating against the creation, perfection, or enforcement of a lien against property of the debtor, protects "most property that is acquired after the date of the filing of the petition, property that is exempted, or property that does not pass to the estate."\textsuperscript{77} A provision in section 362(c)(1) prescribing the duration of the stay of an act against property of the estate obviously does not apply to a stay of an act against property of the debtor.\textsuperscript{78} "Property of the estate," however, includes all the debtor's property as of the commencement of the case,\textsuperscript{79} since the debtor can exempt only from "property of the estate,"\textsuperscript{80} and since the property claimed as exempt on the debtor's list "is exempt."\textsuperscript{81} It is not clear when the stay provided by paragraph (5) becomes effective with respect to exempt property.\textsuperscript{82} Since the scope and operation of the stay with respect to liens against property of the estate and of the debtor are in most respects identical, however, the question is not likely to become critical. A difference between the stays provided by paragraphs (4) and (5) is that the latter paragraph applies only with respect to liens securing prepetition claims. This limitation is necessary to keep the stay from operating against the creation, perfection, and enforcement of liens securing debts that are collectible without restriction by the bankruptcy laws. The fresh start policy contemplates that the debtor should be free to incur new debt, both secured and unsecured.

The House Report suggested that the stay of paragraph (5), like that prescribed by paragraph (4), prevents creditors from receiving preferential treatment.\textsuperscript{83} Insofar as the paragraph succeeds in preventing prepetition creditors from obtaining priority with respect to property not belonging to the estate, it serves a questionable objective.\textsuperscript{84} A sounder justification for paragraph (5) is that it protects the debtor in the enjoyment of his discharge.\textsuperscript{85}

\textsuperscript{77} HOUSE REPORT, supra note 14, at 341.
\textsuperscript{78} See notes 153-58 infra.
\textsuperscript{80} Id. § 522(b).
\textsuperscript{81} Id. § 522(l).
\textsuperscript{82} See also the discussion in the text accompanying notes 153-58 infra.
\textsuperscript{83} HOUSE REPORT, supra note 14, at 341.
\textsuperscript{84} It seems ill advised for the law to handicap a prepetition creditor with a nondischargeable claim in a competition with postpetition creditors where both are pursuing property of the debtor that is not property of the estate. It is hardly more appropriate for the law to restrain competition for priority among prepetition creditors with nondischargeable claims with respect to such property.
\textsuperscript{85} Circumvention of the discharge is acknowledged to be one of the purposes of the stay. HOUSE REPORT, supra note 14, at 341.
Some but not all liens against exempt property are voidable by the debtor under section 522. The stay operates generally against the creation, perfection, and enforcement of liens, whether or not voidable, on the debtor's property until the debtor's discharge is granted or denied or the case is closed or dismissed. As previously noted, however, the stay of postpetition perfection is subject to the limitation in subsection (b)(3) that the stay is inoperative if the perfection relates back against intervening rights under non-bankruptcy law. Both section 362(b)(3) and section 546(b), to which the former section refers, speak only of the effect of perfection on the trustee's rights. The debtor's right to avoid a lien for belated perfection, however, cannot exceed that of the trustee. Indeed, it will often be considerably less because no right of avoidance of any voluntary transfer of exempt property is given the debtor under section 522, except with respect to nonpossessory nonpurchase-money security interests in certain kinds of personalty. These latter interests in exempt personalty are voidable by the debtor without regard to their being perfected and without regard to their validity as against the trustee. In sum, the stay of perfection of liens provided by section 362(a)(5) is not likely to be of much utility to the debtor.

5. Collection of Prepetition Claims—The sixth paragraph of section 362(a), staying any act to collect, assess, or recover a prepetition claim against the debtor, overlaps substantially the first paragraph of the subsection. The first paragraph stays only a judicial, administrative, or other proceeding against the debtor, whereas the sixth paragraph extends to activity that may not be connected in any way with such a proceeding. Since the fourth and fifth paragraphs of section 362(a) deal explicitly with enforcement of liens, and the third paragraph deals with the taking of possession, a remedy generally available only to secured creditors, it is inferable that the sixth paragraph of the subsection is directed primarily to activities of unsecured creditors. The House Report confirms that the objective of the provision is to prevent evasion of the bank-

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87 Id. § 362(c)(2).
88 See the text accompanying note 63 supra.
90 It should be noted that both paragraphs (1) and (6), along with the other paragraphs of subsection (a), are subject to the exceptions of subsection (b), which excludes from the operation of the stay certain proceedings and acts to collect prepetition claims.

The word "assess" was added at a very late stage in the legislative process, and its purpose and effect are not explained in the legislative report. The manifest intention is to stay tax collectors from taking any step in the direction of enforcing unsecured tax claims against the debtor.
ruptcy laws’ purpose, which is to afford consumer debtors, particularly those who are “[i]nexperienced, frightened, or ill-counseled,” a fresh start free of the load of prepetition debt. The result is consistent with a questionable decision under the automatic stay rules which imposed liability for counsel’s fees on a creditor who tried to collect a dischargeable debt by persistent calls and communications during the pendency of its debtor’s bankruptcy case. Although the new provision overrules the numerous cases that decline to interfere with nonjudicial efforts to collect debts, it probably does not go so far as to create a right of action for damages against a creditor for resorting to coercive collection techniques against a debtor.

Section 505(c) of Title 11 contains a qualification of section 362(a)(6). Section 505, which is derived from, but is a considerable elaboration of, section 2a(2A) of the Bankruptcy Act, vests jurisdiction in the bankruptcy court to determine the amount or legality of any tax, fine or penalty relating to a tax, or any addition to a tax, subject to certain limitations prescribed by the section. After determination by the bankruptcy court of a tax under section 505, the governmental unit charged with responsibility for its collection may assess the tax against the estate, the debtor, or a successor to the debtor. If the assessment of a tax determined under section 505 should operate prejudicially with respect to the administration of the estate or undercut the fresh start policy of the bankruptcy laws, the injunctive power of the bankruptcy court presumably can be invoked by the trustee or the debtor.

6. Setoff–The seventh paragraph of section 362(a) stays setoff of a prepetition debt owed to the debtor against a claim against the debtor. This makes a feature now found only in Rules 8-501 and 9-466 generally operative in all cases under Title 11. This provision

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91 House Report, supra note 14, at 342. See also Senate Report, supra note 14, at 54. In re Gann, 1 Bankr. Ct. Dec. 154 (Ref., E.D. Tenn. 1974), cited in Automatic Stay 1, supra note 3, at 201 n.138. Cf. In re Ryan Co., 16 Collier Bankr. Cas. 492, 496 (Ref., D. Conn. 1978), where Bankruptcy Judge Seidman enjoined a union from calling a strike against a Chapter XI debtor in possession for the purpose of coercing the payment of arrearages to a pension and welfare fund. After noting that “the threatened strike [was] not related to a ‘labor dispute’ which is within the exclusive jurisdiction of the National Labor Relations Act,” Judge Seidman observed that the threatened strike was “an effort to obtain by improper means what it [the union] is restrained from doing by operation of law, to wit, the provisions of Rule 11-44(a).”

92 See Automatic Stay 1, supra note 3, at 202 n.139.


96 See Automatic Stay 1, supra note 3, at 214 & nn.203-07.
does not purport to affect the right of an obligee of the debtor or the trustee to setoff a postpetition debt against any kind of claim against the debtor; in any event, the possibility of the assertion of such a setoff is quite unlikely. It does not matter under the statute as passed whether the obligee of the debtor has a postpetition or prepetition claim against the debtor. Setoff is stayed in either case, however, only if the obligee's debt to the debtor arose before the petition was filed. It is to be emphasized that section 362 does not govern the question whether setoff ultimately will be allowed before final distribution is ordered or a plan is confirmed. The stay simply prevents the exercise of the right of setoff at the outset of the case until the merits of the creditor's claim against the debtor can be determined in due course during the administration of the case.

7. Proceeding Before the United States Tax Court—The managers of the bankruptcy bills added to section 362(a) an eighth category of proceedings subject to the stay, namely, "a proceeding before the United States Tax Court concerning the debtor." This additional role for the automatic stay was recommended by William T. Plumb. 97 Section 6871 of the Internal Revenue Code itself forbids the filing of a petition for redetermination with the Tax Court during the pendency of a case concerning the taxpayer under the bankruptcy laws. 98 If a proceeding for the determination of a deficiency is pending in the Tax Court when the taxpayer files a petition under the bankruptcy laws, section 6871 contemplates that an assessment of deficiency shall be made promptly and a claim presented in due course to the bankruptcy court. 99 The bankruptcy court and the Tax Court have had concurrent jurisdiction to determine the claim in this situation. Mr. Plumb argued persuasively that the Tax Court ordinarily, in the interest of judicial economy and the avoidance of unnecessary expense to the distressed tax-

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98 I.R.C. § 6871(b) prohibits the filing of any petition for redetermination of the Tax Court "after the adjudication of bankruptcy, the filing or (where approval is required by the Bankruptcy Act) the approval of a petition of, or the approval of a petition against, any taxpayer in any other bankruptcy proceeding, or the appointment of the receiver." It will be necessary in due course to coordinate the language of that subdivision with that of the new Title 11.

99 The deficiency assessment is made without notice and hearing in order to enable the Revenue Service to file its tax claim in the bankruptcy court.
payer, should suspend action on a pending case until the bankruptcy court has passed on the claim. Moreover, injustice may be done if the Tax Court sets the case for trial and thereafter dismisses the case for lack of prosecution when the taxpayer, having no funds to litigate the matter in the Tax Court or having assumed that the bankruptcy court had exclusive jurisdiction of the matter, fails to make an appearance. The Tax Court's dismissal is then conclusive of the amount of the deficiency proposed by the commissioner or adjusted by the Tax Court. The automatic stay provided by section 362(a)(8) eliminates the uncertainty, confusion, and potential injustice that may accrue to the debtor who has filed a petition in the Tax Court prior to the filing of a petition concerning the debtor under Title 11. If the litigation in the Tax Court has proceeded to an advanced stage or if there is other good reason for permitting the litigation to continue there, relief may be granted to permit the Tax Court to continue.

B. Limitations on the Stay: Section 362(b)

Section 362(b) of Title 11 contains eight explicit limitations on the operation of the stay provided for in subsection (a). Arguably, some of these restrictions are implicit under the prior law; but only one, relating to the collection of alimony, maintenance, or support, has a clear counterpart in any of the automatic stay rules.

1. Criminal Actions and Proceedings—The first limitation in section 362(b) excludes applicability of the stay to "a criminal action or proceeding against the debtor." Although Rule 401 purports to stay only an action or the enforcement of a judgment if founded on a debt, a district court has read the rule to reach a criminal proceeding where the court perceived its purpose to be to collect a dischargeable debt. Insofar as section 362(b)(1) precludes from the

100 Plumb, supra note 97, at 1402-03.
101 Such an injustice is illustrated by Monjar v. Higgins, 132 F.2d 990 (2d Cir. 1943), where a bankrupt taxpayer suffered a dismissal of his case pending in the Board of Tax Appeals (the predecessor of the Tax Court) because he failed to appear. The bankruptcy case was a nominal asset case, and although the government filed a claim, no objection was filed and no determination regarding liability of the claim was made. The government thereafter recovered the deficiency in its claim from after-acquired property of the debtor, and the taxpayer's subsequent petition for a refund filed in a United States district court was held to be barred by statute. Still later the taxpayer unsuccessfully sought to obtain equitable relief in the Tax Court. Relief was held to be unavailable, however, since the petition for review came too late under the statute governing procedures in the Tax Court. The Tax Court also has been held to lack the power of a court of equity after the lapse of the statutory period to grant equitable relief from its judgments. Laskey v. Commissioner, 352 U.S. 1027 (1957), aff'g per curiam, 235 F.2d 97 (9th Cir. 1956). See also Plumb, supra note 97, at 1403-04.
102 I.R.C. § 6512(a); Fiorentino v. United States, 226 F.2d 619, 621 (3d Cir. 1955).
103 In re Penny, 414 F. Supp. 1113 (W.D.N.C. 1976), cited in Automatic Stay I, supra note 3, at 196 n.107. The bankrupt was charged, tried, convicted, and sentenced after his filing of a voluntary petition in bankruptcy. The sentence of six months' imprisonment was to be suspended on payment of the amount of a check given by the bankrupt and dishonored on
scope of the stay criminal contempt proceedings, it appears to be consistent with the approach taken by the courts when a bankrupt has sought an injunction against the continuation of such a proceeding under section 2a(15) of the Bankruptcy Act.104

2. Collection of Alimony, Maintenance, or Support—Section 362(b)(2) of Title 11 excludes from the operation of the statutory stay the collection of alimony, maintenance, or support from property that is not property of the estate. Rule 401(a) excludes from the stay the commencement or continuation of any action, or the enforcement of any judgment, founded on a debt not dischargeable under section 17a(7) of the Bankruptcy Act. Since section 17a(7) excepts from discharge provable debts for alimony, maintenance, and support of wife or child, there is substantial identity of purpose and scope in the exclusions from the stay provided by the statute and the rule. Nevertheless, there are noteworthy differences. First, the automatic stay provided by the Rules applicable in Chapter XI, XII, and XIII cases operates against the commencement or continuation of any court proceeding, or the enforcement of any judgment, against the debtor, including one founded on a claim for alimony, maintenance, or support. In this respect the stay under several of the rules is broader than the statutory stay.

Second, the automatic stay provided by the Rules applicable in Chapter XI, XII, and XIII cases bars the enforcement of any judgment against the debtor and the enforcement of any lien against his property. On the other hand, the statutory stay does not keep the alimony, maintenance, or support claimant from pursuing property that is not property of the estate. Exempt property105 and postpetition acquisitions by the debtor may thus be reached by such a claimant under the statute without violating the stay.

presentation for payment before the bankruptcy. The court entered a permanent injunction against officials of the state of North Carolina and the courts of a county in that state from "bringing, or continuing, criminal proceedings or execution thereon" on account of the dishonor of the bad check unless the debt was ultimately not discharged. The word "action" is apparently used in the Federal Rules of Procedure only with reference to civil proceedings, but the court in Penny referred to criminal action and criminal proceedings indiscriminately. Compare In re Convenient Food Mart, 3 Bankr. Ct. Dec. 389 (Ref., E.D. Ark. 1977) (a temporary injunction against a criminal prosecution of a debtor for alleged violation of a state "hot check" law was set aside on the ground that the debtor's rights could be vindicated in the state court).

104 See In re Koronsky, 170 F. 719 (2d Cir. 1909). See also Automatic Stay I, supra note 3, at 250 n.367.

105 Section 522(c) provides that property exempted under the section is not liable during or after the close of the case for any prepetition debt for taxes that are not dischargeable under § 523(a)(1) or for alimony, maintenance, or support under § 523(a)(5). This section represents no change of the law insofar as exempt property remains liable for nondischargeable debts for taxes and alimony, maintenance, and support, but the provision for protection of exempt property after the closing of the case from the collection of other kinds of nondischargeable claims is a new departure in bankruptcy law.
Third, unlike all of the automatic stays of the Rules, the automatic stay of section 362(a) operates against nonjudicial acts to collect any prepetition claim, including one for alimony, maintenance, or support. Both the Rules and the statute coincide, however, in excluding from the stay nonjudicial acts to collect alimony, maintenance, or support from property not belonging to the estate.

