

ORIGINAL

IN THE SUPREME COURT OF OHIO

DISCIPLINARY COUNSEL,	:	
	:	
RELATOR,	:	
	:	CASE NO. 2010-2021
VS.	:	
	:	
PERCY SQUIRE,	:	BCGD Case No. 09-023
	:	
RESPONDENT.	:	

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**RESPONSE OF RESPONDENT PERCY SQUIRE TO MOTION TO  
SUPPLEMENT THE RECORD**

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**FILED**

DEC 14 2015

CLERK OF COURT  
 SUPREME COURT OF OHIO

**RESPONSE OF PETITIONER PERCY SQUIRE TO MOTION TO  
SUPPLEMENT THE RECORD**

In accordance with the provisions of S. Ct. Prac. R. 4.01(B) (1) the undersigned respectfully requests that the motion of the Board of Professional Conduct to supplement the record in this reinstatement case be granted. It is further requested that the record be further supplemented to revise and eliminate any requirement for the undersigned to pay \$2,798.45 to the Office of Attorney General for the reason this amount represents a statutory fee imposed in violation of the automatic stay in bankruptcy under 11 U.S.C. §362(a) and as such is both void ab initio and voidable.

The undersigned was suspended from the practice of law by the Ohio Supreme Court on November 3, 2011. The suspension order required payment of Board costs in the amount of \$3,995.77. On May 7, 2015, the undersigned filed a petition under Chapter 11 of the United States Bankruptcy Code to Reorganize. See, Exhibit A. Six months following the undersigned's filing of a Chapter 11 petition, the claim for payment of Board costs was certified to the Attorney General and collection costs under R.C. §131.02(A) were imposed. The imposition of statutory costs under R.C. 131.02(A) during the pendency of the undersigned's Chapter 11 was violative of the automatic stay under 11 U.S.C. §362(a).

It is well settled because the Constitution vests exclusive control over the regulation of bankruptcy in Congress, Congress has the power to "oust the jurisdiction of state courts over bankruptcy matters by vesting exclusive jurisdiction in the federal court." In re Bulldog Trucking, Inc., 147 F.3d 347, 353 (4<sup>th</sup> Cir. 1998) (citing Kalb v. Feuerstein, 308 U.S. 433, 438-39 (1940)). As the United States Supreme Court has explained:

Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation...render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally....The States cannot, in the

exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land.

Kalb, 308 U.S. at 438-39.

Within the exercise of this authority, Congress enacted section 362(a), which, as stated above, causes an automatic stay, binding on all people and entities, to take effect immediately upon the filing of a bankruptcy petition. Gilchrist v. General Elec. Capital Corp., 262 F.3d 295, 303 (4<sup>th</sup> Cir. 2001). The automatic stay is “a bedrock policy upon which the [Bankruptcy] Code is built and a fundamental debtor protection of the bankruptcy law.” In re. Lampkin, 116 B.R. 450, 453 (Bankr. D. Md. 1990). As the Court of Appeals has explained, the automatic stay is broad in scope and is intended to give the debtor a ‘breathing spell’ from his/her creditors, to allow time to formulate a repayment or reorganization plan, and to prevent a chaotic and uncontrolled scramble for the debtor’s assets in a multitude of uncoordinated proceedings in different courts, by ensuring that all claims against the debtor, other than those exempted from the stay, will be brought in a single forum. Klass v. Klass, 377 Md. 13, 22 (2003); see also, Williford v. Armstrong World Indus., 715 F.2d 124, 127 (4<sup>th</sup> Cir. 1983) (the automatic stay “‘gives the debtor a breathing spell from its creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simple to be relieved of the financial pressures that drove him into bankruptcy.’” (quoting S. Rep. No. 95-989, 95<sup>th</sup> Cong. 2d Sess. 54-55 (1978))).

