§ 4.03 Exceptions to the Automatic Stay

[1]—General

Subsection 362(b) contains seventeen exceptions to the automatic stay, up from eight when the Code was passed. Originally, the exceptions existed for "reasons of either policy or practicality."[1] Other reasons may exist for the exceptions added since 1979.[2] Some of these are exceptions from all of the provisions of Section 362(a), while others are more limited.

Some of the exceptions are rarely applied in Chapter 11 cases; they are mainly applicable to cases concerning individuals.[3] Other exceptions apply to commodity broker cases, which are Chapter 7 cases.[4] The exception relating to tax audits, assessments, and the issuance to the debtor of a notice of tax deficiency,[5] deals with discrete tax issues.

Some exceptions apply to the entirety of Section 362(a); others from discrete portions thereof.

[2]—Post-Petition Perfection of Interests in Property

Some exceptions from the automatic stay commonly arise in Chapter 11 cases. Section 362(b)(3) provides that no part of the automatic stay prevents a creditor from perfecting (or continuing the perfection of) an interest in property of the estate to the extent that the trustee's rights and powers are subject to such perfection under the provisions of Section 546(b) of the Code.[6] Section 546(b) deals with, *inter alia*, period-of-grace perfection statutes, and governs situations in which a lien arose but was not perfected prior to the petition, but "generally applicable law[7] permits later

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[1] H.R. Rep. No. 595, 95th Cong., 1st Sess. 342 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. news 5963, 6298. The original exceptions, mostly unchanged, are now paragraphs (1)-(6), (8) and (9) of Section 362(b).

[2] Section 362(b), paragraph (7), deals with repos; paragraph (8) with foreclosure of insured mortgages and deeds of trust by the Secretary of Housing and Urban Development; paragraphs (12) and (13) with preferred ship mortgages; paragraphs (14), (15) and (16), with educational matters, and paragraph (17) with swaps. These provisions are of such parochial interest as to make them beyond the scope of this work. The other exceptions are discussed in the text.

[3] These exceptions permit the commencement or continuation of criminal actions or proceedings against the debtor, 11 U.S.C. § 362(b)(1), and collection of alimony and support payments, 11 U.S.C. § 362(b)(2).

[4] Bankruptcy Code § 362(b)(6); 11 U.S.C. § 362(b)(6).

[5] Bankruptcy Code § 362(b)(9); 11 U.S.C. § 362(b)(9).

[6] 11 U.S.C. § 546(b).

[7] A phrase interpreted in Peltz v. Wisconsin Department of Workforce Development (In re AR Accessories Group, Inc.), 267 B.R. 583 (Bankr. E.D. Wis.

perfection against lienors and purchasers who acquired their interests after the lien in question arose but before it was perfected.[8] The operation of the section is illustrated by cases in which a mechanic's lienor was allowed to perfect his lien post-petition against the property of the Chapter 11 debtor,[9] and by the application of Section 9-317(e) of Revised Article 9 of the Uniform Commercial Code (formerly Section 9-301(2)), which permits perfection of a purchase money security interest in personal property within twenty days of the delivery of the collateral to the debtor and relates that perfection back to the date of such delivery. If the Chapter 11 petition is filed during the twenty day period, Section 362(b)(3) permits post-petition perfection to take place. In order for Section 362(b)(3) to be applicable, the lien must have arisen prior to bankruptcy[10] and must be protected, during the period of grace, from intervening *bona fide* purchasers and encumbrancers.[11]

Section 362(b)(3) also excepts from the automatic stay such post-petition perfection "to the extent that such act is accomplished within the period provided under section 547(e)(2)(A)" of Title 11, which is the analog to Revised U.C.C. § 9-317(e). This provision makes it clear "that the automatic stay does not operate to prevent a purchase money security interest from being perfected" post-petition pursuant to the requirements of the Uniform Commercial Code.[12] However, it would appear that even post-petition perfection within the time period of Section 547(e)(2) would not save a transfer from vulnerability to avoidance under other avoiding powers contained in the Code, if applicable.

The Section 362(b)(3) exception was used to validate the postpetition perfection of a state environmental lien in *229 Main Street Limited Partnership v. Massachusetts Department of Environmental Protection* (*In re 229 Main Street Limited Partnership*).[13] The state had expended significant sums in an emergency cleanup of premises owned by the debtor. Under state

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2001), as requiring the statute in question to apply outside of as well as in bankruptcy.

[8] In re New England Carpet Co., 26 B.R. 934 (Bankr. D. Vt. 1983). See also Peltz v. Wisconsin Department of Workforce Development (In re AR Accessories Group, Inc.), *supra* N. 6.1 (there is no requirement that the state law contain a relation-back provision to fit within the (b)(3) exception).

[9] In re Fiorillo & Co., 19 B.R. 21 (Bankr. S.D.N.Y. 1982).

[10] In re New England Carpet Co., 26 B.R. 934 (Bankr. D. Vt. 1983).

[11] The most controversial use of Section 546(b) is in cases concerning postpetition real estate rents, issues and profits, discussed in § 5.01[3] *infra*.

[12] H.R. Rep. No. 1195, 96th Cong., 2d Sess. 10 (1980).

[13] 229 Main Street Limited Partnership v. Massachusetts Department of Environmental Protection (In re 229 Main Street Limited Partnership), 262 F.3d 1 (1st Cir. 2001).

law, the state is entitled to record a lien against the property to secure past and present future costs, and had informed the debtor of its intention to do so. The debtor's first response was to deny liability and commence an adjudicatory hearing; its second was to file Chapter 11. Despite the latter, the state recorded its lien.