Finally, the exclusion by section 362(b)(2), unlike the exclusion by Rule 401, of the collection of alimony, maintenance, or support from the operation of the stay is not in terms limited to the collection of a nondischargeable claim. The alimony, maintenance, or support that is nondischargeable under the proposed law must be for and owing to a spouse, former spouse, or child of the debtor. Similar limitations apply to the alimony, support, or maintenance that is nondischargeable under prior law. No such limitation applies to the alimony, maintenance, or support that may be collected free of the statutory stay; but the trustee or debtor may seek an injunction against an attempt to collect dischargeable "alimony," "maintenance," or "support" from the debtor.

3. Perfection of Liens and Other Interests—The automatic stay of section 362 operates against the perfection of any lien against property of the estate and any lien against property of the debtor insofar as the lien secures prepetition debt. Paragraph (3) of subsection (b), however, excepts from the operation of the stay any act of perfection that relates back pursuant to section 546(b) as against rights that attached to the property before the perfection. An illustration of the intended application of this limitation is the perfec-


107 Section 17a(7) of the Bankruptcy Act. This clause refers only to a "wife," and it has been held unconstitutional because it creates an arbitrary classification based on sex. Schiffman v. Wasserman, 3 Bankr. Ct. Dec. 467 (Ref., D.R.I. 1977) (a bankrupt husband is discharged from liability for accrued alimony to his divorced wife); contra, Pinkerton v. Pinkerton, 4 Bankr. Ct. Dec. 182 (Ref., N.D. Ga. 1978); In re Stephens, BANKR. L. REP. (CCH) ¶ 66,928 (Ref., W.D. Va. 1978). The general construction of § 17a(7) treats alimony, support, and maintenance as nondischargeable whether owed to a former or present wife.

108 An award of what is denominated alimony, support, or maintenance may be determined to be a property settlement that constitutes a dischargeable obligation. See, e.g., Cox v. Cox, 543 F.2d 1277 (10th Cir. 1976); Branca, Dischargeability of Financial Obligations in Divorce: The Support Obligation and the Division of Marital Property, 9 FAM. L.Q. 405 (1975); Loiseaux, Domestic Obligations in Bankruptcy, 41 N.C.L. REV. 27, 31-36 (1962); Swann, Dischargeability of Domestic Obligations in Bankruptcy, 43 TENN. L. REV. 231, 237-43 (1976); cf. HOUSE REPORT, supra note 14, at 364; SENATE REPORT, supra note 14, at 79. An award of support may be for the benefit of a person other than a spouse or child of the discharged debtor and therefore not protected from discharge. See, e.g., In re Sullivan, 262 F. 574 (N.D.N.Y. 1920) (obligation on bond given to support bankrupt's brother's wife held dischargeable). The bankruptcy court would have power to enjoin proceedings and acts not covered by the statutory automatic stay, as the court now has power to enjoin proceedings and acts not covered by the automatic stays of the Rules. See HOUSE REPORT, supra note 14, at 342.

tion by notice-filing of a mechanic’s lien against real property belonging to the estate. By section 362(a)(4) the filing of a petition by or against the debtor appears to stay the notice-filing. The automatic stay does not stand in the way of such perfection, however, if nonbankruptcy law allows the notice-filing to perfect the mechanic’s lien as against a prior judgment lien against the same property. Another illustration is the perfection by notice-filing of a purchase-money security interest within the ten-day period allowed by section 9-301(2) of the Uniform Commercial Code. If a petition is filed by or against the debtor during the ten-day period following delivery to him of the collateral, perfection by notice-filing (or otherwise) can be effected without violating the statutory stay. The exception to the stay provided by section 362(b)(3) is broader than the stay itself to the extent that it purports to allow perfection of an interest in property that is not a lien. Moreover, the exception refers to an interest in any property, whether belonging to the estate, the debtor, or any other entity. The resulting discrepancies between the scope of the stay and the exception are probably inconsequential.

4. Governmental Enforcement of Police or Regulatory Power—Paragraphs (4) and (5) of section 362(b) render the automatic stay inoperative against any governmental unit enforcing its police or regulatory power otherwise than by collecting a money judgment. As indicated earlier,110 these paragraphs overrule several applications of the automatic stay rules,111 but sustain the position taken in others.112 As illustrative of actions or proceedings immunized from the stay, the House and Senate Reports suggest suits to enforce laws preventing fraud, protecting the environment, protect-

110 See the text accompanying note 36 supra.
112 Colonial Tavern v. Byrne, 420 F. Supp. 44 (D. Mass. 1976), appeal dismissed as moot (license revocation proceeding held not subject to stay of Rule 11-44); Brennan v. T & T
ing consumers, and prescribing safety standards. The statutory stay would not prohibit injunctive and declaratory relief or even the entry of a judgment for damages against the debtor, but a money judgment would not be collectible by a governmental unit absent permission of the court. The enforcement of a money judgment by a governmental unit and the commencement or continuation of litigation to collect taxes or to pursue some governmental objective not embraced within the units "police or regulatory power" apparently are subject to the statutory stay. Indeed, the managers of the bills point out that "[t]his section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."

Nevertheless, the United States and the state governments can be expected to invoke sovereign immunity when the debtor or trustee seeks the shelter of the stay. The House and Senate Reports state that section 362 and the sections empowering the bankruptcy court to issue injunctive orders "are intended to be an express waiver of sovereign immunity of the Federal government," and an assertion of the bankruptcy power in derogation of the sovereign immunity of the several states.

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113 HOUSE REPORT, supra note 14, at 343; SENATE REPORT, supra note 14, at 52.
114 HOUSE REPORT, supra note 14, at 343. Cf. In re Joydon, Inc., 17 Collier Bankr. Cas. 86, 4 Bankr. Ct. Dec. 166 (Ref., N.D. Ohio 1978) (Rule 401 held not to apply to an action instituted by the Department of Labor alleging violation of the Service Contract Act of 1965); In re Fortiner Realty Co., BANKR. L. REP. (CCH) ¶ 66,924 (Ref., M.D. Fla. 1978) (Rule 401 held not to authorize a stay of disciplinary proceedings against a real estate broker by a state commission). Although the injunctive relief sought by the Secretary of Labor in the Brennan case, 396 F. Supp. at 618, would require the payment of wage claims which might have been dischargeable, at least in part, the court declined to regard the action as one brought to collect a debt. Cf. Civil Aeronautics Board v. Tour Travel Enterprises, 440 F. Supp. 1265, 1269 (N.D. Ill. 1977) (automatic stays of Rules 401 and 601 held inapplicable to action by CAB to enjoin bankrupt from violating Federal Aviation Act and Board's regulations); In re Citizens Loan & Sav. Co., BANKR. L. REP. (CCH) ¶ 66,497 (Ref., W.D. Mo. 1977) (SEC permitted to sue to enjoin violation of federal securities laws); In re Richie's Villa Capri, Inc., 14 Collier Bankr. Cas. 144 (Ref., S.D.N.Y. 1977) (city's enforcement of a municipal ordinance by imposition of penalty for building violations held not subject to stay under Rule 401).
116 HOUSE REPORT, supra note 14, at 342; SENATE REPORT, supra note 14, at 52. The Reports could well have cited 5 U.S.C. §§ 702-703 (1976) as collateral support for their position.
The purpose expressed in these reports is substantially strengthened by an amendment of section 106 made during the joint House and Senate consideration of the new bankruptcy legislation. Under the version of section 106 as it originally passed both houses of Congress, the government could have argued with considerable success that a waiver of sovereign immunity by any governmental unit would depend on the filing of a proof of claim or interest by the unit involved. The section thus could have been construed as overruling the many cases that have held the government suable under section 2a(2A) and (12) of the Bankruptcy Act when the debtor seeks a determination of dischargeability of tax or other governmental claim. The courts have rejected as immaterial to their jurisdiction under the Bankruptcy Act that the governmental unit has filed no proof of claim. Section 106(c) as finally enacted provides that notwithstanding any assertion of sovereign immunity, any provision of Title 11 referring to "creditor," "entity," or "governmental unit" applies to governmental units, and "a determination by the court of an issue arising under such provision binds governmental units." According to the legislative history, the purpose is "to comply with the requirement in case law that an express waiver of sovereign immunity is required in order to be effective." Although more guardedly drafted, section 106 comes close to adopting the broad provision for general applicability of the bankruptcy laws to the federal or state government that had been recommended by the Commission on the Bankruptcy Laws. The scope of a waiver of sovereign immunity is essentially a matter of determining congressional intent.

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that Congress has waived sovereign immunity as a defense to actions seeking only injunctive or declaratory relief. See also Verran v. United States Treasury Dep't, 4 Bankr. Ct. Dec. 47 (E.D. Mich. 1978).

Under the version of § 106 that originally passed the House and the Senate, a governmental unit that files a proof of claim would be deemed to have waived sovereign immunity with respect to any compulsory counterclaim but to have submitted only to an offset of a permissive counterclaim against its own allowed claim or interest. See HOUSE REPORT, supra note 14, at 317; SENATE REPORT, supra note 14, at 29-30.

See, e.g., Gwilliam v. United States, 519 F.2d 407 (9th Cir. 1975); In re Durenksy, 377 F. Supp. 798 (N.D. Tex. 1974), appeal dismissed, 519 F.2d 1024 (5th Cir. 1975).

Section 2a(2A) of the Bankruptcy Act vests jurisdiction in the bankruptcy court to determine the amount and legality of any unpaid tax unless the issue has been previously contested and decided by a competent tribunal. Section 2a(12) empowers the court to determine the dischargeability of debts and to render judgments thereon. See Plumb, supra note 97, at 1396-99. The jurisdiction of the bankruptcy court to determine tax liability is retained and considerably extended in § 505 of Title 11.

Section 1-104 of the Commission's proposed Bankruptcy Act reads in part as follows: "All provisions of this Act shall apply to the United States and to every department, agency, and instrumentality thereof, and to every state and every subdivision thereof except where otherwise specifically provided." COMMISSION REPORT II, supra note 9, at 10.

Section 106(c) appears to make Title 11 and determinations by the bankruptcy court there-
5. Setoff of Claims and Debts Involving Commodity Contracts

A sixth paragraph of section 362(b) excepts from the stay the setoff of any mutual debt and claim "that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities of securities." This paragraph presumably applies only in liquidations of commodity brokers, which are governed by sections 761-766. The terms "commodity contract" and "leverage transaction" are defined in section 761 of Title 11. The Senate Report emphasizes the special need for expeditious administration of commodity broker liquidations. Inferably, freedom in the exercise of the right of setoff will facilitate the settlement of the affairs of insolvent commodity brokers. Section 763(c), however, explicitly prohibits the offset of the net equity in one customer's account against the net equity in any other customer's account.

6. Foreclosure of Insured Mortgages of Multiple Housing Units by HUD

A seventh paragraph in section 362(b) excepts from the operation of the stay the commencement of an action by the Secretary of Housing and Urban Development to foreclose an insured mortgage of five or more living units. Section 263 of the Bankruptcy Code is fully applicable to every governmental unit insofar as it may be acting or proceeding against the debtor or its property. Subsection (c) is subject to subsections (a) and (b) of section 106, but it is not apparent how these subsections limit the scope of subsection (c). Subsection (a) is a declaration of waiver of sovereign immunity with respect to any claim against a governmental unit that arises out of the same transaction or occurrence as that underlying a governmental unit's claim. Subsection (b) of section 106 requires an offset against an allowed claim or interest of a governmental unit of any claim belonging to the estate against the governmental unit. The allowability of neither the counterclaim nor the offset depends on the filing of a proof of claim by the governmental unit, as had been required under the earlier version of section 106(a), (b), passed by the House and Senate.

The considerations involved in establishing a separate subchapter of Title 11 to deal with liquidations of commodity brokers are set out in the House Report, supra note 14, at 269-73. See also id. at 390-93; Senate Report, supra note 14, at 7-8, 104-09.

The paragraph bars "the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust." 11 U.S.C.A. § 362(b) (West Supp. 1979). A deed of trust in this context is a form of mortgage. G. Osborne, Mortgages § 17 (2d ed. 1970). The mortgages covered by the exception of paragraph (b)(7) must be insured, or have been formerly insured, under the National Housing Act. The reference to former insurance is undoubtedly intended to neutralize an argument that the insurance feature is no longer necessary or operative once the government has taken an insured mortgage by assignment, and that relief from enforcement of the mortgage ought to be available in the bankruptcy court as if it had never been insured. Such an argument was made and rejected in In re Bristol Hills Apt., 4 Bankr. Ct. Dec. 164, 165-66 (Ref., E.D. Mich. 1978).

S. 2266 as passed originally by the Senate contained a broader dispensation for the Secretary of HUD in enforcing mortgages insured and formerly insured under the Housing Act. The automatic stay of § 362(a) would have been rendered inoperative as against either the commencement or the continuation of a foreclosure irrespective of whether the Secretary proceeded by judicial action or by exercise of a power of sale. Moreover, action to obtain possession as a mortgagee in possession would have been freed from the effect of the stay.
Bankruptcy Act precludes applicability of Chapter X to a mortgage insured pursuant to the National Housing Act, and section 517 contains a similar exclusion of such a mortgage from the application of Chapter XII. While section 362(b)(7) might appear to have a justification similar to that underlying these two provisions of the Bankruptcy Act, it has a different scope and effect. It is significantly narrower in applying only to foreclosure of security interests in multiple housing units. Moreover, it purports only to permit the commencement of a judicial foreclosure action. The operation of the automatic stay and the availability of other kinds of relief, including a modification of the secured obligation, against the Secretary of HUD or the insured mortgagee are not otherwise affected by Title 11. Thus, even if foreclosure of an insured mortgage has been commenced before the filing of a petition by or against the mortgagor, the stay bars its continuation.

7. Issuance of Notice of Tax Deficiency—The eighth and last paragraph of section 362(b) excludes the application of the stay to "the issuance to the debtor by a governmental unit of a notice of tax deficiency." The term "notice of tax deficiency" clearly has reference to the statutory notice provided for in section 6212 of the Internal Revenue Code. The notice affords the taxpayer a 90-day opportunity within which to file a petition with the Tax Court before an assessment of the amount of the deficiency is made. The notice does not trigger the incidence of a tax lien under the Internal Revenue Code. The issuance of the notice of tax deficiency may be

In explaining the rejection of the broad exception provided by S. 2266, Congressman Edwards and Senator DeConcini pointed out that "[i]t would have permitted a particular governmental unit to obtain a pecuniary advantage without a hearing on the merits contrary to the exceptions contained in sections 362(b)(4) and (5)." 124 CONG. REc. H11,092 (daily ed. Sept. 28, 1978); 124 CONG. REc. S17,409 (daily ed. Oct. 6, 1978). The substantial revision of this exception in its finally enacted form is convincing evidence of the Congressional intent that the exception granted the Secretary of HUD should be given a restricted interpretation.