The prevailing view among the federal courts of appeal is that actions taken in violation of the automatic stay are void *ab initio*. See, In re. Smith Corset Shops, Inc., 696 F.2d 971 (1<sup>st</sup> Cir. 1982); In re. 48<sup>th</sup> Street Steakhouse Inc., 835 F.2d 427 (2d Cir. 1987), *cert. denied* 485 U.S. 1035 (1988); In re. Ward, 837 F.2d 124 (3d Cir. 1988); Smith v. First American Bank, N.A., 876 F.2d 524 (6<sup>th</sup> Cir. 1989); In re. Taylor, 884 F.2d 478 (9<sup>th</sup> Cir. 1989)...See, In re. Miller, 10 B.R. 778, 780 (Bankr. D. Md. 1981) (“An action taken in violation of the stay is void *ab initio* whether it is taken with knowledge of the stay or without.”) Anglemyer v. United States, 115 B.R. 510 (D. Md. 1990) (IRS assessment for unpaid taxes made during the automatic stay was “null and void *ab initio* and has no validity for any purpose.”) In re. Lampkin, 116 B.R. at 453 (“This court will adhere to the general rule that violations of the stay are void.”).

Sonia Kochhar v. Amar Nath Bansel, et al., Court of Special Appeals of Maryland, No. 435-September 2014.

In this connection the United States Court of Appeals for the Sixth Circuit has stated a majority of the Circuits, including this Circuit, have

held that actions taken in violation of the automatic stay are void. See, In re. Potts, 142 F.2d 883, 888, 890 (6<sup>th</sup> Cir. 1944), cert. denied, 324 U.S. 868, 65 S. Ct. 910, 89 L.Ed. 1423 (1945), but see In re. Smith, 876 F.2d 524 (6<sup>th</sup> Cir. 1989). See also, Raymark Industries, Inc. v. Lai, 973 F.2d 1125, 1132 (3d Cir. 1992); In re. Schwartz, 954 F.2d 569, 574 (9<sup>th</sup> Cir. 1992); In re. Calder, 907 F.2d 953, 956 (10<sup>th</sup> Cir. 1990); In re. 48<sup>th</sup> Street Steakhouse, Inc., 835 F. 2d 427, 431 (2d Cir. 1987), cert. denied, 485 U.S. 1035, 108 S. Ct. 1596, 99 L.Ed.2d 910 (1988); Matthews v. Rosene, 739 F.2d 249, 251 (7<sup>th</sup> Cir. 1984); In re. Smith Corset Shops, Inc., 696 F.2d 971, 976 (1<sup>st</sup> Cir. 1982); Borg-Warner Acceptance Corp. v. Hall, 685 F.2d 1306, 1308 (11<sup>th</sup> Cir. 1982); 2 L.King, Collier on Bankruptcy §362.11 (15<sup>th</sup> ed. 1987) (“actions taken in violation of the stay are void and without effect”). The Fifth Circuit is alone in explicitly holding that actions taken during the pendency of the stay are voidable. Sikes v. Global Marine, 881 F.2d 176, 178 (5<sup>th</sup> Cir. 1989)...

If violations of the stay are merely voidable, debtors must spend a considerable amount of time and money policing and litigating creditor actions. If violations are void, however, debtors are afforded better protection and can focus their attention on reorganization...

In re. Schwartz, 954 F.2d at 571. We believe the Ninth Circuit overstates the difference between what would be required of debtors if actions in violation of the stay are void or voidable, because in either case, the debtor must respond in some fashion to the action. A debtor need only file a motion to dismiss on the grounds that the action violates section 362(a) and should be declared void. Indeed, this is the procedure followed in all cases in which the void/voidable issue has arisen... unless equity dictates otherwise, these actions will be voided by the court in which the invalid action against the debtor was filed.

In summary, we hold that actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances.

Easley v. Pettibone Michigan Corporation, 990 F.2d 905 (6<sup>th</sup> Cir. 1993). Also see, “Automatic Stay Violations Void Rather than Voidable” Jones, Day 2002 (Exhibit B) and In re. Mitchell, 278 B.R. 839 (B.A.P. 9<sup>th</sup> Cir. 2002).

As a result of the above and the Board’s motion, the undersigned states the total remaining amount owed is \$3,615.49 because the \$2,798.45 claimed by the attorney general was imposed in violation of 11 U.S.C. §362(a).

The undersigned respectfully tenders \$3,615.49 herewith and requests that this constitute compliance with the Court's December 8, 2015 reinstatement order and grant the undersigned permission to resume the practice of law.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Percy Squire", written over a horizontal line.

