



Yet Another Court Addresses Violation of the Automatic Stay

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On July 1, 2019, we issued a client alert which addressed application of the automatic stay to pre-petition seizures - “The Automatic Stay: Even Pre-Petition Seizures May Be Covered”. The impact and interpretation of Bankruptcy Code § 362 – the automatic stay provision – is again made topical by Bankruptcy Judge Joel D. Applebaum in his first written opinion since recently being appointed to the bench in the Eastern District of Michigan.

In a decision issued in August 2019, Judge Applebaum addresses two important issues related to § 362.

In the matter of *In re Joshua Aaron Newberry*, Case No. 19-30726-jda (Bank. E.D. Mich.), the court considered the individual chapter 7 Debtor’s motion seeking to hold a creditor (RPM) in contempt for violating the automatic stay provision.

Specifically, prior to the filing of the Petition, RPM filed a writ of garnishment in the state court in Michigan seeking to garnishee any tax refund to which the Debtor may become entitled. Upon receipt of notice of the garnishment, the Debtor failed to exercise his right to object to same.

However, the Debtor subsequently filed for relief under Chapter 7 of the Bankruptcy Code. Thereafter, a tax refund due the Debtor was issued to RPM and the Debtor sought return of the funds.

The Debtor asserted that RPM’s refusal to tender the money was a willful violation of the automatic stay provided under § 362 of the Code. In its opposition, RPM argued that the tax refund was not property of the Debtor or the bankruptcy estate and thus, retention of the funds could not be a stay violation. Additionally, it argued that the post-petition receipt of an income tax refund resulting exclusively from a pre-petition garnishment is not an act in violation of the automatic stay provision.

First, Judge Applebaum determined that the Debtor did have a continuing interest in the tax refund. Therefore, the refund was property of the Estate.

Further, Judge Applebaum held that the creditor’s refusal to turn over the refund was a violation of the automatic stay. The court concluded that, regardless of the fact that the Creditor had not taken any affirmative action to

obtain the garnisheed funds post-petition, the failure to surrender same to the Debtor was a willful violation because "a party acts willfully by taking any action prohibited by section 362(a) after party receives notice of the bankruptcy filing An intent to violate the stay is not necessary." *In re Banks*, 253 B.R. 25, 29 (Bankr. E.D. Mich. 2000).

This case and others dealing with automatic stay violations will likely lead to a review of this matter by the United States Supreme Court to review this matter. Indeed, we look forward to that as a way of settling what are still conflicting opinions among the courts.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient. If you have questions regarding these provisions, or any other aspect of bankruptcy law, please contact Michael Traison at [312.860.4230](tel:312.860.4230)

Practices

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