124 The effect of these sections on the automatic stay imposed by Rules 10-601 and 12-43 is discussed in Automatic Stay I, supra note 3, at 214-15 & nn.208-09.

125 Since the obligations secured by mortgages insured pursuant to the National Housing Act cannot be affected by the provisions of any chapter of the Bankruptcy Act other than Chapters X and XII, the special exceptions of §§ 263 and 517 apply only to cases under those chapters.

The automatic stay of present Rule 601 operates against the enforcement of insured mortgages on property in the custody of the bankruptcy court, and Rule 13-401 stays foreclosure of insured mortgages of the debtor's property irrespective of custody. No reported cases have been found involving the operation of the stay against foreclosure of an insured mortgage in a bankruptcy or Chapter XIII case.

The obligations secured by the mortgages described in § 362(b)(7) can be affected in cases under Chapters 7, 11, and 13 of Title 11. Except as limited by § 362(b)(7), the automatic stay of § 362(a) operates against the foreclosure of a mortgage insured or formerly insured under the National Housing Act, irrespective of the chapter in which the case concerning the debtor is pending.

124 Congressman Edwards explained on the floor of the House that "[t]he commencement of such an action is necessary for tax purposes." 124 CONG. REc. H11,866 (daily ed. Oct. 6, 1978)
regarded, however, as an act to collect a claim against the debtor that would be subject to the automatic stay but for this paragraph (8). As explained by the spokesmen for the conferees who reconciled the House and Senate versions of the legislation, the purpose of allowing the issuance of the notice of deficiency is to enable the taxpayer debtor to take his personal tax case to the Tax Court, if the bankruptcy court authorizes him to do so by lifting the stay against the commencement of a proceeding before the Tax Court. The bankruptcy court may determine a debtor's federal tax liability under section 505, whether the court's jurisdiction is invoked by the government, the trustee, or the debtor. The stay of the commencement or continuation of any proceeding in the Tax Court concerning the debtor protects the debtor and the other interested parties against a determination in that court unless and until the bankruptcy court lifts the stay. If the bankruptcy court does determine the merits of a tax claim against the debtor's estate, however, the debtor is not bound thereby, because the debtor is not deemed personally subject to the court's jurisdiction. On the other hand, if before the Tax Court exercises its jurisdiction after the stay has been lifted, the bankruptcy court determines dischargeability of the tax claim pursuant to section 523 on the request of either the government or the debtor, the determination binds both parties and the bankruptcy court on the ground of res judicata.

Section 362(b)(8) is not limited in terms to freeing from the stay the issuance of a notice of a federal tax deficiency, but it presumably operates only with respect to a process that functions in substantially the same way as the issuance of such a notice under the Internal Revenue Code. Particularly important is that paragraph (8) does not appear to limit the operation of the stay against an assessment. Thus, if the issuance of a notice of a state tax deficiency operates as an assessment, the stay would nevertheless be effective against that event unless and until relief is obtained pursuant to section 362(d).

128 The bankruptcy court may lift the stay to permit the debtor to invoke the jurisdiction of the Tax Court for determination of the debtor's personal liability while retaining jurisdiction to determine the claim allowable against the estate. The court may also lift the stay at the instance of the trustee to permit him to submit the question of the estate's liability to the Tax Court's jurisdiction if the debtor has commenced a proceeding there. See 124 Cong. Rec. H11,110 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 Cong. Rec. S17,426 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).
130 Id.
8. Application by SIPC for Protective Decree—Section 742 of Title 11 engrafts another exception on the scope of the stay of section 362. Notwithstanding the automatic stay prescribed by section 362, the Securities Investor Protection Corporation, better known as SIPC, may file an application for a protective decree under the Securities Investor Protection Act of 1970. The filing of such an application operates to stay all proceedings in a case pending under Chapter 7. Section 742 does not say which debtors are or may be affected by it, and reference must be made to the Act of 1970 for an indication of which debtors are amenable to liquidation pursuant to proceedings under the legislation.

The Securities Investor Protection Act of 1970 provides a procedure for the liquidation of a member of SIPC in financial difficulty. Membership in SIPC includes practically all broker-dealers except those whose business is exclusively intrastate or does not require them to have custody of their customers' funds or securities for any significant period of time. Whenever SIPC determines that a member has failed, or is in danger of failing, to meet its obligations to customers and is insolvent or evidences financial difficulty in one of the other ways specified in the Act, SIPC may apply for a decree extending the protection of the Securities Investor Protection Act to the member's customers. The filing of the application on behalf of the customers of a debtor in a Chapter 7 case suspends the proceedings in the bankruptcy court "unless and until such application is dismissed." If SIPC completes the liquidation of the debtor pursuant to the Securities Investor Protection Act of 1970, the bankruptcy court must dismiss the case initiated under the Title

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133 15 U.S.C. § 78ccc(a)(2) (1976). The Act technically applies only to members of SIPC. These are identified in the statute as brokers or dealers registered under § 15(b) of the Securities Exchange Act of 1934 or members of national securities exchanges, but certain classes of persons, such as brokers or dealers exclusively engaged in selling variable annuities, are excluded. The coverage of the Act is substantially that stated in the text. See HOUSE REPORT, supra note 14, at 266-67.
135 11 U.S.C.A. § 742 (West Supp. 1979). Since a stockbroker cannot be a debtor under Chapter 11 or Chapter 13, see § 109(d)-(e), the possibility that the automatic stay of § 362 may operate against SIPC's filing an application for a protective decree is unlikely to arise in respect to a debtor in a case under either of these chapters. "Stockbroker" as defined in § 101(39) is intended to encompass a dealer as well as a broker. HOUSE REPORT, supra note 14, at 314; SENATE REPORT, supra note 14, at 27. If a member of SIPC who is not a stockbroker as so defined becomes a debtor under Chapter 11 or 13, the stay of § 362 operates against the filing of an application by SIPC for a protective decree, but SIPC may seek relief from the stay pursuant to § 362(d). SIPC is declared not to "be an agency or establishment of the United States Government." 15 U.S.C. § 78ccc(a)(1)(1976). Accordingly, the exclusion by § 362(b)(4) from the operation of the stay of an action or proceeding by a governmental unit to enforce its police or regulatory power affords the SIPC no immunity. See 11 U.S.C.A. § 101(21) (West Supp. 1979).
11. This liquidation is carried out under the supervision of SIPC, the corporation created by the 1970 Act, and a United States district court.\textsuperscript{136} If a stockbroker is not subject to liquidation under the Act of 1970, or if SIPC does not opt to apply for a protective order, the estate of a broker may be administered under Chapter 7 without interruption.\textsuperscript{137}

The filing of an application by SIPC for a protective decree for the customers of a bankrupt stockbroker or dealer does not violate the automatic stay provided by Rule 401 or Rule 601. Such an application is neither an action on a provable debt nor a proceeding to enforce a lien. If an application by SIPC relates to a debtor in a case pending under a debtor relief chapter, the applicable automatic stay would be violated, since such an application commences a court proceeding for the purpose of liquidating the estate of the debtor.\textsuperscript{138} Section 5(b)(2) of the Securities Investor Protection Act, however, requires the court in which an application for a protective decree is filed to stay "any pending bankruptcy, mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the debtor or its property and any other suit against any receiver, conservator, or trustee of the debtor or its property."\textsuperscript{139} Moreover, the district court in which the application is filed has exclusive jurisdiction of the debtor and its property.\textsuperscript{140} While such a grant would not necessarily deprive the bankruptcy court of power to determine whether SIPC is guilty of contempt in disregarding the automatic stay effected by the filing of the petition under the Bankruptcy Act,\textsuperscript{141} it is unlikely that a proceeding for such a purpose would be initiated or, if initiated, prosecuted to a conclusion adverse to SIPC. In any event, section 742 appears practically to eliminate the theoretical possibilities that exist under the Bankruptcy Act for violation of an automatic stay by SIPC.

9. Repossession of Transportation Equipment by Purchase-Money Creditors—The automatic stay is rendered inapplicable to the enforcement by certain creditors of their rights to take possession of transportation equipment constituting collateral for


\textsuperscript{137} A stockbroker may not be a debtor under any chapter of Title 11 except chapter 7. 11 U.S.C.A. § 109(d), (e) (West Supp. 1979).

\textsuperscript{138} The application is to be filed in a United States district court. 15 U.S.C. § 78eee(a)(2) (1976); Karmel & Weissman, \textit{Taking Stock of the Court's Jurisdiction in a SIPA Liquidation}, 41 BROOKLYN L. REV. 1, 4-5 (1974).


\textsuperscript{140} Id.

\textsuperscript{141} Cf. David v. Hooker Music, Ltd., 14 Collier Bankr. Cas. 303, 309 (9th Cir. 1977) (automatic stay of Rule 401 held not to bar contempt proceedings in nonbankruptcy court); \textit{Automatic Stay I}, supra note 3, at 259 n.415.
purchase-money obligations. The provisions for this special protection are found in sections 1110 and 1168 of Chapter 11 and carry forward provisions found in sections 116(5) and (6) and 77(j) of the Bankruptcy Act. The equipment recoverable without hindrance from the stay includes "aircraft, aircraft engines, propellers, appliances, or spare parts," "vessels," and "rolling stock equipment or accessories used on such equipment, including superstructures and racks." The injunctive power of the bankruptcy court, as well as the automatic stay, is subject to the special rights of these purchase-money creditors.

The pertinent sections in Chapter 11 contain two qualifications on the inapplicability of the stay and the court's injunctive power. These qualifications appear to revive the stay and the court's injunctive power if, first, the trustee, with the court's approval, assumes the obligations of the debtor under the security agreement within sixty days after the date of the order for relief; and, second, any prepetition default is cured within the same sixty-day period and any postpetition default is cured within thirty days, or within the sixty-day period if that is longer. The sixty-day period may be extended by the trustee and the secured party, with the court's approval.

The legislative reports explicating section 1110 insist that during the first sixty days after the order for relief in a Chapter 11 case, the

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143 See 6 COLLIER ¶ 3.34A-.34B (1977).

144 See 5 COLLIER ¶ 77.12, at 538 (1978).


147 11 U.S.C.A. § 1166(a) (West Supp. 1979). These terms are an elaboration of the term, "rolling-stock equipment," as it appeared in § 77(j) of the Bankruptcy Act, from which it was derived. See note 144 supra.

148 The rights specified in §§ 1110(a) and 1168(a) are "not affected by section 362 or 363 [governing use, sale, or lease of property] of this title or by any power of the court to enjoin such taking of possession." Unlike the provisions of the Bankruptcy Act that protect only lessors and conditional vendors in exercising the right to take possession of transportation equipment, the provisions of §§ 1110 and 1168 extend protection to the secured financers of the acquisition of such property, however their interests are denominated. See HOUSE REPORT, supra note 14, at 240. The Uniform Commercial Code has made distinctions in rights and results based on differences in form obsolete. U.C.C. § 9-202, Official Comment; id § 9-507, Official Comment 1; Fruehauf Corp. v. Yale Express Sys., Inc., 370 F.2d 433 (2d Cir. 1966), on appeal after remand, 384 F.2d 990 (2d Cir. 1967).

149 Both §§ 1110 and 1168 exclude from the defaults that must be cured by the trustee a "default of a kind specified in section 365(b)(2) of this title." Such a default is a breach of a provision relating to insolvency or financial condition of the debtor or similar provision, known generally as a "bankruptcy clause" or "ipso facto clause." The paragraphs of §§ 1110 and 1168 prescribing the conditions for setting the stay in operation differ slightly as a
automatic stay prevents foreclosure, but that is not what the section says. Rather the language indicates that the stay of section 362 does not restrict the secured creditor's rights unless, within the times prescribed by the two subparagraphs of subsection (a), the trustee assumes and cures the defaults. If he does that before the secured creditor seizes the collateral, the creditor would have neither the right nor, presumably, the incentive to enforce his possessory rights. While the sixty-day and thirty-day periods are apparently intended to be grace periods within which the trustee may assume and cure a default, the literal language of the section affords him only a tenuous kind of dispensation. Prior to his assumption and cure of the default, the trustee's right to retain and use the collateral can be cut off by exercise of the secured creditor's right to take possession during the sixty-day or thirty-day period. If he thereafter, but within one of the periods allowed him by the section, obtains court approval to assume the obligation of the assignment and cures a default by appropriate tender, the statute presumably entitles him to the protection of the stay against further enforcement of the lien by the secured creditor. Nothing in section 362 or either of the special sections under consideration here, however, entitles him to restoration of possession. If either the sixty-day or the thirty-day period lapses before the trustee assumes and cures, then it seems clear that neither the stay nor the injunctive power of the court can help the trustee against a secured creditor who stands on its rights. The secured creditor may, of course, be willing to allow the trustee to cure the default and to assume the debtor's obligations after the lapse of the statutory period, and the court is not likely to withhold its approval because of the delay.

In view of the harshness of a literal application of the words of sections 1110 and 1168, the courts may be expected to reach results in their application that are more consistent with the explanations set out in the legislative reports than with the statutory text.

result of a last-minute amendment of § 1168(a). The trustee is required under this provision to cure a prepetition default that "is an event of default therewith" within the 60-day period, and to cure a postpetition default that occurs or becomes an event of default within the 30-day or the 60-day period, whichever is the longer. The reference to "event of default" is intended to refer to an event that follows an earlier inchoate default and entitles the secured creditor to take action when it occurs to enforce its rights under the security agreement.

If the rights of secured creditors "are not affected" by § 362 unless one of the conditions specified in § 1110(a) is satisfied, there is nothing in the law to interfere with the exert-
Moreover, it is not to be assumed that the courts will be deterred by the unconditional language of the sections under consideration from enjoining seizure of possession by the secured creditor that is not in strict compliance with the governing contract of the parties, or that is based on a security agreement subject to invalidation by the trustee because not perfected or because otherwise voidable.\footnote{As is pointed out in 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), §§ 1110 and 1168 do not require the trustee to assume any contract within the scope of either of these sections. The point is that if the trustee complies with the requirements of either section, the trustee is entitled to retain the collateral subject to the normal requirements of § 365, which governs the assumption of executory contracts. See also 124 CONG. REC. S17,419 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).}

\section*{C. Duration of the Stay}

According to section 362(c)(1), the stay of any act against property of the estate continues until the property is no longer property of the estate.\footnote{As is pointed out in 124 CONG. REC. H11,102 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), §§ 1110 and 1168 do not require the trustee to assume any contract within the scope of either of these sections. The point is that if the trustee complies with the requirements of either section, the trustee is entitled to retain the collateral subject to the normal requirements of § 365, which governs the assumption of executory contracts. See also 124 CONG. REC. S17,419 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).} The paragraph is less explicit than the comparable provisions of the automatic stay rules, since neither section 362 nor any other provision of Title 11 specifies when property of the estate ceases to exist as such. The House Report says, illustratively, that the stay terminates when the property is sold, abandoned, or cise of the secured creditor’s right prior to the trustee’s performance of the condition so specified. Financiers secured by a right to take possession of such equipment as railroad rolling stock are not likely to be precipitate in exercising their possessory rights. Such equipment is neither easily reduced to possession nor easily disposed of by sale. See The Bankruptcy Reform Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of Sen. Comm. on the Judiciary, 95th Cong., 1st Sess. 760-62 (1977).