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Pro Se

**PROOF OF SERVICE**

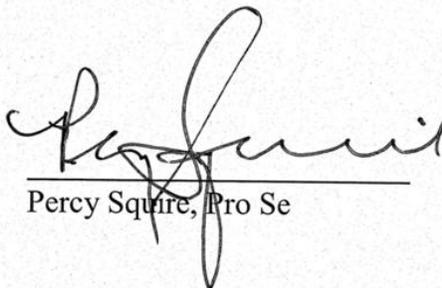
I hereby certify that a true and correct copy of the forgoing was served via email

December 14, 2015 upon:

Scott Drexel  
The Supreme Court of Ohio  
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Percy Squire, Pro Se

## Notice of Bankruptcy Case Filing

A bankruptcy case concerning the debtor(s) listed below was filed under Chapter 11 of the United States Bankruptcy Code, entered on 05/07/2012 at 1:55 PM and filed on 05/07/2012.

**Percy Squire**  
341 S Third Street  
Suite 101  
Columbus, OH 43215  
SSN / ITIN: xxx-xx-6343



The case was assigned case number 2:12-bk-53950 to Judge Charles M Caldwell.

In most instances, the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. Under certain circumstances, the stay may be limited to 30 days or not exist at all, although the debtor can request the court to extend or impose a stay. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized. Consult a lawyer to determine your rights in this case.

If you would like to view the bankruptcy petition and other documents filed by the debtor, they are available at our *Internet* home page <http://ecf.ohsb.uscourts.gov/> or at the Clerk's Office, 170 North High Street, Columbus, OH 43215-2414.

You may be a creditor of the debtor. If so, you will receive an additional notice from the court setting forth important deadlines.

**Kenneth Jordan**  
**Clerk, U.S. Bankruptcy**  
**Court**

<b>PACER Service Center</b>	
<b>Transaction Receipt</b>	
12/14/2015 10:43:16	
PACER	percysquire:2687096:0 Client Code:

<b>Login:</b>			
<b>Description:</b>	Notice of Filing	<b>Search Criteria:</b>	2:12-bk- 53950
<b>Billable Pages:</b>	1	<b>Cost:</b>	0.10

This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.



*Charles M. Caldwell*  
Charles M. Caldwell  
United States Bankruptcy Judge

Dated: December 13, 2012

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

In re	)	Case No. 12-53950
	)	
PERCY SQUIRE	)	Chapter 11
	)	
Debtor.	)	Judge Caldwell
	)	

**JOINT STIPULATION AND ORDER RESOLVING TRUSTEE MOTION TO DISMISS (DOCKET 83) AND DEBTOR'S SECOND MOTION FOR AN ENLARGEMENT OF TIME TO FILE PLAN OF REORGANIZATION AND DISCLOSURE STATEMENT (DOCKET 78) AND DEBTOR'S SECOND MOTION FOR AN ORDER EXTENDING EXCLUSIVITY PERIOD DURING WHICH ONLY THE DEBTOR MAY FILE A CHAPTER 11 PLAN AND SOLICIT ACCEPTANCE THEREOF (DOCKET 98)**

This stipulation is made as of December 4, 2012, by and among the United States Trustee ("the Trustee") and Percy Squire ("the Debtor").

**WHEREAS:**

A. The Trustee has filed a motion to convert or dismiss this case under 11 U.S.C. §1112(b). Debtor has opposed the Trustee's motion;

B. Debtor has filed unopposed motions to Enlarge the Time to File a Plan of Reorganization and to Extend the Exclusivity Period during which only Debtor may file a Chapter 11 Plan and Solicit Acceptance thereof;

C. After consulting with the Court during a show cause hearing on November 20, 2012, the Parties have agreed, subject to Court approval, to resolve the pending motions on the following terms and conditions:

**NOW THEREFORE**, the Parties hereby stipulate and agree as follows:

1. This case be and it is hereby DISMISSED, without prejudice;
2. The Debtor shall timely file his November Monthly Operating Report;
3. The Debtor shall pay to the United States Trustee any and all quarterly fees due and owing pursuant to 28 U.S.C. §1930(a)(6) for the Fourth Quarter of 2012;
4. If the Debtor fails to timely file his November Monthly Operating Report or pay the United States Trustee Quarterly Fee for the Fourth Quarter of 2012, the United States Trustee shall file a Report to Court detailing said failure, which unless good cause for Debtor's failure is demonstrated by Debtor, shall result in this dismissal being WITH PREJUDICE;
5. The Clerk of Court is hereby directed to retain this case in active status to enable Debtor to comply with the terms set forth above;
6. The United States Trustee shall file a Report to advise the Court after the Debtor complies with the terms of this Agreed Order so the Clerk is notified to close the case without delay; and
7. Debtor's Second Motion for an Enlargement of Time (Docket 78) and Second Motion for an Order Extending Exclusivity Period (Docket 98) are by reason of this Order moot and therefore denied.