In holding that the postpetition recordation fell within Section 362(b)(3), the court held: (a) the exception extends to "interests in property," not just liens;[14] (b) the state's prepetition activities were sufficient to give it an "interest" in the subject property;[15] and (c) the exception applied even though the state's action in recording simultaneously created and perfected its lien.

The court's decision could have far-reaching consequences by promoting claims for environmental cleanup costs from prepetition unsecured to secured claims. Some analysis is required, therefore, particularly with respect to the second and third legs of the opinion. First, it is a reach to hold that expenditure of funds, a notice of intention to record a lien, and participating in an administrative process is, or should be, sufficient to create an interest in property. This ought to be a question of federal law, not of state law, and significant bankruptcy policies of equality of distribution should militate against the result reached here.

Second, one could certainly quarrel with the third leg of the court's opinion. First, it held that the exception applies to more than state relation-back (or period-of-grace) statutes. All that is required, the court opined, is that the statute have a retroactive effect. Here it did; the enabling legislation provided that the state's lien primed earlier encumbrances. The problem of interpretation here is that it wasn't the state's "interest in property" that was perfected; it was a lien. Moreover, the lien did not exist prior to recordation. One reason this distinction matters is that the lien in question secured future as well as past expenditures; at most what could be perfected would be the claim for past expenditures.

If the opinion in *229 Main Street* proves to have legs, one can expect that any state having environmental laws that do not follow the Massachusetts pattern will give serious consideration to amending them so that they do.

[3]—Governmental Units

[a]—The Statutory Language

Paragraph (4) of subsection 362(b) was the subject of a significant amendment by, of all things, the Chemical Weapons

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[14] *Cf.* Bankruptcy Code § 363(f); 11 U.S.C. § 363(f) (authorizing sales free and clear of "any interest"), discussed at § 6.04[3] *infra*.

[15] These activities were the cleanup, the notice of its intention to record a lien, and "participating vigorously in the administrative hearing process."

Convention Implementation Act, which is turn was part of the Omnibus Consolidated Emergency Supplemental Appropriations Act, 1998.[16] Prior to the 1998 amendment, paragraph (4) excepted from Section 362(a)(1) the commencement or continuation of a judicial or administrative proceeding by a governmental unit to enforce its police or regulatory power. Former paragraph (5), which was consolidated with paragraph (4) by the 1998 amendment, excepted from Section 362(a)(2) a government unit's enforcement of a judgment, other than a monetary judgment, obtained under its police or regulatory power.

Section 362(b)(4) now provides:

> The filing of a petition . . . does not operate as a stay— . . . (4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's police or regulatory power[.][17]

This amendment is open to mischievous interpretation as applying, in its entirety, solely to governmental units exercising their authority under the Convention; that is, the absence of a comma after the first time "governmental unit" appears in paragraph (4) might be taken to suggest that that term (as well as the term "organization") is modified by "exercising authority under the Convention," etc.[18] Such an interpretation would, however, negate the public policy decision of Congress ever since the Code was enacted that certain activities of governmental units are so important to the common welfare that they are to be free of the automatic stay. The balance of this discussion, therefore, will assume that the courts will interpret the amendment to continue to except the kinds of activities formerly contained in Section 362(b)(4) and (5).[19]

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[16] Pub. L. No. 105-277.

[17] 11 U.S.C. § 362(b)(4).

[18] The *presence* of a comma was determinative in a case interpreting Section 506(b): see United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 209 (1989), discussed at § 5.04 *infra*.

[19] See In re Dolen, 265 B.R. 471 (Bankr. M.D. Fla. 2001).

[b]—Limits of the Exception: Regulatory Powers vs. Pecuniary Interests

Paragraph (4), then, deals with the exercise by governmental units of their police and regulatory powers.[20] Unlike the exceptions discussed thus far, the activities set out in these subsections are not freed from the entire stay, but only from Section 362(a)(1),[21] (2),[22] (3), and (6).[23]

These exceptions, which permit governmental units to commence or continue proceedings to enforce their police and regulatory powers, as well as to enforce any judgments obtained in such proceedings, have been the subject of much controversy. The courts have had a difficult job determining precisely what sorts of activities by governmental units are excepted from the stay. Some litigation instituted by governmental units involves pursuit of the units' pecuniary interests rather than their police or regulatory powers. Congress foresaw and warned against such an eventuality:

> "Thus, where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. Paragraph (5) makes clear that the exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of the money judgment. Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit of a money judgment would give it preferential treatment to the detriment of all other creditors."[24]

In the floor statements accompanying the Code's passage, it was further stated that Section 362(b)(4) (as it read when enacted in 1978 and prior to its amendment in 1998) was "to be given a

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[20] The exception permits going forward with a proceeding before a state public utility commission that would affect a debtor-utility's rates even though the proceeding could result in shifting certain costs of deregulation from customers to the utility. Pacific Gas & Electric Co. v. California Public Utility Commission (In re Pacific Gas & Elec. Co.), 263 B.R. 306 (Bankr. N.D. Cal. 2001).

[21] Section 362(a)(1) is discussed at § 4.01[2] *supra*.

[22] Section 362(a)(2) is discussed at § 4.01[3] *supra*.

[23] Prior to the 1998 amendment to Section 362(b)(4) and (5), the activities of governmental units were not excepted from Section 362(a)(3) or (6), discussed at §§ 4.01[4] and [7] *supra*.