\footnote{The property of the debtor and the property of the estate appear to be mutually exclusive terms, although that proposition does not appear anywhere in the text of the most relevant section, § 541, or in the House and Senate Reports. Thus, it is stated in both Reports that “[o]nce the estate is created, no interests in property of the estate remain in the debtor.” HOUSE REPORT, supra note 14, at 368; SENATE REPORT, supra note 14, at 83. The property exempted by § 522 is property of the estate, and the reports declare that Lockwood v. Exchange Bank, 190 U.S. 294 (1903), is overruled. HOUSE REPORT, supra note 14, at 368; SENATE REPORT, supra note 14, at 82. Lockwood held that once the bankrupt’s exempt property has been set aside by the bankruptcy court, the court’s jurisdiction over the property ceased. While the stated purpose of the new law is laudable, the text of the statute is far from clear in requiring the courts to effectuate the purpose. The reference in § 362(c)(1) to “the stay of an act against property of the estate under subsection (a)” is also unclear. See notes 50-54 and 75-82 and the accompanying text supra. It presumably refers to the stay provided by paragraph (2), insofar as that stay applies to the enforcement of a judgment against property of the estate, paragraph (3), insofar as that stay applies to an act to obtain possession of property of the estate, and paragraph (4), insofar as it applies to the creation, perfection, and enforcement of liens against property of the estate. Other paragraphs that do not explicitly refer to the property of the estate may nevertheless prohibit an act that would affect the property of the estate; for example, paragraph (7) makes the stay operative against the setoff of any debt owing to the debtor. Does § 362(c)(1) fix the duration of the stay prescribed by § 362(a)(7)? A permissible construction of § 362(c)(1) is that insofar as any act subject to the stay provided by subsection (a) would affect the property of the estate, the stay terminates when the property ceases to be property of the estate.}
exempted, but the sections dealing with sale, abandonment, and exemption do not indicate when these events have the effect of severing the property from the estate or even that they have that effect. Yet, the Report inexplicably continues, the stay against property of the debtor is not terminated "if the property leaves the estate and goes to the debtor." 158

The stay of any act other than one against the property of the estate continues until the case is closed or dismissed or the debtor is either granted or denied a discharge. The earliest of these eventualities terminates the stay under paragraph (2).

The language and intent of subsection (c) apparently are similar to those of the automatic stay rules, but the operation of the stay against the creation, perfection, or enforcement of liens on the debtor's property after it is exempted is a significant extension. 159 The survival of a stay after the closing of the case, now possible under Rule 401, is precluded by the statute. The statute also departs from Rule 401 in terminating the stay when a discharge is

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156 Id. § 554.
157 Id. § 522.
158 House Report, supra note 14, at 343. The statute is particularly obscure in indicating when or how property of the estate leaves the estate when it is exempted, but it apparently does. Section 541(a) declares that the property of the estate comprises all legal or equitable interests of the debtor in property as of the commencement of the case. Section 522(b), however, says that property claimed as exempt in a list filed by the debtor is exempt unless a party in interest objects. Presumably such a list will ordinarily be filed with the debtor's petition in a voluntary case and shortly after the entry of an order for relief in an involuntary case. Cf. Rules 108(b) and 403(a). Arguably, exempt property never enters and therefore never leaves the estate when the debtor claims his exemptions concurrently with the filing of the petition, if no objection is raised to the claim. If objection is made, it is not clear whether the property claimed comes into the estate pending the resolution of the issue raised or only after there has been a determination adverse to the claim of exemption. In an involuntary case, all property of an individual debtor is, presumably, property of the estate until a claim of exemption is filed, whereupon the property listed as exempt leaves the estate. Again the status of the property claimed as exempt becomes unclear after an objection to the exemption is made and before the issues raised are resolved.

To a considerable extent the automatic stay operates in the same way and to the same extent with respect to acts against the property of the debtor and acts against property of the estate. It is thus of no consequence, ordinarily, for the purpose of construing § 362, whether property is categorized as property of the debtor or property of the estate. A difference does arise when an act to create, perfect, or enforce a lien securing a postpetition claim is taken or threatened. The automatic stay does not protect property of the debtor against such an act, though it does protect property of the estate.

The House Report compounds confusion by saying that the stay against property of the debtor, which ex hypothesi cannot have been operative against property of the estate, does not terminate when the property leaves the estate to become property of the debtor.

159 As indicated in note 153 supra, the jurisdiction of the bankruptcy court under the Bankruptcy Act has not been deemed to extend to the protection of the bankrupt's exempt property after it has been set apart to him with the approval of the court. See J. MacLachlan, Bankruptcy § 167 (1956); Countryman, For a New Exemption Policy in Bankruptcy, 14 Rutgers L. Rev. 678, 708-14 (1960); Kennedy, Limitation of Exemptions in Bankruptcy, 45 Iowa L. Rev. 445, 461-69 (1960).
granted as well as when it is denied, thus eliminating the theoretical duality of injunctive protection of a discharged bankrupt now provided by Rule 401 and section 14f(2) of the Bankruptcy Act.

Like the automatic stay of the rules, the statutory stay is also subject to termination, annulment, modification, or conditioning by action of the court. There is no provision comparable to subdivision (c) of four of the Rules,160 which automatically nullifies the stay with respect to a creditor whose claim has not been scheduled and who does not file a claim within a short time after the first date set for the first meeting of creditors. After a request has been made for relief, however, there is a thirty-day limit on a stay of any act against property under the statute unless the court extends the stay after notice and hearing.161

Title 11 does not provide for a suspension of any statute of limitations applicable to an action on a claim that is subject to an automatic stay provided under Title 11.162 The creditor or other person subject to the stay is nevertheless allowed up to thirty days after notice of the termination of the stay under either section 362, 922, or 1301 for commencing any action that was not barred when the petition was filed.163 The thirty-day period may thus start to run from notice of the court’s granting relief, the closing or dismissal of the case, the grant or denial of the debtor’s discharge, or, if the stay affects property of the estate, when the property ceases to belong to the estate. The provision clarifies and greatly simplifies a problem that may arise under the Bankruptcy Act.164 A general result of the approach taken in Title 11 is to reduce the time heretofore available for the prosecution of a claim that remains enforceable against a debtor whose estate is administered under the bankruptcy laws.165 The method and form of notice of most of the events that terminate stays under Title 11 will be governed by the Rules of Bankruptcy Procedure. Undoubtedly, a stay often will be termi-

161 See notes 169 and 170 and accompanying text infra.
162 If any statute of limitations provides for suspension during the pendency of a case concerning a debtor whose estate is being administered under the bankruptcy laws, however, the suspension is recognized as effective by § 108(c). An example of such a suspension is that provided by I.R.C. § 6503(b), which suspends collection of tax liabilities while the debtor’s assets are in the control or custody of a court and for six months thereafter. See 124 Cong. Rec. H11,109 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards); 124 Cong. Rec. S17,426 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini).
164 See Automatic Stay I, supra note 3, at Part IV D.
165 If a debt is discharged, § 524(a)(2) imposes “an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, or from property of the debtor, whether or not discharge of such debt is waived.” The authorization in § 108(c) for extension of the period of limitations fixed for the bringing of an action on a claim against the debtor is thus made expressly inapplicable to actions on discharged claims.
nated with respect to particular persons without their getting any notice of the event. Thus, it will behoove the debtor to take steps to assure wide dissemination of information respecting such events.

D. Relief from the Stay

1. Procedure—The last four subsections of section 362 deal with relief from the automatic stay. Subsection (d) follows the basic pattern of the comparable subdivision of the automatic stay rules. The mode of requesting relief is not specified, this being a matter left for the Rules of Bankruptcy Procedure. The House Report explains that the procedure to gain relief from the automatic stay, "including specification of adequate notice, form of hearing, or means by [sic] obtaining ex parte relief," is to be dealt with by the Rules or by local rules of court. Any "party in interest" is authorized to request relief. Unless the term is restricted by a valid Rule of Bankruptcy Procedure, eligibility to seek relief is not limited to a person holding a claim against the debtor.

166 It is recommended that the form of the request for relief be prescribed by statute as a motion in a redraft of subsections (d)-(g) of § 362 set out in Peitzman & Smith, The Secured Creditor's Complaint: Relief from the Automatic Stays in Bankruptcy Proceedings, 65 CALIF. L. REV. 1216, 1257-59 (1977) [hereinafter cited as Peitzman & Smith]. This redraft is further discussed in notes 169, 171, 174, and 194 infra.

The justification for requiring a request for relief to be made by motion, according to Peitzman & Smith, is that the present practice under the Rules "has caused significant difficulties in the administration of bankruptcy estates" because it invites the debtor or trustee to assert affirmative defenses and counterclaims. Id. at 1259. The result is said to forestall prompt action on the request for relief from the stay. Cited were Judge Babitt's opinions in C. I. Mortgage Group v. Groundhog Mountain Corp., l Bankr. Ct. Dec. 923, 924 (S.D.N.Y. 1975), where he observed that prior to the Rules relief from a stay was granted or denied on motion, and in First Nat'l Bank v. Overmeyer Co., 2 Bankr. Ct. Dec. 992 (S.D.N.Y. 1976), where the debtor had filed counterclaims to the creditor's complaint seeking relief from the stay. Present practice under the Rules permits needed flexibility in hearing and acting on requests for relief from the stay, and the Rules contain several safeguards against the risk of undue delay in the consideration and disposition of a complaint seeking relief from the stay. See Automatic Stay I, supra note 3, at 224 & n.247, 226 & n.250, 231-33 & nn.273-78. To suggest that a statutory matrix can free the courts to act more expeditiously in granting relief to movants fails to recognize the real causes of delay and creates obstructions to the development by the courts of flexible procedures adaptable for varying situations. See note 169 infra.

Peitzman & Smith suggest that the need for all litigation over the continuation of a stay to be initiated by motion is the more imperative because the new bankruptcy court will have general jurisdiction. 65 CALIF. L. REV. at 1259-60. The party resisting the granting of relief will thus have an incentive to introduce into the trial "antitrust, securities fraud, and other complex claims for relief." Id. at 1260. The statutory provisions of the new law appear to be sufficiently nonrestrictive, however, to permit the courts to develop rules of procedure to deal adequately with the increased volume and diversity of litigation that may develop.

The most direct attack on the problem of delay and dilatoriness in dealing with requests for relief from the stay is the imposition of a time limit on the effectiveness of the stay unless the court finds cause for its continuance. Section 362(e) addresses this matter by imposing 30-day limits on the effectiveness of a stay of an act against property unless it is continued by the court after a hearing and on any interim between a preliminary and a final hearing. See notes 170-73 and the accompanying text infra.

167 HOUSE REPORT, supra note 14, at 295.

168 Title 11 wisely does not undertake to define "party in interest." Although a definition
Subsection (e) addresses one of the criticisms most frequently heard concerning the operation of the automatic stay rules, and judicial inertia generally, in acting on motions for relief from injunctions entered by courts. The subsection terminates a stay of any act against property of the estate thirty days after the request for relief has been made, unless the court orders its continuance after notice and hearing. The subsection does not command a final determination of the issues raised by the request for relief within thirty days after it is filed. Notice must have been given and a hearing held, however, before the court may order a continuance beyond the thirty-day period even though its purpose is to preserve the status quo pending the final hearing. Moreover, in order to continue the stay after a preliminary hearing, the court is required to find that there is a reasonable likelihood that the party opposing relief will prevail at the final hearing. The statute thus requires the court to take affirmative action to prolong a stay affecting property within the thirty-day period following the request for relief.

By a of the term appears to be procedural in character, it is not clear under 28 U.S.C. § 2075, as amended by Pub. L. No. 95-598, § 247, 92 Stat. 2549 (1978), whether statutory terms may be defined by rules, particularly if the rule significantly narrows the scope of the statutory term. See notes 6-21 and the accompanying text supra.

169 S. 2266 added a sentence to § 362(d) requiring that "[t]he hearing of such motion [requesting relief] shall take precedence over all matters except older matters of the same character." This provision would have carried out a recommendation of Peitzman & Smith, supra note 166, at 1258. A similar provision now appears in all the automatic stay rules except Rule 9-4. The rule frequently is not observed. See Automatic Stay I, supra note 3, at 224 n.247. It may be doubted that casting such a rule in statutory form would force a different ordering of court calendars. Moreover, if such precedence should be made a statutory requirement, the statute would constrain the draftsmen of Rules of Bankruptcy Procedure to maintain a formal deference to the statutory command, irrespective of competing exigencies. The inappropriateness of such a requirement in reorganization proceedings was pointed out by the SEC in House Hearings, supra note 23, at 2199 (Report of SEC on Proposed Bankruptcy Legislation (H.R. 31 and H.R. 32)): "Indeed by a succession of requests for relief under this provision, various lien creditors might delay or hinder the progress of the reorganization or even bring the reorganization proceeding to a complete halt." The statements of Congressman Edwards and Senator DeConcini, in explaining on behalf of the conferees the provisions of the final text of the amended bills, expressed a precatory anticipation "that the Rules of Bankruptcy Procedure will provide that those hearings will receive priority on the calendar." 124 Cong. Rec. H11,092 (daily ed. Sept. 28, 1978); 124 Cong. Rec. S17,409 (daily ed. Oct. 6, 1978).


The termination effected by the running of the 30-day period of subsection (e) affects only the party in interest who made the request for relief.

Section 362(d) in S. 2266 would also have required the court to grant relief for cause within 30 days of the hearing. Unless and until it found cause, however, the court would not be bound to grant relief from the stay. Since the hearing provided for in § 362 will ordinarily be held after notice, may continue for a number of days, and may itself be delayed by motions and procedural maneuvers, the 30-day limitation of subsection (e) is likely to be a more effective prod than would the proposed provision in the Senate bill.

171 The Peitzman & Smith redraft of subsection (e) contained a detailed and rigid schedule for notices and the holding of preliminary hearings on motions by the party opposing relief from the stay. Peitzman & Smith, supra note 166, at 1258. The draftsmen of the new bankruptcy law wisely and scrupulously avoided setting the number of days' notice that ought to
new paragraph (2) in section 362 (e), a final hearing must be commenced within thirty days after a preliminary hearing held pursuant to the subsection. The new law does not preclude the possibility of an extension of the stay, either during the pendency of the final hearing after an order of continuance has been timely entered at the preliminary hearing, or during the pendency of an appeal. The House and Senate Reports contain exhortations against allowing the hearing on a request for relief from the stay to become cluttered with counterclaims and other collateral matters likely to delay determination of the issues on which the right to relief depends.