**IT IS SO ORDERED.**

SUBMITTED BY:  
DANIEL M. McDERMOTT  
UNITED STATES TRUSTEE  
REGION 9

/s/ Pamela Arndt

Pamela Arndt (0068230)  
Attorney for the U.S. Trustee  
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/s/ Percy Squire

Percy Squire, Debtor *pro se*  
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COPIES TO:

ALL CREDITORS AND PARTIES IN INTEREST

###

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re	)	Chapter 11
	)	
PERCY SQUIRE,	)	Case No. 12-53950
	)	
Debtor In Possession.	)	Judge Caldwell
_____	)	

**REPORT TO COURT REGARDING THE JOINT STIPULATION AND ORDER**  
**(Docket No. 116)**

This Report is being submitted pursuant to the Joint Stipulation and Order (Docket No. 116) entered by the Court on December 13, 2012. The Order states, in relevant part:

- 2. The Debtor shall timely file his November Monthly Operating Report;
- 3. The Debtor shall pay to the United States Trustee any and all quarterly fees due and owing pursuant to 28 U.S.C. §1930(a)(6) for the Fourth Quarter of 2012;
- 6. The United States Trustee shall file a Report to advise the Court after the Debtor complies with the terms of this Agreed Order so the Clerk is notified to close the case without delay.

The Debtor timely filed his November Monthly Operating Report on December 20, 2012 (Docket No. 118). Further, the Debtor paid all existing and remaining United States Trustee's quarterly fees (*See*, Docket No. 120). As such, the Debtor is in full compliance with the terms of the Joint Stipulation and Order and the Clerk can close this case without delay.

Dated: February 14, 2013

DANIEL M. MCDERMOTT  
UNITED STATES TRUSTEE FOR REGION 9  
By: /s/ Pamela Arndt  
Pamela Arndt (0068230)  
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**CERTIFICATE OF SERVICE**

I hereby certify that on or about February 14, 2013, a copy of the foregoing REPORT TO COURT REGARDING THE JOINT STIPULATION AND ORDER (Docket No. 116) was served on the following registered ECF participants, electronically through the court's ECF System at the email address registered with the court:

Pamela Arndt, [pamela.d.arndt@usdoj.gov](mailto:pamela.d.arndt@usdoj.gov)  
Attorney for the U.S. Trustee

Scott Nathan Schaeffer, [scott@ksrlegal.com](mailto:scott@ksrlegal.com)  
Attorney for Fahey Banking Company

Joel K. Jensen, [sohbk@lsrlaw.com](mailto:sohbk@lsrlaw.com)  
Attorney for JPMorgan Chase Bank, NA

Brian M. Gianangeli, [bgianangeli@mifsudlaw.com](mailto:bgianangeli@mifsudlaw.com)  
Attorney for Ohio Department of Taxation

And on the following by ordinary U.S. Mail addressed to:

Percy Squire  
341 S. Third Street, Suite 101  
Columbus, OH 43215

By: /s/ Pamela Arndt  
Pamela Arndt



## **Automatic Stay Violations Void Rather than Voidable**

August 2002

Courts disagree whether creditor actions undertaken in violation of bankruptcy's automatic stay are void, such that they are deemed to be of no effect as a matter of law, or are merely voidable, such that they will be recognized unless and until the bankruptcy trustee or the debtor obtains a court order declaring that the act violated the stay and (perhaps) sanctioning the perpetrator. In *In re Mitchell* and *In re Best Payphones*, the 9<sup>th</sup> Circuit bankruptcy appellate panel and a New York bankruptcy court adopted the majority position in holding that actions violating the automatic stay are void *ab initio*. *In re Mitchell* also addresses whether the safe harbor afforded to an unknowing recipient of an unauthorized post-petition transfer constitutes an exception to the automatic stay.

### **The Automatic Stay**

Upon the filing of a voluntary or involuntary bankruptcy petition, an automatic statutory injunction is activated to prevent any entity from commencing or continuing actions against the debtor or property of the debtor's bankruptcy estate for the purpose of collecting on a debt that arose prior to the bankruptcy petition date. Thus, Bankruptcy Code section 362(a) stays, among other things, "the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case . . . or to recover a claim against the debtor that arose before the commencement of the case." The "automatic stay" also precludes the enforcement of a pre-bankruptcy judgment against the debtor or its property, "any act to obtain possession" of estate property, to exercise control over estate property and a wide variety of creditor enforcement actions, including perfecting a lien on the debtor's property and "any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case."

The automatic stay is broad in scope and applies to almost every formal and informal action against the debtor or its property. Its purpose is to give the debtor a breathing spell from creditors during which either the debtor can devise a repayment or reorganization plan or a bankruptcy trustee can effect an orderly liquidation of the debtor's assets. The automatic stay also protects creditors by

averting a scramble for the debtor's assets and facilitating an orderly liquidation procedure under which all similarly situated creditors are treated equally.

### **Automatic Stay Exceptions and Relief from Stay**

Certain actions are excepted from the automatic stay. Most of these exceptions are based upon important policy considerations developed over many years predicated upon the perception that certain actions should not be interrupted or foreclosed by a bankruptcy filing because the prejudice suffered by non-debtors outweighs the "breathing spell" policy underlying the automatic stay. Thus, Bankruptcy Code section 362(b) provides that the stay does not preclude, among other things, the commencement or continuation of criminal, paternity, child support, alimony or maintenance actions, certain setoffs by stock and commodities brokers, forward contract merchants and securities clearing agencies, tax audits or the issuance of a notice of tax liability and actions by a commercial lessor to obtain possession of leased property if the lease expired prior to the bankruptcy filing.

While the stay in Bankruptcy Code section 362(a) is automatic, it is not permanent. As a general rule, the stay of actions against a debtor's property continues until the asset is no longer part of the bankruptcy estate (*i.e.*, when the property has been sold or abandoned or when the estate no longer exists because the case is dismissed). The stay of any other act specified in the statute continues until the earliest of closure or dismissal of the bankruptcy case or the denial or grant of a discharge to the debtor. However, the automatic stay may be lifted earlier. Any entity seeking relief from or modification or termination of the stay may petition the bankruptcy court for this purpose. The court will grant the request if it finds "cause" to do so. "Cause" is typically found where the debtor cannot adequately protect a creditor's interest in property, or where the debtor lacks "equity" in the asset (*e.g.*, because it is encumbered by mortgages in excess of the value of the property) and the property is not necessary for the debtor, in a chapter 11, 12 or 13 case, to reorganize effectively.

It is generally recognized that the debtor may not waive the automatic stay. Still, the stay is a shield, not a sword. If the debtor affirmatively acts, such as by commencing litigation post-bankruptcy, the defendant is permitted to defend itself without running afoul of the automatic stay (although, in defining the parameters of a defense, many courts distinguish between mandatory counterclaims, which are allowed, and permissible counterclaims, which are not). In addition, some courts have construed certain provisions of the Bankruptcy Code other than section 362(b) to create implicit exceptions to the automatic stay. Once such provision is section 549(c), which provides an exception to the bankruptcy trustee's power to avoid unauthorized post-petition transfers of real property "to a good faith purchaser without knowledge of the commencement

of the case and for fair equivalent value." According to some courts, because transfers of estate property without court authority are precluded by the automatic stay and would therefore be void, the exception set forth in section 549(c) to the trustee's ability to avoid post-petition transfers also acts as an exception to the automatic stay.

### **Violations of the Automatic Stay**

Although the Bankruptcy Code contains a fairly detailed list of actions which are and which are not precluded by the automatic stay, it does not address the ramifications of failing to abide by its dictates, except in one respect. Under Bankruptcy Code section 362(h), any "individual" injured by a willful violation of the stay is entitled to recover actual damages, including attorneys' fees, and in appropriate circumstances, may recover punitive damages. However, other than providing for a remedy, the Bankruptcy Code does not explain whether actions taken in violation of the stay are void from their inception, and should be deemed never to have occurred, or whether such actions are merely voidable, such that they will be permitted to stand unless and until the debtor, the bankruptcy trustee or some other party-in-interest in the bankruptcy case complains to the court. The distinction is an important one, given the potentially significant legal and property rights and remedies connected with a wide variety of actions that arguably run afoul of the automatic stay, whether they be voluntary, involuntary, knowing or unknowing.

