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When Stay Means Move

The automatic stay which comes into effect upon filing a bankruptcy petition prevents creditors from taking any action to commence or continue litigation against the debtor, to collect debts, to enforce or perfect liens or to exercise control over any property of the debtor. Two bankruptcy courts recently held that in certain instances it also requires creditors to dismiss a pending action.

A creditor garnished the bank account of a Florida debtor seeking to enforce a judgment. The debtor filed a Chapter 13 case, and the creditor ceased all collection efforts. However, the Florida bankruptcy court sanctioned the creditor for failure to dismiss the garnishment immediately upon learning of the bankruptcy filing. *In re Mims*, 209 B.R. 746 (Bankr. M.d Fla. 1997).

Similarly, a bankruptcy court in Virginia sanctioned a finance company for violating the automatic stay by delaying to dismiss a wage garnishment against a debtor. *In re Manuel*, 212 B.R. 517 (Bankr. E.D. VA. 1997).

Enforcement of Stay Waivers

Courts are divided as to whether a debtor may waive the protection of the automatic stay in a pre-bankruptcy workout agreement. A bankruptcy court in Maryland has recently discussed the enforcement of pre-bankruptcy waivers.

The debtor owned an office building in Montgomery County subject to a mortgage. Four years prior to the bankruptcy, the loan had been in default. The lender and debtor entered into a restructuring agreement which provided that (1) the debtor would not file a bankruptcy

petition, (2) if the debtor did file, the automatic stay was waived, and (3) if the stay applied, the debtor waived the right to defend against the lender's stay relief motion.

After a 1997 Chapter 11 filing, the lender moved for stay relief to permit foreclosure, relying on the waivers in restructuring agreement. The court ruled that the first two waivers are unenforceable.

As to the third waiver, the court declined to enforce it automatically, but rather weighed it among other factors to be considered. Determining the weight to be given to the waiver, the court considered the following: (1) the sophistication of the party making the waiver; (2) the proximity in time between the waiver and the filing of the bankruptcy case; and (3) the consideration for the waiver, including the risk assumed by the lender in entering into a restructuring agreement. Because the borrower had been represented by experienced attorneys and the lender had assumed additional risk in the prior workout, the court enforced the third waiver and granted stay relief.

In re Shady Grove Tech Center Associates Limited Partnership, 1998 Bankr. LEXIS 9 (Bankr. D. Md. Jan. 7, 1998).



This newsletter is intended to inform its readers of developments in the area of debtor/creditor relations. It is not legal advice or a legal opinion regarding any specific matter. You should consult a lawyer regarding any questions relating to your particular situation.

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