[24] H.R. Rep. No. 595, 95th Cong., 1st Sess. 343 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6299.

narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate."[25]

The pecuniary interest in question need not be that of the governmental unit. For example, an action seeking to enjoin the shipment of "hot goods"—i.e., goods produced by workers that had not been paid minimum wages in accordance with the Fair Labor Standards Act—did not fall within the exception because its purpose was to protect the rights of the employees, not to enforce public policy.[26]

The cases have been alert to the distinction between pecuniary interests and governmental interests in protecting the public health and safety. In *State of Missouri v. United States Bankruptcy Court*,[27] the State of Missouri had instituted proceedings under state laws dealing with insolvent grain warehouses seeking the appointment of a receiver for all of the debtor's assets. The debtor filed bankruptcy; nevertheless, three days later the state court appointed a receiver who was ordered to liquidate the debtor's assets. Not surprisingly, both the state court and the bankruptcy court asserted exclusive jurisdiction over the debtor's property. Among other things, the State contended that Section 362(b)(4) applied, and that the state receivership could go forward. Rejecting this argument, the court held that the restricted nature of the exception meant that it did not apply to regulatory laws that "directly conflict with the control of the *res* or property by the bankruptcy court."[28] The court also found that the Missouri legislation under which the receiver was appointed related to the pecuniary interests of the state and its citizens, and not to matters of public health and safety.

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[25] 124 Cong. Rec. S17409 (daily ed. Oct. 6, 1978); 124 Cong. Rec. H 11092 (daily ed. Sept. 28, 1978).

[26] Chao v. Hospital Staffing Services, Inc., 270 F.3d 374 (6th Cir. 2001). See also LTV Steel Co. v. City of Buffalo Urban Renewal Agency, 2002 U.S. Dist. LEXIS 8860 (W.D.N.Y. May 9, 2002) (action seeking an injunction requiring debtor to implement fair market value protection program stayed because it sought to benefit owners of residential properties in the area in which debtor had allegedly violated environmental laws).

[27] State of Missouri v. United States Bankruptcy Court, 647 F.2d 768 (8th Cir. 1981), *cert. denied* 454 U.S. 1162 (1982).

[28] *Id.*, 647 F.2d at 776. Similarly, University Medical Center v. Sullivan (In re University Medical Center), 973 F.2d 1065 (3d Cir. 1992), concluded that the stay prohibits governmental units from exercising contractual rights against the debtor, while Hillis Motors, Inc. v. Hawaii Automobile Dealers' Association, 997 F.2d 581 (9th Cir. 1993), held the stay violated when a debtor's corporate charter was revoked for failure to file annual reports and pay the appropriate fees. The state was not exempted from the stay of Section 362(a)(3).

To be contrasted is a case in which the enforceability of an injunction obtained by the Commodity Futures Trading Commission was called into question. In addition to appointing a receiver of the debtor's assets, the non-bankruptcy court had directed defendants to disgorge all payments received by them from their unlawful activities and also directed the debtor's attorneys to turn over to the bankruptcy estate a check delivered to them by the debtor. As to whether this ancillary relief could be enforced following the Chapter 11 filing, the court, distinguishing the *Missouri* case, held that the order directing turnover of such proceeds by the attorney could be enforced as following upon the exercise of the CFTC's regulatory powers. Enforcement of the order would aid, not hinder, the administration of the bankruptcy case.[29]

The United States Supreme Court's decision in *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc*.[30] furthers this distinction. The case involved a conflict between the jurisdiction of the bankruptcy court and the administrative powers of the Board of Governors of the Federal Reserve System. Before MCorp's Chapter 11 case had been filed, the Board had instituted an administrative proceeding against the company, charging it with having violated the Board's "source of strength" regulation. The other administrative proceeding, instituted following the filing of the Chapter 11 case, charged the debtor with a violation of the Federal Reserve Act.

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[29] Commodity Futures Trading Commission v. Co Petro Marketing, 700 F.2d 1279 (9th Cir. 1983). *Accord:* SEC v. First Financial Group of Texas, 645 F.2d 429 (5th Cir. 1981) (SEC receiver).

NLRB unfair labor practices proceedings have been held excepted from the stay because they effectuate public policy rather than adjudicate private rights. See:

First Circuit: Ahrens Aircrafts, Inc. v. NLRB, 703 F.2d 23 (1st Cir. 1983).

Fifth Circuit: NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981).

Sixth Circuit: NLRB v. Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986).

A close case was presented by Commonwealth of Massachusetts v. First Alliance Mortgage Co. (In re First Alliance Mortgage Co.), 263 B.R. 99 (B.A.P. 9th Cir. 2001), which permitted litigation seeking an injunction and a judgment for civil penalties and attorneys' fees for alleged violation of the state's consumer protection laws to go forward. The same result was reached on the governmental unit's claim for restitution on behalf of 299 Massachusetts borrowers so long as no attempt was made to enforce any judgment. The money claims were found to be part of the regulatory scheme and not solely for the state's pecuniary interests. Similarly, In re Dolen, 265 B.R. 471 (Bankr. M.D. Fla. 2001), permitted the FTC to pursue an action seeking to enjoin certain conduct prohibited by statute, but not insofar as it sought to freeze the debtor's post-petition earnings.

[30] Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., 502 U.S. 32, 112 S.Ct. 459, 116 L.Ed.2d 358 (1991).

When MCorp filed its Chapter 11 case, it initiated an adversary proceeding against the Board, arguing that both administrative proceedings had been stayed by the automatic stay or, alternatively, that they should be enjoined. The district court granted the relief sought and entered a preliminary injunction.[31] The Court of Appeals, reversing in part, held that the district court had no jurisdiction to enjoin the proceeding alleging a violation of the statute but that it did have jurisdiction to enjoin the first proceeding while it reviewed the validity of the "source of strength" regulation.[32] The Supreme Court concluded that the courts lacked jurisdiction to enjoin either proceeding.