In *Kalb v. Feuerstein*, the United States Supreme Court examined the issue under the former Bankruptcy Act and held that actions in violation of the automatic stay are void. The circuit courts that have addressed this issue in the context of the present day Bankruptcy Code are split. The minority view is that an act taken in violation of the automatic stay is not void, but merely voidable. The Fifth and District of Columbia Circuits subscribe to this position. A majority of the circuits hold that an action in violation of the automatic stay is void *ab initio*, although some courts, like the Third Circuit, have recognized that the bankruptcy court's power to grant relief from the stay retroactively may make a stay violation merely voidable under appropriate circumstances. The law is not quite so clear in the Sixth Circuit. While two panels of that court have held that actions in violation of the automatic stay are void, one panel has held that acts violating the automatic stay are invalid and "voidable." The Eighth Circuit has yet to address this issue, and expressly declined to do so in a recent opinion.

The Ninth Circuit bankruptcy appellate panel and a New York bankruptcy court addressed the legal implications of violating the automatic stay and certain other related issues in *In re Mitchell* and *In re Best Payphones, Inc.*

### **In re Mitchell**

Tyrone and Eva Mitchell (collectively, the "debtor") filed a bankruptcy petition the day before Value T Sales, Inc. ("Value T") had scheduled a foreclosure sale on their residence. Value T went ahead with the sale anyway (although it is unclear whether it had knowledge of the bankruptcy filing), and acquired the property at foreclosure for approximately \$300,000. Upon learning of the debtor's bankruptcy filing shortly thereafter, Value T sought an order from the bankruptcy court modifying the automatic stay and validating the foreclosure sale on the basis that the debtor filed its bankruptcy case in bad faith (having filed five petitions in the past four years). Alternatively, Value T sought a determination that the foreclosure sale could not be avoided because it was excepted from the automatic stay by reason of Bankruptcy Code section 549(c). Value T recorded its deed on the transferred property before the bankruptcy court acted on its requests. The bankruptcy court ultimately denied Value T's motions.

On appeal, the bankruptcy appellate panel for the Ninth Circuit addressed whether section 549(c) is an exception to the automatic stay, such that Value T validly acquired the debtor's property at the foreclosure sale as a bona fide purchaser without notice of the debtor's bankruptcy filing. Noting that the law in the Ninth Circuit is that actions taken in violation of the stay are void, the court rejected Value T's assertion that section 549(c) "validates the sale and creates a unique exception to the automatic stay."

Section 549(c), the court emphasized, is not intended to cover the same actions prohibited by the automatic stay, nor is it rendered moot by the stay's "voiding" of all prescribed violations. Rather, it noted, section 549(c) is an exception only to actions brought by a bankruptcy trustee or chapter 11 debtor-in-possession under section 549(a) to avoid unauthorized post-petition asset transfers initiated by the debtor. According to the court, unlike in the context of asset transfers violating the automatic stay that involve parties other than the debtor, "Congress saw fit to protect BFP's in [section] 549 but not in [section] 362, presumably expressing its intent to afford greater protection to BFP's who purchase from debtors than to those purchasing at sales violating the automatic stay." Turning to the facts before it, the appellate panel affirmed the bankruptcy court's denial of Value T's motion for a determination that the foreclosure sale was valid by reason of Bankruptcy Code section 549(c) because the bankruptcy trustee was not attempting to avoid the sale under section 549(a), but sought to set aside the foreclosure sale because it violated the automatic stay.

#### **In re Best Payphones, Inc.**

Best Payphones, Inc. ("Best") was engaged in the business of operating public payphones in New York City. Prior to filing for chapter 11 protection in October of 2001, Best was sued in administrative proceedings before the New York City Environmental Control Board (the "ECB Proceeding") by the New York City Department of Information Technology and Telecommunications (the

"City") for allegedly operating payphones without a proper permit. Two months later, an administrative law judge dismissed the violations (the "ECB Order"), ruling that the City had failed to establish that Best's right to operate the payphones had been terminated validly. The City sought to modify the automatic stay for the purpose of appealing the ECB Order. It argued that the ECB Proceeding was excepted from the automatic stay as an action by a "governmental unit" to enforce its "police or regulatory powers." The City also contended that the EDB Order was void as a violation of the automatic stay.

The bankruptcy court addressed only the latter. It found that the ECB Order was void because its issuance "violated the automatic stay, even though it was based entirely on the pre-petition record." According to the court, "once triggered by a debtor's bankruptcy petition, the automatic stay suspends any non-bankruptcy court's authority to continue judicial proceedings then pending against the debtor." While ministerial court actions are excepted, the court emphasized, the issuance of a decision by a judge or similar officer "is clearly prohibited, and therefore, void." Still, the court recognized, although an action taken in violation of the stay is void, a bankruptcy court nevertheless has the power to validate it retroactively because Bankruptcy Code section 362(d) expressly authorizes the court to "terminate" or "annul" the stay. An order terminating the automatic stay, the court observed, acts only prospectively, "but an order annulling the stay *nunc pro tunc* acts retroactively to validate otherwise void actions taken post-petition." Based upon its conclusion that the ECB Order was void, and the fact that the City sought only to terminate the stay rather than annulling it with retroactive effect, the court ruled that the City's motion for relief from the automatic stay was moot since there was no valid order upon which it could base its appeal.

### **Analysis**

*In re Mitchell* and *In re Best Payphones, Inc.* are consistent with the majority view concerning the legal consequences of actions taken in violation of the automatic stay. Such actions are deemed to be void, rather than merely voidable. This means that they will be given no legal effect, unless the bankruptcy court exercises its discretion to annul the automatic stay, and thereby retroactively legitimizes the conduct in question. Annulment is most frequently granted in cases where actions in violation of the stay were taken without knowledge of the debtor's bankruptcy filing and the court determines that the party seeking annulment would have been entitled to relief from the stay had it been aware of the bankruptcy filing and sought that relief from the bankruptcy court. However, unknowing conduct alone is no excuse, given the important policy considerations underlying the automatic stay and its purpose in protecting both the debtor and its creditors.

The decisions also illustrate that the scope of the automatic stay is

broad, and exceptions to its reach are narrowly construed in keeping with the important protections it affords. As noted by the bankruptcy appellate panel in *In re Mitchell*, Congress knew how to create an exception to the automatic stay "as it has provided eighteen of them" in Bankruptcy Code section 362(b). Additional exceptions should not be presumed.

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*Value T Sales, Inc. v. Mitchell (In re Mitchell)*, 278 B.R. 839 (B.A.P. 9<sup>th</sup> Cir. 2002).

*In re Best Payphones, Inc.*, 279 B.R. 92 (Bankr. S.D.N.Y. 2002).

*Kalb v. Feuerstein*, 308 U.S. 433 (1940).

*Picco v. Global Marine Drilling Co.*, 900 F.2d 846 (5th Cir. 1990).

*Bronson v. United States*, 46 F.3d 1573 (D.C. 1995).

*In re Soares*, 107 F.3d 969 (1st Cir. 1997).

*Constitution Bank v. Tubbs*, 68 F.3d 685 (3d Cir.1995).

*Parker v. Bain*, 68 F.3d 1131 (9th Cir. 1995).

*Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020 (10<sup>th</sup> Cir. 1994).

*Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522 (2d Cir. 1994).

*In re Albany Partners, Ltd.*, 749 F.2d 670 (11<sup>th</sup> Cir. 1984).

*Matthews v. Rosene*, 739 F.2d 249 (7<sup>th</sup> Cir. 1984).

*In re Smith*, 876 F.2d 524 (6<sup>th</sup> Cir. 1989).

*National Labor Relations Bd. v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6<sup>th</sup> Cir. 1986).

*Easley v. Pettibone Michigan Corp.*, 990 F.2d 905 (6<sup>th</sup> Cir.1993).

*Riley v. United States*, 118 F.3d 1220, 1222 n. 1 (8<sup>th</sup> Cir.1997).

**Text Box Excerpt:**

***The void/voidable distinction is an important one, given the potentially significant legal and property rights and remedies connected with a wide variety of actions that arguably run afoul of the automatic stay, whether they be voluntary, involuntary, knowing or unknowing.***