Subsection (f) of section 362 requires the court, without a hearing, to grant whatever relief is necessary to prevent irreparable damage to the interest of an entity in property, if such damage will otherwise occur before there can be a hearing on notice. This subsection continues in effect the provision for ex parte relief found in most of the automatic stay rules, but the rules are phrased in permissive language. The substitution of mandatory language in the statute is unlikely to be regarded by the courts as a constraint on their discretion. The determination of "cause" is one that necessarily requires exercise of judicial judgment, involving

precede hearings and prescribing other procedural details of a like nature. The Peitzman & Smith proposal would not have permitted the Rules to authorize courts to determine when preliminary hearings ought to be held in the light of the exigencies of the calendar and the usual considerations of procedural economy and convenience.

The statute does not specify when the 30-day period begins to run—i.e., whether from the commencement of the preliminary hearing or from its conclusion.

As the House Report pointed out:

At the expedited hearing under subsection (e), and at all hearings on relief from the stay, the only issue will be the claim of the creditor and the lack of adequate protection or existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor on largely unrelated matters. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather they will be the subject of more complete proceedings by the trustees to recover property of the estate or to object to the allowance of a claim.

House Report, supra note 14, at 344. The Senate Report added that the approach of subsection (e) "is consistent with that taken in cases such as In re Essex Properties, Ltd., 430 F. Supp. 1112 (N.D. Cal. 1977), that an action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert counterclaims." Senate Report, supra note 14, at 55. The Essex Properties case is discussed in Automatic Stay I, supra note 3, at 229 & nn.265-69, 231 & nn.272-73. This procedure is similar to that now possible and contemplated under the Rules. See Automatic Stay I, supra note 3, at 221 nn.235-37.

Peitzman & Smith would revise subsection (f) by extending its length from 60 to 224 words, incorporating most of the detail of the provisions for ex parte relief in the automatic stay rules but introducing the admonition that this kind of relief should be accorded only "in exceptional circumstances." Peitzman & Smith, supra note 166, at 1258.

See Automatic Stay I, supra note 3, at 226 n.251. Ex parte relief is available under all the automatic stay rules except Rule 401, which operates only against in personam actions and judgments. The rules for debtor relief cases limit the operation of ex parte relief to stays of the enforcement of a lien or the commencement or continuation of a rehabilitation or liquidation proceeding. Ex parte relief under § 362(f), while not restricted to secured creditors, is most likely to be used successfully by them. The possibility of obtaining ex parte relief against a stay of a rehabilitation or liquidation proceeding is not retained in § 362(f).
mixed questions of fact and law, and the trial court’s determination will not be reversed unless abuse is shown.\textsuperscript{176} Inferentially, the court can act on its own initiative under this subsection of the statute, although, of course, it is unlikely to do so.

2. \textit{Grounds for Relief}—The statute departs from the automatic stay rules in saying that the court “shall” (not merely “may”) grant relief “for cause.” One cause identified in subsection (d) of section 362 is “the lack of adequate protection of an interest in property” of the party requesting relief.\textsuperscript{177} When adequate protection is required under this section,\textsuperscript{178} three acceptable ways of providing it are set out in section 361. First, the trustee may be required to make periodic cash payments to the entity entitled to the protection in an amount sufficient to compensate for the decrease in the value of the entity’s interest resulting from the stay.\textsuperscript{179} Second, the entity may be provided with an alternative or additional lien equal in value to the decrease in value of the interest resulting from the stay.\textsuperscript{180} Finally, any other relief may be granted that will give the entity realization of the “indubitable equivalent” of its


\textsuperscript{177} The specification of this cause for granting relief appears to be a codification of the case law that has developed under the automatic stay rules. See Automatic Stay I, supra note 3, at 244-50.

\textsuperscript{178} Adequate protection is required not only as a condition to the continuation of a stay under § 362, but also as a condition to the use, sale, or lease of property by the trustee under § 363 and the giving of security for a trustee’s obligation under § 364, when the stay, use, sale, lease, or giving of security may adversely affect the interest of another entity in property. The concept of “adequate protection” is said to be “derived from the fifth amendment protection of property interests,” but “[i]t is not intended to be confined strictly to the constitutional protection required.” House Report, supra note 14, at 339. The Bankruptcy Act does not contain any reference to a requirement for adequate protection in sections dealing with stays, injunctions, sales, leases, or issuance of certificates of indebtedness. The use of encumbered property by the trustee is not dealt with in the Bankruptcy Act at all. The Commission on Bankruptcy Laws of the United States had recommended that the reorganization chapter of its proposed Bankruptcy Act include a § 7-203 dealing with the use of leased or encumbered property during the pendency of the automatic stay. The lessor or secured party was authorized by subdivision (b)(2) of that section to seek relief from the stay unless afforded adequate protection. Commission Report II, supra note 9, at 237.

\textsuperscript{179} This was the kind of adequate protection tendered and accepted in \textit{In re Bermec Corp.}, 445 F.2d 367 (2d Cir. 1971), and other cases discussed in Automatic Stay I, supra note 3, at 255 n.388. Curiously, the House Report indicates that the provision for the first method of adequate protection “is derived from \textit{In re Yale Express, Inc.}, 384 F.2d 990 (2d Cir. 1967) (though in that case it is not clear whether the payments required were adequate to compensate the secured creditors for their loss).” House Report, supra note 14, at 339. Actually the court in the cited case rejected the secured creditors’ application for periodic payments and relegated the applicants to “equitable consideration in the reorganization plan.” \textit{In re Yale Express, Inc.}, 384 F.2d at 992 (citing \textit{In re New York, New Haven & Hartford R. Co.}, 147 F.2d 40 (2d Cir.), cert. denied, 325 U.S. 884 (1945)). This method is not accorded any explicit recognition in § 361 or the legislative reports.

\textsuperscript{180} As the Commission suggested in the note to its proposed § 7-202, additional security appropriately would be required only “if there is no equity or the equity is marginal.” Commission Report II, supra note 9.
interest in the property.\textsuperscript{181}

The Commission on Bankruptcy Laws had stated that "'[a] benchmark in determining the adequacy of protection is the liquidation value of the collateral at the date of the petition.'"\textsuperscript{182} This statement was criticized by spokesmen for secured creditor interests,\textsuperscript{183} and the draftsmen of section 361 and the accompanying legislative reports avoid making any unequivocal statement about the standard of valuation.\textsuperscript{184}

An additional ground for mandatory relief from the stay of an act against property is that the debtor has no equity in the property and that the property is not necessary to an effective reorganization.\textsuperscript{185}

The thrust of this provision, set forth in section 362(d)(2), is elaborated in statements made by the spokesmen for the conferees who explained the amendments reconciling the Senate and House bills:

\begin{quote}
This section is intended to solve the problem of real property mortgage foreclosures of property where the bankruptcy petition is filed on the eve of foreclosure. The sec-
\end{quote}

\textsuperscript{181} The House Report suggested as two forms of adequate protection that illustrate the last mode of adequate protection the following: (1) the guaranty by a third party "outside the judicial process" of compensation for any loss incurred in the case; and (2) permitting a secured creditor to bid in his claim at the sale of the property and to offset the claim against the price bid in. \textit{House Report, supra} note 14, at 340. The second mode of protection is no more than permission to exercise one of the rights provided by his contract and accorded constitutional status in \textit{Louisville Joint Stock Land Bank v. Radford}, 295 U.S. 555, 594-95 (1935), \textit{discussed in Automatic Stay I, supra} note 3, at 180.

\textsuperscript{182} \textit{COMMISSION REPORT II, supra} note 9, at 237.


\textsuperscript{184} The section does not specify how value is to be determined, nor does it specify when it is to be determined. These matters are left to case-by-case interpretation and development. . . .

\textsuperscript{185} Neither is it expected that the courts will construe the term value to mean, in every case, forced sale liquidation value or full going concern value. \textit{House Report, supra} note 14, at 339; \textit{Senate Report, supra} note 14, at 54.

\textsuperscript{186} The lack of an equity in conjunction with an absence of a reasonable possibility for a successful reorganization has dictated the grant of relief from the stay in reorganization cases under the Rules. \textit{See Automatic Stay I, supra} note 3, at 239-43, 244-50. Section 361(d)(2) is at least consonant with the case law regarding the role of a lack of equity in the application of the automatic stay rules.

The original version of § 362(d) in S. 2266 required relief to be granted whenever the court finds no equity in the property subject to the stay. That proposal would have overruled many
tion is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even though the debtor has no equity if the property is necessary to an effective reorganization of the debtor. 186

Subparagraph (2) and the explication quoted in the text represent a substantial modification of a proposal embodied in section 362(d) as it originally passed the Senate. The Senate-approved version of the subsection declared that "property is not necessary to an effective reorganization of the debtor if it is real property in which no business is being conducted by the debtor other than the business of operating the real property and activities incidental thereto." In the next sentence, the subsection declared that "[w]here the debtor owns two or more properties for which an established business enterprise has been created for the purpose of managing and leasing such property, however, the court may find that one or more of such properties are essential to the effective reorganization of such real estate management enterprise." 187 The Senate Report explained that "[t]he intent of this exception is to reach the single-asset apartment type cases which involve primarily the tax-shelter investments and for which the bankruptcy laws have provided a too facile method to relay [sic] conditions, but not the operating shopping center and hotel cases where attempts at reorganization should be permitted." 188


187 S.2266 § 362(d). An additional sentence in the Senate version of § 362(d) required property not necessary for an effective reorganization to be sold pursuant to § 363 if the court determined that the debtor had an equity in the property.

188 SENATE REPORT, supra note 14, at 53. The purpose of the draftsmen of the provision in the Senate bill was to curb what has been widely regarded as an abuse of Chapter XII of the Bankruptcy Act by investors in tax shelters whose objective is preservation of anticipated tax benefits rather than continuation of an economic enterprise for the benefit of the debtor, creditors, and the general public. The federal tax laws have made a limited partnership that acquires an apartment building by executing a mortgage securing a nonrecourse loan an attractive investment for persons looking for a tax shelter. Glasser, Gimme Shelter: Reform of Real Estate Tax Shelters, 7 U. Mich. J.L. Ref. 267, 271-77 (1974); Note, Tax Classification of Limited Partnerships, 90 Harv. L. Rev. 745, 781-83 (1977). The anticipations of many investors and lenders have been dashed by the depression of real estate values that has occurred in the last five years. See Lifton, Real Estate in Trouble: Lender's Remedies Need an Overhaul, 31 Bus. Law. 1927 (1976). Chapter XII has been resorted to by many of the limited partnerships that have defaulted on payments due their mortgagees. See State Mut. Life Assur. Co. v. KRO Assoc., 4 Bankr. Ct. Dec. 462, 467 (Ref., S.D.N.Y. 1978); Macey & Macey, The Chapter XII Chrysalis, 52 AM. BANKR. L.J. 121-122 (1978); Reopened Chapter: Real Estate Slump Helps to Revive Use of Long-Dormant Bankruptcy Provision, Wall St. J., Sept. 29, 1976, at 48, col. 1. In the most celebrated case, In re Pine Gate Assoc., Ltd., 10 Collier Bankr. Cas. 581 (Ref., N.D. Ga. 1976), the bankruptcy court ruled that a plan may be confirmed under § 461(11), the cram-down provision of Chapter XII of the Bankruptcy Act, notwithstanding the dissent of all the secured creditors. The plan would provide for payment to the first mortgagee of an amount equal to the appraisal value of the mortgagee's collateral,
Under section 362(d), as enacted, the bankruptcy court may, but is not required to, find that an encumbered building which the debtor operates without having an equity in it is not essential to an effective reorganization. The subsection avoids constitutional doubts that surely would have clouded application of the Senate-approved subsection.

The House and Senate Reports take pains to explain that the grounds specified in the statute are not the only causes for relief. Other sufficient causes suggested in the reports include simply "a desire to permit an action to proceed to completion in another tribunal," and "the lack of any connection with or interference with the pending bankruptcy case." References are made to a divorce or child custody proceeding involving the debtor and to a probate proceeding in which the debtor is the executor or the administrator of another's estate to illustrate situations where relief from the stay should be granted. "Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors."

In any hearing on a request for relief from the stay, subsection (g) places the burden of proof with respect to the issue of the debtor's equity in property on the party requesting relief from the stay. On all other issues the party opposing such relief has the

consisting of an apartment building, permitting the partnership as the mortgagor to retain the property without liability for any deficiency to the secured creditors who had made non-recourse loans on the property. See also In re Pine Gate Assoc., Ltd., 12 Collier Bankr. Cas. 607 (Ref., N.D. Ga. 1977) (property valued by capitalization of current earnings plus an increase of 20% from future earnings based on improvement in economic factors). Section 213(e) of the Tax Reform Act of 1976, I.R.C. § 704(d), has limited the availability of a tax shelter for certain activities, but the reform did not reach the use of the limited partnership in connection with real estate syndications. Note, Tax Classification of Limited Partnerships, 90 HARV. L. REV. 745, 781 (1977).

189 HOUSE REPORT, supra note 14, at 343; SENATE REPORT, supra note 14, at 52.

190 HOUSE REPORT, supra note 14, at 343. The Report might well have cited Foust v. Munson S.S. Lines, 299 U.S. 77 (1936), and other cases cited in Automatic Stay I, supra note 3, at 235 n.291.

191 HOUSE REPORT, supra note 14, at 343; SENATE REPORT, supra note 14, at 52. An appropriate reference might have been made to In re Laufer, 230 F.2d 866 (2d Cir. 1956), and the other cases cited in Automatic Stay I, supra note 3, at 236 n.294.

192 HOUSE REPORT, supra note 14, at 343. Appropriate citations would have included Hernandez v. Borgos, 343 F.2d 802 (1st Cir. 1965), and Herman v. Herman, 12 Collier Bankr. Cas. 274 (W.D. Mich. 1977).

193 HOUSE REPORT, supra note 14, at 343-44; SENATE REPORT, supra note 14, at 52.

194 There is no indication in § 362(d) what standard of value should be applied in determining the existence of an equity. This matter is presumably left to the courts as it is in determining the adequacy of protection of the party seeking relief. See note 184 supra.

The Peitzman & Smith redraft of subsection (d) required a party seeking continuation of a stay to show that he would be entitled to prevail at the final hearing. Peitzman & Smith, supra note 166, at 1258. In ruling at either a preliminary or final hearing, the court would be forbidden by subsection (g) of the redraft to order continuation of a stay unless it found that adequate protection had been provided for the party seeking relief. Id. at 1258-59.
burden of proof.\textsuperscript{195} The House Report declared that “[t]he rules may not shift the burden of proof from the moving party,”\textsuperscript{196} but when the final version of the enacted bills was presented to the two houses, it was explained that allocation of the burden of proof by such provisions as section 362(g) was “not intended to preclude the Rules of Bankruptcy Procedure from providing the same or a different burden of proof on other issues arising under those sections or otherwise.”\textsuperscript{197} Moreover, the courts presumably remain free to determine the rules governing the shift of the burden of going forward with the evidence in light of such considerations as the difficulty of proving nonessentiality of property for an effective reorganization and the difficulty of establishing the existence of facts of which evidence is more accessible to one party than the other.

