

## **I. Overview of Motions for Relief from the Automatic Stay**

- A. The Automatic Stay (11 U.S.C. § 362) is a central component of the bankruptcy system and one of the most fundamental protections
- B. Provides Debtor, the Debtor's property, and property of the estate with an immediate federal injunction of most creditor activities (i.e., foreclosure, garnishment, lawsuits, collection activity)
- C. The majority of circuits hold that acts taken in violation of the automatic stay are void ab initio rather than voidable.

## **II. Defending Motions for Relief from Stay**

- a. A Motion for Relief from the Automatic Stay is typically filed by a secured lender that is seeking permission to foreclose upon or seize collateral via the exercise of remedies available under applicable State law.
- b. Plan ahead and inform your client of their duties before filing the case to try to eliminate Motions for Relief or at least make them less likely
  - i. Obligation to maintain post-petition payments on real estate/vehicles
  - ii. Obligation to maintain insurance on real estate/vehicles
  - iii.
- c. There are many exceptions to the automatic stay and various ways the automatic stay can be terminated, modified, or conditioned/limited
- d. Grounds for Obtaining Relief from Stay
  - i. 11 U.S.C § 362(d)
  - ii. Cause, including lack of adequate protection
  - iii. Lack of Equity
  - iv. Unnecessary to effectively reorganize
- e. Burden of Proof
  - i. The party opposing relief from stay (the Debtor) carries the burden of proof on all issues except for issues pertaining to the amount of equity in the property. 11 U.S.C. § 362(g).
- f. Defenses
  - i. Adequate Protection: Evidence of post-petition delinquency means the Debtor must come forward with evidence demonstrating that the secured lender's interest is adequately protected.
    - 1. Examples of Adequate Protection (11 U.S.C § 361)
      - a. Existence of an Equity Cushion (14 B.R. 542 (E.D. Pa. 1981))
      - b. Replacement lien on other unencumbered property (In re Ahlers, 794 F.2d 388, 398 (8th Cir. 1998))
      - c. Cash Payments to the secured lender sufficient to offset depreciation (11 U.S.C. § 361(1))
    - 2. Equity Cushion
      - a. Battle of the Appraisals
      - b. Lien amount is lower due to offset

3. Necessary for Effective Reorganization

a.

4. Laches (*Investor Protection Corp. v. Bernard L. Madoff Inv. Secs. LLC*, \_\_\_ B.R. \_\_\_, 2013 U.S. Dist. LEXIS 55670 (S.D.N.Y. Apr. 15, 2013).

g. Applicable Local Rules

- i. Local Rule 4001-1 (Motions for Relief from Stay)
- ii. Local Rule 9013-1 (Sets forth the general requirements for motions)
- iii. Local Rule 5071-1 (Procedures for Continuances)
- iv. Local Rule 9070-1 (Exhibits and Witnesses)
- v. Local Rule 9014-1 (Certain Rules applicable to Adversary Proceedings are incorporated)
  - 1. Discovery, Depositions, Motions for Summary Judgment

h. Hearing Procedures

- i. A hearing under subsection 362(d) may be a preliminary hearing, or may be consolidated with the final hearing. 11 U.S.C. § 362(e).

i. Trial Procedures

- i. Know if hearing is preliminary or final
- ii. Know elements necessary to obtain relief (what has to be proved)
- iii. Know elements of defenses
- iv. Know who has the burden of proof
- v. Know what evidence is necessary
- vi. Know what witnesses and exhibits are necessary
- vii. Know how to get necessary evidence admitted
- viii. Know if you will need discovery to prove/defend