For our purposes, the opinion in *MCorp* is more important for its *dictim* than it is for its holding. With respect to the latter, the Court looked to 12 U.S.C. § 1818(i)(1) which states:

> "[E]xcept as otherwise provided in this section no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under this section, or to review, modify, suspend, terminate, or set aside any such notice or order."

After pointing out that the case involved only pending administrative proceedings, and did not involve an enforcement action initiated by the Board, the Court held that neither the automatic stay nor the jurisdictional provisions of Title 28 superseded Section 1818(i)(1). The Court held that the regulatory proceedings fell within the Section 362(b)(4) exception because they were proceedings to enforce "a governmental unit's police or regulatory power." At the stage at which the proceedings were when the adversary proceeding had been initiated—no final determination had been made as to whether MCorp had violated either the regulation or the statute—the automatic stay did not apply and there had been no collision between the Board's powers and the bankruptcy court's jurisdiction. It was in this context that the Court stated, in *dicta*: "If and when the Board's proceedings culminate in a final order, and if and when judicial proceedings are commenced to enforce such an order, then it may well be proper for the Bankruptcy Court to exercise its concurrent jurisdiction under 28 U.S.C. § 1334(b). We are not persuaded, however, that the automatic stay provisions of the Bankruptcy Code have any application to ongoing, non-final administrative proceedings."[33] The Court also observed that the prosecution of the proceedings by

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[31] MCorp v. Board of Governors (In re MCorp), 101 B.R. 483 (S.D. Tex. 1989).

[32] MCorp Financial, Inc. v. Board of Governors, 900 F.2d 852 (5th Cir. 1990).

[33] Board of Governors of the Federal Reserve System v. MCorp Financial, Inc., *supra* N. 20, 112 S.Ct. at 464.

the Board "prior to the entry of a final order and prior to the commencement of any enforcement action, seems unlikely to impair the Bankruptcy Court's exclusive jurisdiction over property of the estate protected by 28 U.S.C. § 1334(d)."

The inference to be drawn from the Court's language emphasizes the distinction between a regulatory agency's ability to conduct administrative proceedings during the course of a bankruptcy case and its ability to enforce any order or judgment resulting from such proceedings.[34] While it may be admitted that a contrary result in the *MCorp* case would have rendered meaningless the exceptions to the automatic stay found in Section 362(b)(4), it seems probable that the Court, were it to be presented with the issue, would not interpret Section 1818(i)(1) to permit a governmental agency to enforce a final order in such a way as to impair the administration of the bankruptcy case or affect the property of the estate.

If the *dicta* in *MCorp* are to be believed, then the high-profile decisions of the Second Circuit Court of Appeals in the *NextWave* Chapter 11 case are quite disturbing.[35] The debtor had won certain licenses at an auction conducted by the FCC for $4.74 billion. As permitted by the FCC regulations governing the auction, it paid 10% down; the balance was to be paid over time and was secured by the licenses. NextWave was unable to make the first installment called for by the FCC regulations. It filed Chapter 11 and sought a determination that that part of the bid that exceeded the fair market value of the licenses was a fraudulent conveyance. The bankruptcy court ruled that NextWave's obligation was only $1.023 billion, the amount the court found the licenses were worth when they were actually issued, less the down payment already made. The district court affirmed, but was reversed in *NextWave I*.

The appeals court noted that, acting pursuant to its authority, the FCC had made "full and timely payment of the winning bid" a regulatory condition for retaining the spectrum licenses obtained through an auction. The court termed the Federal Communications Act "a unified and comprehensive regulatory system" that permitted the FCC to impose conditions on the use of licenses it

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[34] Thus, a hearing to consider revoking a permit does not violate the stay; only the actual revocation would. In re National Cattle Congress, Inc., 179 B.R. 588 (Bankr. N.D. Iowa 1995), *remanded sub nom*. National Cattle Congress, Inc. v. Iowa Racing & Gaming Comm'n (In re National Cattle Congress, Inc.), 91 F.3d 1113 (8th Cir. 1996) for further consideration in light of Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). See § 2.04[2] *supra*.

[35] FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.), 200 F.3d 43 (2d Cir. 1999), *cert. denied* 531 U.S. 924 (2000) ("*NextWave I*"); In re FCC, 217 F.3d 125 (2d Cir.), *cert. denied* 531 U.S. 1029 (2000) ("*NextWave II*").

grants.

Relying upon Section 2343 of Title 28 of the United States Code, which provides, in part, that "The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47," the court found that neither the bankruptcy court nor the district court had jurisdiction over the adversary proceeding. The decisions below had improperly treated the FCC as an ordinary creditor. "The FCC's auction rules . . . have primarily a regulatory purpose: to ensure that spectrum licenses end up in the hands of those most likely to further congressionally defined objectives. . . . [T]he sole responsibility for the allocation of the licenses lies with the FCC, with appeal to the courts of appeals, not the bankruptcy or district courts."[36]

By holding that the debtor could retain the licenses for a reduced price, the lower courts had impaired the FCC's method of awarding licenses by awarding them to an entity that the FCC determined was not entitled to them. "This is not to say that these courts lacked jurisdiction over every aspect of the relationship between the FCC and NextWave. To the extent that the financial transactions between the two do not touch upon the FCC's regulatory authority, they are indeed like the obligations between ordinary debtors and creditors. NextWave's arguments that the FCC seeks to frustrate the purposes of the bankruptcy laws are therefore misplaced. We are merely holding that NextWave may not collaterally attack or impair in the bankruptcy courts the license allocation scheme developed by the FCC."[37]

So far so good; nothing in *NextWave I* seems to be inconsistent with *MCorp,* at least if you believe that the FCC is exempt from the bankruptcy avoiding powers. It is *NextWave II* that is problematical. After the remand, the debtor offered to pay the full amount owed the FCC in a lump sum. However, the FCC on the very next day issued a public notice that the debtor's licenses were being reauctioned and that failure of the debtor to have paid the first installment of the original notes had resulted in the automatic cancellation of the licenses. The bankruptcy court held that the cancellation violated the stay and issued an order prohibiting the FCC from reauctioning the licenses because the timely payment requirement lacked a regulatory purpose, unlike the full payment requirement blessed by *NextWave I*. The FCC successfully sought mandamus in the circuit court.

The opinion in *NextWave II* held that the bankruptcy court's action amounted to a review of an FCC order, for which that court lacked jurisdiction, and contravened the court of appeals' earlier

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[36] *NextWave I,* 200 F.3d at 54-55.

[37] *Id.*

mandate. The court in *NextWave I* held that the FCC's *full* payment requirement had more than financial implications; it was the "paradigmatic instance of the FCC's exclusive regulatory power over licensing."[38] Holding that the *timely* payment requirement served no regulatory purpose was "at odds" with the earlier decision. "[W]henever an FCC decision implicates its exclusive power to dictate the terms and conditions of licensure, the decision is regulatory. And if the decision is regulatory, it may not be altered or impeded by any court lacking jurisdiction to review it."[39] Time of payment serves the same regulatory function as full payment. Thus when NextWave missed its first payment, it had no way of retrieving the licenses.

The court then held that the holding below that the automatic stay prevented termination of the licenses and that Section 362(b)(4) was inapplicable because the FCC was exercising its pecuniary interests rather than its regulatory powers flatly contradicted *NextWave I*. Paying lip service to *MCorp*,[40] the appellate court utterly failed to address *MCorp's* distinction between the administrative proceeding itself and any attempt to enforce a decision resulting therefrom.

So there are two problems with the *NextWave* opinions. First, they conclude that attempts by the FCC to recapture the licenses were not stayed even though a reasonable person certainly could infer that the FCC was acting to protect its pecuniary interests and not to enforce its regulatory power. That same observer might also conclude that, at a minimum, the Second Circuit should have addressed *MCorp's* language regarding attempts by an administrative agency to enforce its decisions. The action of the FCC in declaring the licenses forfeit would seem to have the same effect as the judgment enforcement paradigm that the Supreme Court had worried about in *MCorp*. The *NextWave* decisions certainly seem to expand the definition of what exactly constitutes a governmental unit's police and regulatory powers in a setting that seemed to have much more to do with money than with protecting the public's safety. After all, if the debtor satisfied the criteria for entering the bidding, meaning that it was an appropriate operator, the fact that it couldn't come up with the money would seem to be a typically bankruptcy court concern.

At the end of the day, however, NextWave was able to hold on to its licenses. In a decision that casts some doubt upon the validity of *NextWave I and II*,[41] the Supreme Court, in the course of holding

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[38] *NextWave II*, 217 F.3d at 134, quoting 200 F.3d at 54.

[39] *NextWave II*, 217 F.3d at 135.

[40] *Id.*, 217 F.3d at 139.

[41] FCC v. NextWave Personal Communications, Inc., ___ U.S. ___, 123 S.Ct. 832, 154 L.Ed.2d 863 (2003), discussed at § 4.03[3][e] *infra*.

that the FCC's actions had violated Section 525(a) of the Code,[41.1] used language that could lead one to believe that, even though the prompt payment requirement had some regulatory purpose, the FCC, by choosing to accept installment payments, had created a "debt," and that the FCC could not ignore the Code by "cancelling licenses rather than asserting security interests in licenses when there is a default."[41.2]

[c]—The Environmental Cases

The thin line between pecuniary and non-pecuniary activity is highlighted by cases which do not directly involve the automatic stay but that nevertheless speak to this difficult issue. In *Ohio v. Kovacs,*[42] the State of Ohio had obtained an injunction directing Kovacs and a corporation which he controlled to remove certain toxic wastes from the corporation's premises, and to pay the state $75,000 for injury to wildlife. To enforce the clean-up injunction, the state procured the appointment of a receiver to take possession of the assets of both defendants. Kovacs filed bankruptcy, whereupon the state sought an order that the cost of clean-up was not a "claim" and therefore not dischargeable in Kovacs' bankruptcy.

Affirming the lower court decisions in favor of Kovacs, the Supreme Court noted that the state had decided to pursue only monetary remedies against Kovacs; that is, it had attempted to seek garnishment of his postpetition wages. The Court stated:

> "The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets as well as the assets of the corporate defendants and to comply with the injunction entered against Kovacs. As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property . . . . Although Kovacs had been ordered to 'cooperate' with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs. At oral argument in this Court, the State's counsel conceded that after the receiver was appointed, the only performance sought from Kovacs was the

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[41.1] 11 U.S.C. § 525(a).

[41.2] FCC v. NextWave Personal Communications, Inc., ___ U.S. ___, ___, 123 S.Ct. 832 , 154 L.Ed.2d 863, ____ (2003).

[42] Ohio v. Kovacs, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985).

payment of money."[43]

The Court then furnished a roadmap for governmental agencies regarding what course of conduct to pursue to best protect their rights against debtors in bankruptcy cases and, inferentially, what to do in order to take advantage of the exceptions from the automatic stay contained in subsection 362(b)(4).[44]

To be directly contrasted with the decision in *Kovacs* is the Third Circuit's decision in *Penn Terra Limited v. Department ofEnvironmental Resources*.[45] In that case, the Department of Environmental Resources (DER) of the State of Pennsylvania had found that Penn Terra was operating coal mines in violation of various environmental protection statutes. A consent order was entered establishing a schedule for corrective measures. Penn Terra did not comply, and thereafter filed a petition under Chapter 7. The

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[43] *Id.*, 105 S.Ct. at 710.

[44] *Id.*, 105 S.Ct. at 711-712.

> "It is well to emphasize what we have not decided. First, we do not suggest that Kovacs' discharge will shield him from prosecution for having violated the environmental laws of Ohio or for criminal contempt for not performing his obligations under the injunction prior to bankruptcy. Second, had a fine or monetary penalty for violation of state law been imposed on Kovacs prior to bankruptcy, § 523(a)(7) forecloses any suggestion that his obligation to pay the fine or penalty would be discharged in bankruptcy. Third, we do not address what the legal consequences would have been had Kovacs taken bankruptcy before a receiver had been appointed and a trustee had been designated with the usual duties of a bankruptcy trustee. Fourth, we do not hold that the injunction against bringing further toxic wastes on the premises or against any conduct that will contribute to the pollution of the site or the States' waters is dischargeable in bankruptcy; we here address, as did the Court of Appeals, only the affirmative duty to clean up the site and the duty to pay money to that end. Finally, we do not question that anyone in possession of the site—whether it is Kovacs or another in the event the receivership is liquidated and the trustee abandons the property, or a vendee from the receiver or the bankruptcy trustee—must comply with the environmental laws of the State of Ohio."

To be compared is United States v. Whizco, Inc., 841 F.2d 147 (6th Cir. 1988), involving an individual who had received a Chapter 7 discharge subject to an affirmative injunction directing the cleanup and restoration of property that had been used for strip mining. Although the injunction did not require the payment of monetary damages, the court, realistically observing that the individual did not have the physical capacity to reclaim the mine site himself and would have to hire others (at considerable expense) to perform the work, found that what the United States sought was really the payment of money. However, if the individual could comply with the injunction without spending money, he would have to do so.

[45] Penn Terra Limited v. Department of Environmental Resources, 733 F.2d 267 (3d Cir. 1984).

DER then brought an action in state court seeking a preliminary injunction against Penn Terra directing it to correct the violations of the state's statutes and to enforce the terms of the consent order. The state court granted injunctive relief. Penn Terra thereafter sought sanctions for contempt against the DER in the bankruptcy court. That court, affirmed by the district court, held that the actions by the DER were actions to enforce a money judgment and that the DER was enjoined from enforcing the injunction order.

After considering the legislative history of Section 362, the court determined that the exceptions contained in subsections 362(b)(4) and (5) (prior to having been combined into new subsection 362(b)(4) by the 1998 amendment) should be construed broadly and, likewise, "the 'exception to the exception' created by subsection 362(b)(5), rendering 'enforcement of a monetary judgment' by a governmental unit susceptible to the automatic stay, should be construed *narrowly* so as to leave to the States as much of their police power as a fair reading of the statute allows."[46] Based upon this philosophy, the court found that the state court order directing Penn Terra to perform the reclamation work was not an attempt to enforce a money judgment. The court stated:

> "[A]n important factor in identifying a proceeding as one to enforce a money judgment is whether the remedy would compensate for *past* wrongful acts resulting in injuries already suffered, or protect against potential *future* harm. Thus, it is unlikely that any action which seeks to prevent culpable conduct *in futuro* will, in normal course, manifest itself as an action for a money judgment, or one to enforce a money judgment. . . . Indeed, the very nature of injunctive relief is that it addresses injuries which may not be compensated by money."[47]

It is interesting to compare what the state did in *Penn Terra* with what the state did in *Kovacs*. The *Penn Terra* opinion is almost a direct contradiction of the later-decided Supreme Court decision in *Kovacs*:

> "Here, the Commonwealth Court injunction was neither in form nor substance, the type of remedy traditionally associated with the conventional money judgment. It was not intended to provide compensation for past injuries. It was not reducible to a sum certain. No monies were sought by the Commonwealth as a creditor or obligee. The Commonwealth was not seeking a traditional form of damages in tort or contract, and the mere payment of money, without more, even if it could be estimated, could not satisfy the Commonwealth Court's direction to complete the backfilling, to update erosion plans, to seal mine

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[46] *Id.*, 733 F.3d at 273. (Emphasis in original).

[47] *Id.*, 733 F.2d at 276-277. (Emphasis in original).

openings, to spread top soil, and to implement plans for erosion and sedimentation control. Rather, the Commonwealth Court's injunction was meant to prevent future harm to, and to restore, the environment."[48]

An almost identical issue was considered in *Commonwealth Oil Refining Co. v. United States Environmental Protection Agency (In re Commonwealth Oil Refining Co.),*[49] involving a compliance order of the Environmental Protection Agency providing that the debtor in possession was (1) not further to treat, store, or dispose of any hazardous waste without having first obtained a permit; (2) to have thirty days to submit a closure plan for certain of its facilities; and (3) within thirty days to submit a post-closure plan for its land disposal facilities. The lower courts had determined that the EPA's actions were not stayed by Section 362(b) and that grounds did not exist for a discretionary stay under Section 105(a).

Relying heavily on *Penn Terra*, the court first determined that the EPA was not seeking a money judgment and thus was within the exceptions to the stay contained in Section 362(a)(4) and (5) (prior to having been combined into new subsection 362(b)(4) by the 1998 amendment). The fact that complying with the requirements contained in the order would involve the expenditure of money did not render it the enforcement of a money judgment. Any other result would, the court believed, read Section 362(b)(4) out of the statute.[50]

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[48] *Id.*, 733 F.2d at 278. See also, Word v. Commerce Oil Co. (In re Commerce Oil Co.), 847 F.2d 291 (6th Cir. 1988), which held that the automatic stay did not apply to an appeal taken by a debtor from an order of a state environmental commissioner directing the debtor to cease certain illegal discharges into a creek, make certain repairs to wells, and imposing damages and civil penalties. The stay did not apply to the part of the appeal having to do with damages and penalties, because they fell within the police power exceptions to the stay.

[49] Commonwealth Oil Refining Co. v. EPA (In re Commonwealth Oil Refining Co.), 805 F.2d 1175 (5th Cir. 1986).

[50] The court in City of New York v. Exxon Corp., 932 F.2d 1020 (2d Cir. 1991), held that a lawsuit filed by a governmental unit for recovery of costs incurred in responding to a completed violation of environmental statutes falls under the police power exception to the automatic stay. The court relied upon the committee reports which interpreted paragraph (4) as extending to suits "attempting to fix damages for violated of such [an environmental] law,..."

To be contrasted is Apex Oil Co. v. United States (In re Apex Oil Co.), 91 B.R.860 (Bankr. E.D. Mo. 1988), which held that the exception of Section 362(b)(4) did not apply to proceedings by the Department of Energy regarding remedial orders emanating from alleged prepetition violation by the debtor of certain price regulations. The automatic stay thus precluded further activity by the DOE to liquidate administratively its claims against the debtor. Reference should be had to the discussion contained at § 6A.03 *infra* regarding the status of cleanup obligations as dischargeable claims.

Equally interesting is the court's discussion of the applicability of Section 105. The court ruled that, using the standards applicable generally to a motion seeking an injunction, the debtor in possession would not prevail at a trial on the merits because it was admittedly not in compliance with the EPA's standards. The court rejected the debtor in possession's contention that the "merits" were whether it would ultimately comply in a plan or whether it must comply *now*. By refusing to accept this argument, the court must have determined that the expenditure of estate funds for compliance is a price that had to be paid now, rather than later, although the length of time that the case had been pending, along with other, similar, considerations, also convinced the court that the equities did not favor the debtor in possession.

The cases involving the environmental laws are confusing, imprecise, and contain no coherent rationale. The courts failed to note that Subsections (b)(4) and (b)(5) (prior to having been combined into new subsection 362(b)(4) by the 1998 amendment) did not apply to actions taken by governmental units to exercise control over property of the estate. Forcing a debtor's estate to expend monies to comply with cleanup injunctions may have precisely that effect. Now that the governmental exceptions do apply to Section 362(a)(3) as a consequence of the 1998 amendments, these earlier decisions have been ratified.

[d]—Impact on Assets of the Estate

Cases involving other types of litigation instituted by governmental units seem to be decided on the basis of whether any effect might be imposed, from enforcement of a judgment or an injunction, upon the assets of the estate. Thus, while it is proper for a state worker's compensation commission to hear and determine worker's compensation claims where the claim (if found) will be paid either by the state or by a surety,[51] such is not the case where a state industrial commission filed suit to enjoin the debtor's operations because of nonpayment of worker's compensation premiums. The court there held that the suit was filed for the primary purpose of enforcing the state's pecuniary interests and was not excepted from the stay.[52]

Some insight with respect to the tension between the enforcement of governmental policy and depletion of the assets of the Chapter 11 estate is furnished by *Equal Employment Opportunity Commission v. Rath Packing Co.*,[53] which held that the automatic

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[51] Ohio v. Mansfield Tire & Rubber Co. (In re Mansfield Tire & Rubber Co.), 660 F.2d 1108 (6th Cir. 1981).

[52] In re Greffken, 41 B.R. 874 (Bankr. N.D. Ohio 1984).

[53] Equal Employment Opportunity Comm. v. Rath Packing Co., 787 F.2d 318 (8th Cir.), *cert. denied* 479 U.S. 910 (1986). *Accord*: *Fourth Circuit*: EEOC v.

stay does not apply to EEOC lawsuits which, even though brought at the behest of, and for the benefit of, specific individuals, act to vindicate a public interest in preventing invidious employment discrimination. The court held that because Congress created exceptions to the stay for certain actions by governmental units, it must have recognized that the debtor would incur legal fees in defending such actions. That such fees will be incurred is, therefore, not a ground for granting a discretionary stay under Section 105. The court also held that while a money judgment might be entered in such an action, no collection activity would be undertaken.

Illustrations of excepted activities abound. Unfair labor practice proceedings pending before the National Labor Relations Board have been held not subject to the stay.[54] These cases do say, however, that if such proceedings threaten the assets of the estate, they might be enjoined by the bankruptcy court's issuance of a discretionary stay.[55] Similar cases define the scope of activities by governmental units falling within the exception.[56]

The cases for the most part have investigated fully the relationship between the public health and safety and the activity

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McLean Trucking Co., 834 F.2d 398 (4th Cir. 1987).

[54] *First Circuit:* Ahrens Aircraft, Inc. v. NLRB, 703 F.2d 23 (1st Cir. 1983).

Fifth Circuit: NLRB v. Evans Plumbing Co., 639 F.2d 291 (5th Cir. 1981).

Sixth Circuit: NLRB v. Edward Cooper Painting, Inc., 804 F.2d 934 (6th Cir. 1986).

Seventh Circuit: NLRB v. PIE Nationwide, Inc., 923 F.2d 506 (7th Cir. 1991).

Ninth Circuit: NLRB v. Continental Hagen Corp., 932 F.2d 838 (9th Cir. 1991).

Tenth Circuit: Eddleman v. United States Dep't of Labor, 923 F.2d 782 (10th Cir. 1991).

[55] In re Theobald Industries, Inc., 16 B.R. 537 (Bankr. D.N.J. 1981). Of course, this caveat is unnecessary because of the restricted scope of the exception to the stay, adverted to above, contained in Section 362 (b)(4).

[56] *First Circuit:* Cournoyer v. Town of Lincoln, 790 F.2d 971 (1st Cir. 1986) (zoning ordinance).

Second Circuit: Lawson Burich Associates, Inc. v. Axelrod (In re Lawson Burich Associates, Inc.), 31 B.R. 604 (S.D.N.Y. 1983) (hospital operating certificate); In re Cousins Restaurants, Inc., 11 B.R. 521 (Bankr. W.D.N.Y. 1981) (zoning ordinance).

Fourth Circuit: In re County Fuel Co., 29 B.R. 534 (Bankr. D. Md. 1983) (petroleum price regulations).

Seventh Circuit: Donovan v. Timbers of Woodstock Restaurant, Inc., 6 C.B.C.2d 1073 (N.D. Ill. 1981) (Fair Labor Standards Act).

Ninth Circuit: Universal Life Church, Inc. v. IRS (In re Universal Life Church, Inc.), 128 F.3d 1294 (9th Cir. 1997) (IRS revocation of debtor's tax-exempt status).

Eleventh Circuit: Donovan v. TMC Industries, Ltd., 20 B.R. 997 (N.D. Ga. 1982) (Fair Labor Standards Act).

being pursued. Thus, an action to revoke a debtor's exemption from Certificate of Need Review was not within the exception;[57] neither was a public housing authority's attempt to enforce lease provisions.[58] On the other hand, the stay did not apply to the appeal by the debtor of an order imposing sanctions under Rule 11 of the Federal Rules of Civil Procedure; the sanction is meted out by a governmental unit—a court—even though the sanctions themselves are generally sought by a nongovernmental litigant.[59]

[e]—Revocation of Licenses: The Applicability of Section 525

While Section 362(b)(4), as interpreted by the courts, permits a governmental unit to pursue its regulatory powers free from the restraints of the automatic stay, Section 525(a) of the Code[60] provides that that same governmental unit "may not deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, . . . a person that is or has been a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . . ." The relationship between these two sections was the subject of *FCC v. NextWave Personal Communications, Inc.*[61]

NextWave had been the successful bidder for a number of "broadband PCS" licenses in an auction conducted by the FCC. Its bids totaled $ 4.74 billion. It made a ten percent down payment; the balance was payable in installments and secured by the licenses. When NextWave defaulted and filed Chapter 11 in the Southern District of New York, the FCC argued that the licenses had automatically terminated when NextWave missed its first postpetition installment payment.[62] The Second Circuit concluded that the automatic stay did not preclude the cancellation from taking place because the FCC was a "governmental unit" seeking

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[57] Schatzman v. Department of Health (In re King Memorial Hospital, Inc.), 4 B.R. 704 (Bankr. S.D. Fla. 1980).

[58] Gibbs v. Housing Authority of New Haven (In re Gibbs), 9 B.R. 758 (Bankr. D. Conn. 1981).

[59] Alpern v. Lieb, 11 F.3d 689 (7th Cir. 1993).

[60] 11 U.S.C. § 525(a).

[61] FCC v. NextWave Personal Communications, Inc., ___ U.S. ___, 123 S.Ct. 832, 154 L.Ed.2d 863 (2003).

[62] It took two opinions for the Second Circuit to convince the bankruptcy court that the latter did not have jurisdiction to determine whether the automatic stay applied to prevent the termination or that the debtor had overpaid by more than $3 billion. FCC v. NextWave Personal Communications, Inc. (In re NextWave Personal Communications, Inc.), 200 F.3d 43 (2d Cir. 1999), *cert. denied* 531 U.S. 924 (2000); In re FCC, 217 F.3d 125 (2d Cir.), *cert. denied* 531 U.S. 1029 (2000), discussed at §§ 2.04[2][b] and 4.03[3][b] *supra*.

to enforce its "regulatory powers." The District of Columbia Circuit, however, negated the cancellation under Section 525(a),[63] which provides in part that "a governmental unit may not . . . revoke . . . a license . . . to . . . a person that is . . . a debtor under this title . . . solely because such . . . debtor . . . has not paid a debt that is dischargeable in the case under this title . . . " The Supreme Court affirmed.

The Court dismissed as irrelevant the FCC's argument that it had a "valid regulatory motive" in revoking the license because the argument proved too much; that is, in every case a governmental unit has some further motive behind a license revocation and acknowledging that that motive was relevant would eviscerate Section 525(a).

The Court also refused to accept the FCC's contention that NextWave's obligation to pay the unpaid balance of the purchase price was somehow not a "debt" that is "dischargeable." Casting into doubt the continued viability of the Second Circuit's decisions concerning the NextWave licenses,[64] the Court held that "a debt is a debt, even when the obligation to pay it is also a regulatory condition."[65] