
13 NEWS[®]

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PRACTITIONER'S FORUM:

THE AUTOMATIC STAY AND REPOSSESSIONS

BY HOWARD T. DUNCAN

A continuing problem which presents itself to the Bankruptcy Court is the issue of post-petition activity in regard to pre-petition debts. Such activity includes the continued garnishment of the debtor's pay check, refusal to turnover funds to the debtor, continuing phone calls to the debtor, and the retention of a motor vehicle by the creditor after the filing of a bankruptcy petition.

It is clear that upon the filing of a bankruptcy 11 U.S.C. section 362 immediately governs. The clear intent of the Bankruptcy Code is to provide immediate relief to the debtor who files a bankruptcy petition. It is not by accident that 11

U.S.C. Section 362 is titled "automatic stay." Upon learning of the filing of a bankruptcy - either by mail, phone, or fax - creditors have an affirmative duty to either act or cease activity.

The problems often

develop when a creditor is either in possession of a motor vehicle or it has a garnishment against the debtor's pay check. These types of possessory interest are the most difficult for the creditor to relinquish, since it already has either the auto or the money.



Howard Duncan graduated from Creighton University School of Law in 1978. He is engaged in general practice with a heavy emphasis on bankruptcy and financial restructuring, and has represented many Chapter 7, 11, 12, and 13 debtors in Nebraska and Iowa. Occasionally, Mr. Duncan has also represented creditors.

In the case of a motor vehicle the creditor must surrender the possession of the vehicle immediately after being notified of the filing of a Chapter 13 Bankruptcy and the debtor's demand for turnover. Since a Chapter 13 involves a repayment plan, there is no need for a reaffirmation agreement. Rather, the Chapter 13 Plan provides the method by which the creditor receives payment and the debtor receives possession.

However, creditors often attempt to condition the turnover of a motor vehicle based upon requirements of adequate protection, insurance, payment of storage fees, towing fees, and other expenditures. Such a response is at best dangerous and at worst foolhardy. However, it should be noted that no such turnover is required in a Chapter 7 Bankruptcy.

In Re Tarsikes, Neb. Bkr. 96:657 clearly articulates the responsibilities of a creditor upon receiving notice that a Chapter 13 Bankruptcy has been filed and that the debtor's attorney has demanded turnover of the motor vehicle. In such opinion Judge Mahoney stated in part that:

"Proper procedure for the creditor, if concerned about the matter, was to turn the property over and immediately file a motion for relief from the automatic stay or adequate protection. The issue concerning the contractual right to possession versus the statutory provisions contained in Sections 362 could then have been resolved by the court. The creditor does not have the unilateral right to decide that its interest in the vehicle is superior to that of the bankruptcy estate."

Furthermore, by virtue of the separate Order in the same case entered by Judge Mahoney it was provided that:

"The motion for turnover is granted. The vehicle shall be turned over to the debtors no later than 5:00 P.M. Central Daylight Time, Friday, October 11, 1996. Debtors are granted ten days to submit evidence of actual damages and attorney fees. Lessor is granted

ten days thereafter to object. See memorandum entered this date."

In ***Tarsikes*** the creditor's retention of the motor vehicle subjected the creditor to actual damages recoverable by the debtor and against the creditor, which included but were not limited to attorney fees and costs. Although the attorney fees were small in that bankruptcy proceeding, it is possible for such a creditor to incur attorney fees and costs of over \$1,000.00 in a protracted dispute prior to a court hearing. Furthermore, the hearing in the *Tarsikes* case was based upon a motion filed by the debtor's attorney. However, the violation of the automatic stay occurred immediately upon the creditor being supplied with knowledge of the filing of the bankruptcy, with the demand for turnover, and without being supplied with a motion from the debtor's attorney.

Even after the creditor's attorney in the *Tarsikes* case was supplied with the appropriate case law, the battle still continued. It is foreseeable to have a creditor who owes the debtor and the

debtor's attorney a considerable amount of money in compensatory damages arising out of its violation of the automatic stay. In addition, punitive damages may be imposed in some cases.

The second problem that most commonly presents itself after the filing of a bankruptcy is the continuing garnishment of the debtor's pay check or the continued retention of garnished funds by the creditor. The recent case of *In re Hoyle*, Neb. Bkr. 96:701 establishes the danger to a creditor when the creditor refuses to release garnished funds to the debtor.

In the Hoyle case a judgment had been entered. Pursuant to the judgment the debtor's wages were garnished. Sometime after receiving the notice of the bankruptcy filing, the creditor's attorney notified the debtor's employer that the garnishment was released. However, the attorney for the creditor took no action to obtain a release of the funds which were being held by the Clerk of the Court.

The attorney for the debtor contacted the creditor's attorney requesting that the

funds be released. The counsel for the creditor took the position that the creditor had no obligation to take any affirmative action to obtain the release of the funds. The attorney for the debtor even prepared the order to release the funds, submitted it to the attorney for the creditor, but nothing occurred. In *Hoyle*, Judge Mahoney held that a creditor must take affirmative action to obtain release of funds of the debtor and that failure to do so is sanctionable and is a violation of the automatic stay. Judge Mahoney clearly articulated the requirements in the Hoyle case at page 3 of his opinion when he stated in part that:

"At the hearing on the motion for sanctions, the creditor's attorney suggested that counsel could find no cases putting upon the creditor any requirement of affirmative action to obtain release of debtor's funds. However, several cases have made it clear that the creditor is responsible for terminating any garnishment proceeding when it has knowledge of the debtor's bank-

ruptcy filing. If the creditor has knowledge and takes no action to stop the garnishment, it has violated the automatic stay, 11 U.S.C. Section 362 (a) (1). *Matter of Alberti*, Neb. Bkr. 90:643 (Bankr. D. Neb. 1990). The court at *In re Timms*, 178 B.R. 989 (Bankr. E.D. Tenn. 1994) stated that a creditor wilfully violates the automatic stay even when it takes no affirmative action to continue the proceeding. The court also stated that "willful" does not refer to a specific intent to violate a court order, but a willful violation of the automatic stay occurs when the creditor has knowledge of the debtor's bankruptcy filing and does nothing to stop the garnishment. *Id.* at 997. "

It is clear from the foregoing analysis that a creditor who fails to meet its affirmative duty after the filing of a bankruptcy subjects itself to the full and complete powers of the Bankruptcy Court to sanction the creditor and award damages to the debtor, including in some cases, punitive damages.

ANNOUNCING...

Effective November 1, 1996, the Office of Patricia M. Dugan, Assistant United States Trustee, District of Nebraska, became the custodian of the tapes of the Chapter 13 Meetings of Creditors.

Requests for transcripts of a Meeting of Creditors in Chapter 13 cases should be made to Ms. Dugan's office at 210 South 16th Street, Suite 560, Braiker-Brandeis Building, Omaha, Nebraska 68102, telephone (402) 221-4300.

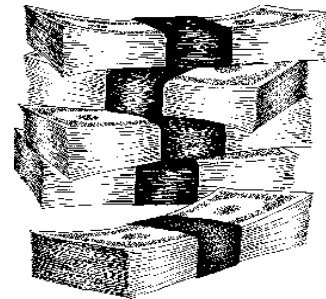
The following information should be given:

- ☞ Name of the Debtor and the Co-debtor
- ☞ Bankruptcy case number assigned by the Clerk
- ☞ Place, date, and time of the Meeting of Creditors
- ☞ Name, address, city, state, zip code, and telephone number of the requesting party.
- ☞ If time is of the essence, the date by which the transcript must be prepared.

Any costs for the handling, shipping, and delivery must be prepaid. The actual transcription of the Meeting of Creditors testimony will be performed by an independent contractor, specifically:

Dar's Word Processing
3508 California Street
Omaha, Nebraska 68131
(402) 345-0125

Dar's Word Processing will prepare the transcript and deal with the requesting party directly regarding further instructions, billing methods, and payment terms.



Processing cutoff for checks in December will be Wednesday, December 13, 1996. Checks will be mailed on Friday, December 20, 1996.

Cutoff for confirmation orders is Tuesday, December 10, 1996, which is ten (10) days prior to the check mailing.

EDITOR'S COMMENT

This newsletter is being published to facilitate communication between the Chapter 13 Trustee's Office and the many people we serve. The information is not meant to constitute legal advice to individuals. If you would like to contribute an article, conference or program information, law review article, book review, comment, or question for further feedback from others, please call me directly or mail your item to:

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