**E. Availability of Other Relief**

Unlike the last subdivision of all the automatic stay rules and section 85(e)(4) of the Bankruptcy Act, section 362 includes no provision that negates any inference that the section is a limitation on the power of the court to issue restraining orders and injunctions or to order relief from stays, orders, and injunctions. As the House Report explains, the amplitude of the power of the bankruptcy court to grant such relief is clear under the broad language of section 105(a) of Title 11 and other provisions of the new bankruptcy law.\textsuperscript{198}

\begin{footnote}
\textsuperscript{195} The Rules of Bankruptcy Procedure require the party seeking the continuation of a stay against lien enforcement to show that he is entitled thereto. \textit{Id.} at 1262. Cited in support were the trio of cases dealing with the constitutionality of former § 75(s) of the Bankruptcy Act: Wright v. Union Cent. Ins. Co., 311 U.S. 273 (1940); Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440 (1937); Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935). These cases impose no such constraint on the draftsmen of an automatic stay statute as assumed by Peitzman & Smith. See Countryman, \textit{Treatment of Secured Claims in Chapter Cases}, 82 Com. L.J. 349, 357-60 (1977).
\end{footnote}

\begin{footnote}
\textsuperscript{196} House Report, supra note 3, at 226-27. In explicitly placing the burden of proof as to all issues other than the existence of an equity on the party opposing relief, the statute appears to ease the burden of the party seeking relief in cases where the stay does not operate against lien enforcement. On the other hand, the placement of the burden of proof on the issue of the debtor’s equity in the property clearly lightens the load for the debtor or other party seeking continuation of a stay against lien enforcement.
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\textsuperscript{198} House Report, supra note 14, at 342. Section 105(a) is derived from § 2a(15) of the Bankruptcy Act but does not include the provision that restricts the authority of a bankruptcy judge to restrain a court. This restriction, however, is imposed by 28 U.S.C. § 1481, which nevertheless gives a bankruptcy court the powers of a court of equity, law, and admiralty. \textit{See House Report}, supra note 14, at 342.
\end{footnote}

The House Report suggests that the All Writs Statute also becomes available to the bankruptcy court by virtue of § 213 which amends 28 U.S.C. § 451 (1976) to include “bankruptcy
III. The Automatic Stay in Chapter 9 Cases

Title 11 includes a special section applicable to the operation of the automatic stay in Chapter 9 cases. Section 901(a) makes section 362 fully applicable in such cases, but section 922 supplements section 362 by providing for an automatic stay exclusively applicable in cases under Chapter 9.

Chapter 9 is only available as a vehicle for the adjustment of debts of a municipality, but municipality is broadly defined to mean any "political subdivision or public agency or instrumentality of a State." The chapter is a revision of Chapter IX, as recently amended by Congress in anticipation of the possible invocation of relief under the Bankruptcy Act by New York City. Section 85(e) of the Bankruptcy Act provided, in paragraph (1), for a statutory stay against the following:

(1) "the commencement or the continuation of any judicial or other proceeding against the petitioner, its property, or an officer or inhabitant of the petitioner, which seeks to enforce any claim against the petitioner";

(2) "an act or the commencement or the continuation of a judicial or other proceeding which seeks to enforce a lien upon the property of the petitioner or a lien on or arising out of taxes or assessments due the petitioner"; and

(3) "the enforcement of any set-off or counterclaim relating to a contract, debt, or obligation of the petitioner."

Rule 9-4(a) is substantially identical in form and content to section 85(e)(1) of the Act.

Section 922(a)(1) of the new law supplements section 362(a) by staying any proceeding against an officer or inhabitant of a municipality-debtor to enforce a claim against the debtor. It is
FALL 1978] Automatic Stay in Bankruptcy 49

immaterial for the purpose of this paragraph whether the claim arose or could have been sued on before or after the filing of the petition. Since the automatic stay of section 362(a)(1) does not operate to bar a proceeding against the debtor on a postpetition claim, the automatic stay of section 922(a)(1) has a longer reach with respect to a proceeding on such a claim against an officer or inhabitant than if the proceeding is directly against the municipality-debtor.

Paragraph (2) of section 922(a) reaches only the enforcement of a lien on or arising out of taxes or assessments owed to the debtor. This provision apparently applies to an act or proceeding that might be or might have been initiated by or on behalf of the debtor. It carries over a feature of section 85(e)(1) of the prior Bankruptcy Act and Rule 9-4(e), but its scope and effect are not clear.

Subsections (c), (d), (e), (f), and (g) of section 362 apply to the stay of section 922. These are the provisions that prescribe the duration of the stay and the procedure for obtaining relief. The duration of the stay under section 362(c) is substantially identical to that provided in section 85(e)(2) of the Bankruptcy Act and Rule 9-4(b). The provisions governing the request for relief are considerably more elaborate under subsections (d)-(g) of section 362 than those found in section 85(e)(3) of the Bankruptcy Act and Rule 9-4(c). Rule 9-4(c) requires the party seeking continuation of the stay to "show that he is entitled thereto," whereas section 362(g) requires the party opposing relief from the stay to carry the burden of proof on all issues except the debtor's equity in the property.

The difference between these provisions with respect to the burden of proof is likely to be inconsequential in Chapter 9 cases.

IV. STAY OF ACTIONS AGAINST CODEBTORS IN CHAPTER 13 CASES

The new bankruptcy law includes another section providing for an automatic stay. Section 1301 generally prohibits any act, or the commencement or continuation of any civil action, by a creditor of a Chapter 13 debtor to collect a consumer debt from an individual primarily for a personal, family, or household purpose or for a transaction for which credit was extended primarily for personal, family, or household purposes.

Nevertheless, the absence of an automatic stay against such a proceeding does not preclude the possibility of injunctive relief at the instance of the debtor. See note 198 and accompanying text supra.


See discussion at pp. 37-47 supra.

See notes 194-95 and accompanying text supra.

A "consumer debt" is one "incurred by an individual primarily for a personal, family,
vidual who is liable as a surety or co-obligor.\textsuperscript{209}

The Commission on Bankruptcy Laws had recommended the imposition of a moratorium, during the pendency of a rehabilitation case concerning a debtor with regular income, on the collection of a debt provided for by the plan from a codebtor of the petitioning debtor.\textsuperscript{210} The Commission was informed that many petitioners under Chapter XIII of the Bankruptcy Act have been required to furnish cosigners or sureties on notes to cover consumer loans and consumer credit sales. While the bankruptcy court may and does enjoin collection of these debts from the borrower or buyer during the pendency of the Chapter XIII case,\textsuperscript{211} it cannot ordinarily bar the creditor from suing a co-obligor or surety who does not accept the plan.\textsuperscript{212}

When collection is enforced or threatened against a

\textsuperscript{209} The stay imposed by § 1301(a) protects “any individual that is liable on such debt with the debtor, or that secured such debt.” The language is similar to that used in a comparable provision recommended by the Commission on Bankruptcy Laws. See the text accompanying notes 210-13 infra. The language appears also in § 509(a) as it did in Rule 304 and other Rules governing the filing of claims by codebtors. As explained in the Advisory Committee’s Note accompanying Rule 304, this language covers a surety, guarantor, indorser, codebtor, or one who secures a creditor of another by pledging collateral or otherwise creating a security interest in his own property without assuming any personal obligation to the creditor. See 12 COLLIER ¶ 304.05 (1975); see also Countryman, Codebtors in Rehabilitation Proceedings, 81 COM. L.J. 383 (1976).

\textsuperscript{210} COMMISSION REPORT I, supra note 9, at 166-67; COMMISSION REPORT II, supra note 9, ¶ 6-208, at 214.

\textsuperscript{211} Prior to the promulgation of the Rules of Procedure for Chapter XIII cases, bankruptcy courts routinely enjoined the collection of debts through judicial proceedings by creditors of petitioning debtors pursuant to §§ 11a and 614 of the Bankruptcy Act. 10 COLLIER ¶ 23.05 (1974). Rule 13-401 has imposed an automatic stay on such collection since the Chapter XIII Rules became effective on October 1, 1973. 15 COLLIER ¶ 13.401.04 (1975).

\textsuperscript{212} COMMISSION REPORT I, supra note 9, at 167:

It is possible under present Chapter XIII for a plan to deal with the creditor’s claim against the surety as well as the debtor [Schraer v. G.A.C. Finance Corp., 408 F.2d 891 (6th Cir. 1969)], but a creditor with a right of action against a surety or other co-obligor may be unwilling to agree to a waiver or modification of his right against the other debtor. There is no means under the present law to compel a creditor to give up any of his rights against the codebtors even though all the other creditors approve the plan as proposed.

When bankruptcy courts have enjoined creditors’ actions to collect Chapter XIII debtors’ obligations from codebtors, the injunctions consistently have been terminated on review in recognition of the applicability of § 16 of the Bankruptcy Act in Chapter XIII cases. Reed v.
cosigner or surety who is a coworker or relative, the debtor is subjected to enormous pressure to reimburse the accommodation party who has paid, or to pay the creditor directly in order to deter suit against the codebtor. Such a payment by the Chapter XIII debtor not only violates the terms of the plan but typically impairs the ability of the debtor to complete performance of his obligations under the plan. The Commission did not recommend any legislative restriction of creditors’ ability to require consumer debtors to furnish cosigners on their obligations, but it viewed the provision for a moratorium as a desirable safeguard against premature termination of plans for debtors with regular income.

A. The Scope of the Stay

The Commission’s proposal was strongly opposed by spokesmen for the banking and consumer finance industry at hearings on the Commission’s and the Bankruptcy Judges’ bills, which included provisions for a moratorium on collection of claims from codebtors in practically identical form and content. One of the objections was that the proposal afforded relief to compensated sureties and endorsers of negotiable instruments. Section 1301 of Title 11 responds to this criticism by making the stay inoperative against a codebtor who assumed his obligation in the ordinary course of business. This limitation is calculated to restrict the stay of section 1301 to its purpose to protect debtors and their families, friends, and coworkers from the harsh consequences of cosigning negotiable instruments imposed on them by the consumer finance industry. The Federal Trade Commission has found that cosigners for accommodation in nonbusiness situations are generally unaware of the legal significance of their acts. Moreover, persons

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General Fin. Loan Co. of Norfolk, 394 F.2d 509 (4th Cir. 1968); In re Shelor, 391 F. Supp. 384 (W.D. Va. 1975); In re Lancaster, 38 F. Supp. 318 (W.D. Mo. 1941).

213 A Chapter XIII plan must deal with all unsecured creditors in the same way. 10 COLLIER ¶ 28.02 (1978).

214 House Hearings, supra note 23, at 917-18, 1027-28, 1029-30. Some of the criticisms are discussed in the text accompanying notes 216 and 249 infra.


217 The Federal Trade Commission has proposed a Trade Regulation Rule on Credit Practices that defines as an unfair credit practice the taking by a lender or retail installment seller in a consumer credit transaction of an obligation as a cosigner from anyone not a spouse of the debtor unless certain disclosures are made several days in advance of the signing. 40 Fed. Reg. 16,347 (1975); Report of the Presiding Officer on Proposed Trade Regulation Rule: Credit Practices, 16 C.F.R. pt. 444, Pub. Record 264-86 (Aug. 11, 1978).
engaged in the business of assuming suretyship obligations are ordinarily compensated. Such sureties do not need the protection of section 1301 because they can take account of the risk of delay or inability to obtain reimbursement from their principal debtors in the premiums they charge.

The purpose of restricting the protection of section 1301 to non-business debtors is further implemented by the limitation of its prohibition to the collection of a consumer debt from an individual. Most compensated sureties are corporations. The Commission's proposal for a stay of collection from codebtors did not include these restrictions, but the Commission's proposal did not contemplate the eligibility of a debtor engaged in business for relief of the kind provided by Chapter 13. Such a debtor is far more likely to have as a codebtor a corporate surety or endorser and to be obligated on a business debt. As a result the stay of section 1301 is not likely to have a significant role in reorganizations of small businesses under Chapter 13.

Section 1301 prohibits not only the initiation or continuation of any civil action against a codebtor but any act to collect from him. If the codebtor has merely secured the debt, the prohibition clearly extends to any act of repossession or foreclosure out of court. The automatic stay of "any act to collect" a claim imposed by section 362(a)(6), as previously noted, is intended to reach harassment and other nonjudicial methods of coercing or merely encouraging payment. It is manifest that section 1301(a) is intended to have the

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The National Commission on Consumer Finance recommended the enactment of legislation relieving any person other than a spouse of the principal obligor from liability as a cosigner unless he receives a copy of an explanatory disclosure of the obligations assumed. Section 3.208 of the Uniform Consumer Credit Code is a response to this recommendation. Compensated sureties have the same right of reimbursement as accommodation sureties, L. Simpson, Suretyship 236 (1950), but they are subject to the stay of § 362 against collection of prepetition claims. See text accompanying notes 39-42 and 90-92 supra. A compensated surety's plight during the pendency of a Chapter 13 case concerning the principal debtor is not likely to generate moral pressure on the debtor to pay the surety or the creditor more or faster than provided by the plan. Corporate codebtors are not protected by the stay, whether or not they are compensated and whether or not their obligations were assumed in the ordinary course of the corporate business. On the other hand, an individual codebtor is protected even though he is compensated for assuming the obligation unless he did so in the ordinary course of his business. The business need not be that of acting as a surety. Thus, an individual who indorsed a check of the debtor in the course of his business falls outside the ambit of the statutory stay.

See Restatement of Security § 82, Comment i (1941). The National Bankruptcy Conference suggested that the limitation on the stay should not be dependent on whether the codebtor was compensated since creditors could easily nullify the purpose of the provision by assuring that codebtors receive a nominal consideration. House Hearings, supra note 23, at 1412, 1423.

See notes 208-09 and the accompanying text supra.

Restatement of Security § 82, Comment i (1941).

See the text accompanying notes 90-92 supra.
same effect. Section 1301(b) explicitly provides, however, that a stay under that section does not preclude the presentation of a negotiable instrument or the giving of notice of dishonor of such an instrument. As the House Report explains, this provision merely enables the creditor "to preserve his substantive rights against the codebtor as required by applicable nonbankruptcy law."223 Unless relief is obtained from the bankruptcy court, however, the stay provided by section 362 prevents the holder or any other party from attempting to collect on a negotiable instrument from the debtor, and section 1301 precludes any act against a protected codebtor other than presentation and notification of dishonor, irrespective of whether the debtor's or the codebtor's liability is as a maker or endorser.224

B. Duration of the Stay; Statute of Limitations

Section 1301(a) does not use the drafting approach employed in section 362 and the automatic stay rules of attaching the effect of a stay to the filing of a petition.225 The statute simply imposes a prohibition on the creditor that takes effect "after the order for relief under this chapter." Since only a voluntary petition can be filed under Chapter 13, the order of relief is simultaneous with the filing of an original petition in a Chapter 13 case.226 If a Chapter 7 or Chapter 11 case is converted to one under Chapter 13, however, the order for relief under Chapter 13 means the conversion of the case to Chapter 13.227 Thus, if an action has been commenced against a codebtor during the pendency of a Chapter 7 or Chapter 11 case, the conversion of the case to Chapter 13 results in a prohibition of the continuation of the action if it could not have been initiated against the codebtor of a Chapter 13 debtor.

Section 1301(a) terminates the stay it provides when the Chapter 13 case is closed, dismissed, or converted to a case under Chapter 7 or Chapter 11. This limitation simply assures that the stay is confined to its purpose to foster the completion of Chapter 13 plans. It

224 See House Hearings, supra note 23, at 1413, 1423, where a similar view was taken of the effect of an amendment of the Commission's bill proposed by the National Bankruptcy Conference.
225 The bill follows the Commission's drafting approach, although the National Bankruptcy Conference had proposed language that would parallel the automatic stay rules and that was followed in the drafting of § 362. House Hearings, supra note 23, at 1417. Possible difficulties arising out of the drafting approach in § 1301 are discussed in the text accompanying notes 228-29 infra.
227 Id. § 348(b).
substantially follows the Commission’s recommendation in this respect.\textsuperscript{228}

The Commission on Bankruptcy Laws recommended that when a stay operates against the initiation of an action to collect a debtor’s claim from a codebtor, the statute of limitations applicable to the commencement of such an action should be suspended until thirty days after the expiration of the stay.\textsuperscript{229} Section 108(c) does not suspend the operation of the statute of limitations but extends any period of limitations running against the creditor when the petition was filed to a date at least thirty days after notice of the termination or expiration of the stay.\textsuperscript{230}

\textit{C. Relief from the Stay}

Subdivision (c) of section 1301 requires the bankruptcy court to grant relief on request by a party in interest\textsuperscript{231} in three circumstances:

1. where the surety or co-obligor of the Chapter 13 debtor received the consideration for the creditor’s claim;
2. where the plan filed by the debtor does not propose to pay the claim; or
3. where the creditor’s interest would be irreparably harmed by the stay.

The relief is to be commensurate with the justification. The stay is

\textsuperscript{228} The duration of the stay of § 1301 is the same as that of § 362 with one exception. Under § 1301, the stay of acts and actions against a codebtor is coterminous with the pendency of a Chapter 13 case and continues without regard to the granting or denial of a discharge in the Chapter 13 case. See discussion of the termination of the stay under § 362 in the text accompanying notes 153-65 supra.

Arguably, the stay of § 1301 should be terminated when a discharge is denied in the Chapter 13 case. The objective of encouraging the debtor to complete performance of his plan is better served, however, by requiring the creditor who wishes to pursue the codebtor after denial of the debtor’s discharge to show that relief from the stay is equitable and compatible with the purposes of the chapter. Since a discharge in a Chapter 13 case is granted only on the eve of closure of the case, the continuing operation of the stay during the interval between discharge and the closing can be consequential only in a rare case. In the rare case relief may be sought pursuant to subsection (b). Where the confirmed plan is a composition, a creditor is entitled to relief from the stay prior to and independently of the discharge with respect to the portion of the claim not proposed to be paid under the plan. See text accompanying note 239 infra.

\textsuperscript{229} COMMISSION REPORT II, supra note 9, at 214.

\textsuperscript{230} The creditor gets more than the 30-day extension if the applicable period, plus any suspension prescribed by applicable law other than Title 11, has not run its course. The provision in § 108(c) invites litigation as to when or whether notice of the termination or expiration of the stay was ever received. Neither the debtor nor the codebtor is likely to be impelled to insure that a notice of the termination or expiration of the stay has been given to the creditor subject to the stay. Section 108(c) imposes on the creditor a duty of diligence in the pursuit of a codebtor if the period of limitations prescribed by nonbankruptcy law expires during the pendency of a stay prescribed by § 1301.

\textsuperscript{231} The party in interest, of course, ordinarily will be the creditor subject to the stay, and until a very late stage in the legislative process, § 1301(c) recognized only that a creditor (presumably the creditor subject to the stay) could request relief. A “party in interest” is not
to be modified rather than terminated when the reason for the relief extends only to part of the creditor’s claim.\textsuperscript{232}

The first ground for relief is intended to permit the creditor to show that the codebtor is the principal, rather than the debtor, and therefore ought to be subject to liability without regard to the pendency of the Chapter 13 case concerning the debtor.\textsuperscript{233} The determination of who received the consideration for the creditor’s claim may be a difficult one, particularly when the debtor and codebtor are closely related.\textsuperscript{234} Where the debtor and codebtor have agreed between them that the codebtor is the party bound to perform, an act or action by the creditor to collect from the codebtor is not likely to exert pressure on the debtor to pay either the creditor or the codebtor.\textsuperscript{235} This situation may arise even when the debtor re-

\textsuperscript{232} Thus, the creditor should be permitted to sue the co-obligor for only a part of the obligation if only a part of the consideration went to the co-obligor; or if the plan provided for a composition rather than an extension; or if the creditor could show irreparable harm from the stay with respect to only part of the creditor’s claim.

\textsuperscript{233} See \textit{House Report}, supra note 14, at 122, 426. Section 1301 does not incorporate a proposal of the National Bankruptcy Conference that a right of contribution or reimbursement belonging to or acquired by the debtor may be enforced against a codebtor. \textit{House Hearings}, supra note 23, at 1413, 1417, 1424. The draftsmen of the section presumably concluded that the proposal expressed what is implied in § 1306, the section of Chapter 13 describing property of the estate.


\textsuperscript{235} The pressure exerted by collection efforts of a creditor against a codebtor of a Chapter 13 debtor does not arise from the codebtor’s right of reimbursement or subrogation against the debtor. The codebtor is, or at least may be, stayed from pursuing the debtor during the pendency of the Chapter 13 case, and the discharge received by the debtor pursuant to § 1328 is binding on the codebtor. It is the pressure to honor the moral obligation owed an accommodation party required to pay or threatened with suit that jeopardizes the performance of the obligations of the Chapter 13 plan. That obligation is onerous when the accommodation party is a relative, friend, or coworker, particularly when the legal significance of the obligation was not understood when it was assumed. See \textit{House Report}, supra note 14, at 121-22, 426; \textit{House Hearings}, supra note 23, at 1324 (statement of Bankruptcy Judge Conrad Cyr, suggesting that the most serious obstacle to completion of successful Chapter XIII plans is the inability to control creditor collection efforts against codebtors); \textit{id.} at 1412-13, 1416-18, 1422-24 (testimony of Professor Vern Countryman, explaining amendments of the Commission’s § 6-208 proposed by the National Bankruptcy Conference); \textit{The Bankruptcy Reform Act: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess.} 606-07 (1975) (testimony of Sam Plowden and Claude Rice of the Nat’l Ass’n of Chapter XIII trustees) [hereinafter cited as \textit{Senate Hearings}]; \textit{cf. House Hearings}, supra note 23, at 943-44 (statement of E.L. Sarason, Jr., of the National Consumer Law Center, Inc., urging discharge of cosigners’ obligations in consumer bankruptcies); \textit{Nat’l Comm’n on Consumer Finance, Consumer Credit in the U.S.} 39 (1972).

The rationale of the Commission’s proposed § 6-208, discussed in the text accompanying notes 210-13 supra, was not understood by representatives of the Department of Justice who testified against the proposal at the hearings on bankruptcy act revision and reform: “The debtor can suffer no detriment from such collection action since the debtor’s discharge abso-
ceived the consideration for the claim held by the creditor.\textsuperscript{236} Thus, the objective of subsection (c)(1) might have been better achieved by authorizing relief to the extent that the creditor can show that the debtor was an accommodation party for the benefit of the codebtor, \textsuperscript{237} or that the codebtor was the party ultimately liable for the debt.\textsuperscript{238}

The second ground for relief recognizes that the creditor should not be precluded from seeking collection from the codebtor of any amount of the debt not provided for in the plan. If the plan offered by the debtor is a composition, it would be inequitable to the creditor to prohibit him from collecting from the surety that portion of the debt the plan does not propose to pay. The creditor's right to payment to the full extent of the obligation assumed by the codebtor is thus recognized, and the delay resulting from the stay is limited to that part of the obligation the Chapter 13 debtor is undertaking to pay under the plan. Before the plan is finally confirmed, there may be some uncertainty as to the amount of the creditor's claim for which payment is offered. During the interim before confirmation, relief from the stay should be granted cautiously under section 1301(b)(2), lest it jeopardize the possibility of developing a feasible and fair plan. In any event, it is clear that if the plan does not propose to pay postpetition interest, attorneys' fees, and costs to which the creditor is entitled under his contract with the debtor, the creditor is not stayed from seeking collection of these items.
from the codebtor. 239

A third ground for relief is that the creditor's interest would be irreparably harmed by the stay. Examples of such harm suggested by the House Report include the filing of a bankruptcy petition by the codebtor, his threat to leave the locale, or his loss of a job. 240 The bankruptcy of the codebtor would trigger the stay of section 362 on his behalf, 241 however, and the codebtor's loss of a job would be likely to make the relief obtainable under section 1301(b)(3) useless.

A more realistic basis for relief under section 1301(c) would be a showing that the creditor's collateral is deteriorating, that the codebtor is likely to be unable to pay the debt at the end of the plan, and that the stay therefore subjects the creditor to the risk of irreparable loss. 242 The many cases decided under the automatic stay rules that award relief on a showing of irreparable harm are pertinent here. 243 The court does not have the same freedom to require adequate protection of the creditor out of the codebtor's estate as it does with respect to the debtor's estate, 244 but relief from the stay may be withheld by the court on provision of adequate protection to the creditor by the codebtor from his or another's estate. 245

Section 1301(c) explicitly requires a "notice and hearing to precede the grant of relief from the stay." As explained in accompanying legislative reports, 246 the requirement negates the power of the court to grant relief sua sponte but does not require the formality of a hearing and the taking of evidence when no party entitled to be heard requests it. 247

receipt of consideration is not the critical matter. Rather it is or ought to be the locus of the ultimate liability on the debt as between the debtor and the codebtor.

239 See HOUSE REPORT, supra note 14, at 122, 426; SENATE REPORT, supra note 14, at 138.

240 HOUSE REPORT, supra note 14, at 426.

241 See text accompanying notes 39 and 90-94 supra.

242 The National Bankruptcy Conference proposed this ground for relief from the stay. House Hearings, supra note 23, at 1412, 1417, 1423. See also id. at 1027, 1030 (testimony of W.W. Vaughan of American Bankers Ass'n and Consumer Bankers Ass'n); SENATE REPORT, supra note 14, at 139.

243 See Automatic Stay I, supra note 3, at 244-50.

244 See discussion accompanying notes 177-84 supra.


247 The phrase, "after notice and hearing," is defined in § 102(1). An actual hearing before the act can be authorized is excused not only in the circumstance set out in the text but also when "there is insufficient time for a hearing to be commenced before such act must be done." It is doubtful that any such emergency will arise to justify an ex parte hearing under § 1301(c). In any event, a prompt hearing after the act would be available to a party opposed to the grant of relief. 124 CONG. REC. H11,090 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards); 124 CONG. REC. S17,407 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).
Section 1301 contains no reference to burden of proof in proceedings for relief from the stay. As a result, Rules of Bankruptcy Procedure may be prescribed to deal with that matter. In the absence of such rules, the courts will be free to allocate the burden in the light of considerations of fairness to the litigants and what comport best with sound judicial administration. Ordinarily, the burden of proof falls on the moving party, and the creditor seeking relief should have the burden of establishing his right to relief and the extent of it. The creditor who has presented a prima facie case, however, should be able to shift the burden of going forward with the evidence to the codebtor in situations where the codebtor has superior access to the relevant facts. Such a shift would be appropriate, for example, if the creditor's request for relief is based on the contention that the codebtor assumed the obligation in the ordinary course of business or on the ground that the codebtor received the consideration for the creditor's claim.

D. Constitutional Considerations

One of the objections made to the proposal in the Commission's and Bankruptcy Judges' bill to stay proceedings against a codebtor was that it is doubtful that Congress properly can provide relief under the bankruptcy clause of the Constitution to persons whose estates are not being administered under the bankruptcy laws. The argument is far-fetched. It would be a whimsical reading of the clause, and one wholly inconsistent with its uniform construction, to deny Congress the power to restrict actions by creditors that interfere with rehabilitation of a financially distressed debtor.

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The explicit requirement of a notice and hearing was inserted rather late in the legislative process but was implicit in the previously included language requiring a request for relief to be made by a creditor. See note 230 supra. The amendment achieved parallelism with § 362(d).


249 House Hearings, supra note 23, at 1027, 1030 (testimony of W.W. Vaughan of American Bankers Ass'n and Consumer Bankers Ass'n); id. at 1365 (statement of the Nat'l Consumer Fin. Ass'n); Senate Hearings, supra note 235, at 130 (statement of W.W. Vaughan of American Bankers Ass'n and Consumer Bankers Ass'n); id. at 143, 170 (testimony of A. O. Wiese of the Nat'l Consumer Fin. Ass'n).

250 A steadily expansive interpretation . . . has been given to the Bankruptcy Clause during the one hundred and forty-eight years which have ensued [since the Constitution was originally proposed] . . . . The trail of that Clause is strewn with a host of unsuccessful objections based on constitutional grounds against the enactment of various provisions, all of which are now regarded as perfectly orthodox features of a bankruptcy law.

because of incidental benefits conferred by the restriction on persons other than the debtor. The principal authority relied on for questioning the congressional power respecting the rights and obligations of a surety is In re Nine North Church Street, Inc., 251 where the court refused to uphold a permanent injunction against enforcement of a solvent surety's obligation. The court observed preliminarily that a modification of the contract rights of creditors "can only be justified by the bankruptcy power which extends only to the relief of insolvent or hard pressed debtors," but, as the court noted, in the case before it, suits against the surety did not embarrass the debtor undergoing reorganization and relief against such suits was therefore not essential to the debtor's reorganization.252 Even in straight bankruptcy cases, bankruptcy courts have stayed actions of creditors against solvent sureties to prevent interference with the equitable administration of debtors' estates.253 In addition, the power of the court to enjoin creditors' actions against third persons when necessary to accomplish the objectives of rehabilitation under the debtor relief chapters has been recognized.254 Congress has more than once exercised its bankruptcy power to provide relief to sureties in order to enhance the attainment of the objectives of providing debtors a fresh start255 and effecting an equitable distribution of debtors' estates.256 The constitutionality of this legislation has not been questioned seriously.

251 82 F.2d 186 (2d Cir. 1936).
252 Id. at 188.
253 Id. at 188-89.

In Stoll v. Gottlieb, 305 U.S. 165 (1938), the Supreme Court held that a confirmation order of a bankruptcy court releasing a guarantor of bonds of the debtor was binding on the bondholders notwithstanding their contention that the order exceeded the bankruptcy court's jurisdiction. The Supreme Court declined to express an opinion on the jurisdictional question and predicated its ruling against the bondholders on res judicata. In Doty v. Love, 295 U.S. 64, 70-74 (1935), the Supreme Court unanimously upheld the constitutionality of a release of the personal liability of shareholders of a bank reorganized pursuant to a Mississippi statute.

256 Section 76 of the Bankruptcy Act made any extension confirmed under § 74 or § 75 applicable to obligations of sureties and other codebtors on the obligations extended by the confirmed plan. F. GILBERT, COLLIER ON BANKRUPTCY § 1641 (4th ed. 1937). Sections 74 and 76 were repealed by the Chandler Act. 5 COLLIER ¶ 99 (1976); id. ¶ 341 (1943).
257 Sections 57i and 63a(8) of the Bankruptcy Act enable a surety to file a claim against the debtor's estate when the creditor neglects to do so, in order to assure that the surety's ultimate obligation will be diminished to the extent of the dividends payable by the estate on the creditor's claim. 3 COLLIER ¶ 57.21 (1974); 3A id. ¶ 63.30 (1975).

Section 67a(5) of the Bankruptcy Act discharges the liability of a surety under a releasing bond or like obligation to the extent of the value of indemnifying property recovered or indemnifying lien avoided by the trustee or debtor pursuant to § 67a(3). See 4 COLLIER ¶ 67.14 (1975).
In any event, as the House Report pointed out, the creditor of a codebtor suffers no impairment of his substantive rights as a result of section 1301.\(^{258}\) He is required to share with other creditors of the same class in receiving payments from the debtor during the operation of the plan under Chapter 13. Like them, he is subject to the delay imposed to enable the debtor to effect a rehabilitation of his financial condition. To the extent the plan does not propose to deal with the creditor’s claim, he is entitled to be relieved from the stay of his collection from the codebtor.\(^{259}\)

**E. Enforcement and Sanctions**

Section 1301 is clearly intended to be self-executing, but the question may arise as to who has standing to require compliance by a creditor who is violating or threatening to violate it. It would be a hostile reading of the provision to give it only a defensive application, *i.e.*, to restrict its enforcement to affording the codebtor an affirmative defense when sued by the creditor. The codebtor, the trustee, and the debtor all appear to be parties in interest entitled to seek injunctive relief against a violation or threat of violation. The jurisdiction of the bankruptcy court conferred by the new bankruptcy legislation seems ample to embrace such an action,\(^{260}\) and the appropriate venue would be the bankruptcy court where the case of the principal debtor is pending.\(^{261}\)

Since the statute does not speak to the allocation of the burden of proof in litigation under section 1301, that matter may be dealt with by the Rules of Bankruptcy Procedure.\(^{262}\) In the absence of such rules, the courts must allocate the burden of proof case by case. Ordinarily, litigation involving section 1301 should be commenced by the creditor seeking relief, and, as previously noted,\(^{263}\) the cred-


\(^{259}\) An objection voiced at the Hearings on the Commission’s and Bankruptcy Judges’ bill that a stay of codebtors would restrict the availability of credit is particularly unconvincing. *See House Hearings,* *supra* note 23, at 1027, 1030, 1432; *Senate Hearings,* *supra* note 235, at 130. The stay of § 1301 is intended and expected to make plans of extension and composition under proposed Chapter 13 more attractive to wage earners than they are under present Chapter XIII. Creditors fare better when such plans are confirmed than they do when debtors resort to bankruptcy, even when the plans are not fully performed. *See D. Stanley & M. Girth, Bankruptcy: Problems, Process, Reform 104-05 (1971).* Insofar as the contingency of a prospective borrower’s resort to the bankruptcy laws enters into a creditor’s calculus, the increased likelihood of a debtor’s proposal of an extension or composition under the proposed law rather than opting for straight bankruptcy should enhance his creditworthiness.

\(^{260}\) The bankruptcy court is authorized to exercise “original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11” by 28 U.S.C. § 1471(b), as added by Pub. L. No. 95-598, § 241(a), 92 Stat. 2549 (1978).


\(^{262}\) *See* note 248 and the accompanying text *supra*.

\(^{263}\) *See* the text following the reference to note 248 *supra*. 
itor is in a better position to provide the relevant proof in such litigation. The burden of proof under section 1301 should not depend, however, on who initiates the litigation. Thus, the burden should not fall on the codebtor to require the creditor to comply with section 1301 where the creditor is seeking judicial assistance. Any other result would furnish an incentive to the creditor to force the codebtor to seek relief to compel compliance rather than to seek relief from the stay pursuant to section 1301(c).

The lack of reference to a "stay" in section 1301(a) is likely to raise the question of what sanction may be imposed on a creditor who disregards the statutory prohibition. It is inferable that in enacting section 362 Congress intended the case law that has developed respecting the enforcement of automatic stays under the Bankruptcy Act and the Rules of Bankruptcy Procedure to apply to the automatic stay established by the statute. That law has recognized the availability of contempt sanctions, at least with respect to the stays provided by the Rules. It is likely to be argued on behalf of one who has violated the statutory prohibition that punishment for contempt of court is inappropriate. Nevertheless, it should be noted that section 1301 is entitled "Stay of action against codebtor," and subdivision (c) of the section refers to "the stay provided by subsection (a) of this section." Moreover, the House and Senate Reports consistently refer to the "stay" effected by section 1301. Therefore, the courts probably will make the same remedies available for violation of the prohibition of section 1301 as for disregard of the automatic stays of sections 362 and 922, including the imposition of contempt sanctions.

V. SUMMARY AND CONCLUSIONS

The automatic stay is a legitimate and logical feature of administration of estates under bankruptcy laws. In the United States such laws have the dual purpose of enabling the debtor to obtain a fresh start and affording creditors equitable shares of their debtor's assets or the assurance of satisfaction or security for their claims on equitable terms. It is necessary to prevent creditors from improving their positions by resort to means not under the control of the court of bankruptcy if the objective of equitable distribution, satisfaction, or security is to be realized. Moreover, it is necessary to stay their efforts to collect from the debtor if the fresh start is to become effective. Under every bankruptcy act it has enacted,
Congress has recognized the importance of granting the bankruptcy court the power to stay creditors from pursuing their remedies and interests after the inception of proceedings by or against a debtor. Prior to the enactment of the new bankruptcy legislation, however, Congress has provided for an automatic stay only in legislation looking toward reorganization or rehabilitation. Nevertheless, the courts generally have acted on the premise that creditors must be stayed in straight bankruptcy as in reorganization and rehabilitation cases if its objectives are to be achieved. Thus, the automatic stays provided by the Rules of Bankruptcy Procedures have tended merely to replace stays ordered by the courts on applications filed by petitioners.

Litigation of the question whether a stay should be continued, terminated, or modified usually has followed patterns established prior to the promulgation of the Rules. Indeed, it was assumed and intended that debtors' and creditors' ultimate rights would not be significantly affected by the imposition of automatic stays by the Rules but that the relief contemplated under the bankruptcy laws would be frustrated by aggressive creditors less often after the Rules became effective.

Changes in bankruptcy law in this country generally and consistently have tended to enhance the fresh start policy and the policy of equalizing creditors' rights against a debtor and his property. Each new step Congress has taken toward fulfilling these objectives has been resisted as an offense against constitutional limitations on its power; however, the constitutional arguments in the courts and the literature have resulted in a formidable array of authority affirming the amplitude of the power of Congress to pursue broad bankruptcy objectives in all reasonable ways. The fresh start policy has been furthered by a series of congressional amendments during the sixties that limited the scope of exceptions and objections to discharge and reduced the risk that the policy would be frustrated by debtors' default and creditors' need. Meanwhile, debtors' rights were being enlarged at the expense of creditors' rights by an uneven, but nonetheless general, expansion of exemptions by nonbankruptcy laws that have been enforceable under the Bankruptcy Act. Equality among creditors has been fostered by a series of amendments to the avoidance sections of the Act; these amendments have enabled the trustee in bankruptcy more easily and frequently to level advantages obtained by creditors before the inception of proceedings under the Bankruptcy Act. Governmental priorities have been diminished by dint of great effort, and other kinds of priorities have been moderated.

The general tenor of bankruptcy law toward more perfect equality among creditors was countered in the sixties by the widespread
adoption of the Uniform Commercial Code and the decisional law construing it to enable secured creditors to obtain advantages over unsecured creditors far more easily than had been possible theretofore in this country. In particular, the Code facilitated the use by lenders of the floating lien against inventory and accounts receivable that could not be defeated by the most diligent and deserving of unsecured creditors of a business debtor. Trailing the development of an improved and simplified law of chattel security was an increasing recognition by bankruptcy courts of the need to protect a debtor’s interest in retaining possession and use of encumbered property during the pendency of a debtor relief case. Decisional law recognizes that, notwithstanding the validity of a security interest, and notwithstanding default by the debtor that would entitle the creditor to enforcement of his security interest under non-bankruptcy law, an appropriate balancing of interests of the debtor, unsecured creditors, secured creditors, and other affected persons may warrant a postponement of secured creditors’ enforcement rights. Court opinions not infrequently have come close to saying that Congress intended secured creditors’ rights to be postponed and subordinated to the extent necessary to afford a debtor in financial distress an opportunity to rehabilitation unless rehabilitation is a forlorn hope. Rehabilitation often is said to be preferable to liquidation, even though rehabilitation means postponement of the enforcement of a creditor’s concededly valid security interest.

The Rules did not change the law insofar as the possession of property by the debtor, the trustee, or a receiver is protected from lien enforcement without permission of the bankruptcy court. Nor did the Rules create any new right in the debtor, trustee, or receiver to stay proceedings pending against the debtor or its property when a petition under the Bankruptcy Act is filed. The initiative was shifted to the creditor to bring the issue before the bankruptcy court whether or how long the stay of such proceedings should continue. This change in the procedural scenario assured every debtor of at least temporary protection against enforced collection of dischargeable debts, and every estate of at least temporary protection against dismemberment by aggressive creditors. Most significantly, it provided breathing space for a debtor seeking rehabilitation in the form of a composition, extension, or reorganization. No longer was the availability of such relief dependent on the sophistication of counsel in preparing the papers for commencing a case under the Act.

The unqualified language of the Rules has enabled some debtors to resort to the Bankruptcy Act for the purpose of obtaining refuge from enforcement of state and federal laws of a regulatory nature. Moreover, the imposition of a sweeping stay on lien enforcement
and proceedings against the debtor has enabled some debtors to exploit the advantages of delay that characterize the judicial process. Although the Rules contain provisions designed to expedite determination of the issues presented by a party seeking relief from the stay, they do not preclude the possibility of irreparable injury to a creditor whose collateral deteriorates during the pendency of the proceedings on the request for relief. The injury to the creditor is aggravated when the court is dilatory in reaching a decision on whether to grant or deny relief. This unseemly result of the law's delay was not introduced by the Rules: criticism of courts for slowness to act on motion to terminate stays antedated the Rules.

Experience under the Rules has not generated a demand that the automatic stay be eliminated in the overhaul of the bankruptcy laws that has been under consideration by Congress for the past decade. The effectiveness of the stay in serving the objectives of these laws has not been challenged or doubted. The attention of Congress rather has been directed to eliminating the opportunity provided by the Rules for frustrating enforcement by governmental officials of regulatory laws and to finding ways of minimizing the incidence of delay in disposing of deserving requests for relief. The device of permitting extension of a stay of lien enforcement only by affirmative action of the court within thirty days after receiving a request for relief and only after a hearing on the request seems a promising approach to abatement of the latter problem. The limitation of the interim between a final and a preliminary hearing to thirty days is procrustean, but it is an understandable effort to deal with the most refractory problem in judicial administration. The withdrawal under the new law of authority from the Supreme Court to promulgate rules of procedure that depart from the statutory provisions preclude the development of other solutions by rules. The provision of the new legislation allowing governmental authorities to enforce laws of a police nature without constraint by the stay is likewise a reasonable resolution of the conflicting policies involved. If governmental officials are required to seek relief from the stay, as now provided by the Rules, it may be doubted that the enforcement of a regulatory scheme is likely to be jeopardized or undermined. Further, it is entirely conceivable that enforcement during an interim before judicial relief can be obtained will be fatal to the hope of financial rehabilitation of a debtor. Nevertheless, it is difficult to justify the position that the bankruptcy courts should provide an automatic shelter from the enforcement of laws that persons other than debtors in Title 11 cases are required to observe.

Insofar as the automatic stay provides a temporary respite from the enforced collection efforts of a minority of the creditors of a
debtor, it partakes of the essence of modern bankruptcy laws. Provi­sion for such relief incurs the risk that creditors, especially cred­itors who have had the foresight and leverage to obtain security, may be prejudiced during the pendancy of the stay. The provisions of the new law that establish and regulate automatic stays repre­sent a reasoned attempt to balance the competing considerations involved. The new Title 11 of the United States Code provides for a bankruptcy court of elevated dignity and prestige and enlarged jurisdiction. The elimination of the dischargeability of a debt under­lying an action and of the custody of the bankruptcy courts as fac­tors in defining the scope of an automatic stay is consonant with the grant of pervasive jurisdiction to the bankruptcy court. Title 28 withholds from the new court the power to enjoin another court, to punish a criminal contempt not committed in the presence of the court, or to punish a contempt by imprisonment.\textsuperscript{266} These limita­tions are relics of the inferior status from which the bankruptcy court in most respects has been lifted.\textsuperscript{267} They have more symbolic than real significance, however, and do not pose any serious threat to the ability of the court to exercise the jurisdiction granted. The automatic stay is an important adjunct to the court’s expanded powers under the new dispensation.


\textsuperscript{267} The denial of the power to enjoin another court derives from a proviso in § 2a(15) of the Bankruptcy Act. The limitations on the power to punish for contempt reflect a traditional reluctance to accord power to punish for contempts to referees in bankruptcy. Until 1973 referees were not authorized to punish any contempt. Rule 920 of the Rules, promulgated in 1973, authorized a referee to punish for contempt, civil or criminal, by imposing a fine of up to $250. Mr. Justice Douglas, in dissenting from the Supreme Court’s order promulgating the Bankruptcy Rules, expressed particular objection to the grant of power to referees to punish for contempt. 411 U.S. 992 (1973). Section 1481 of Title 28, \textit{as added by} Pub. L. No. 95-598, § 241, 92 Stat. 2549 (1978), does not appear to limit the power of the bankruptcy court to impose imprisonment or a fine of any amount for civil contempt, but the provision is more restrictive than Rule 920 insofar as it prohibits the bankruptcy court from punishing a criminal contempt committed outside the presence of the judge.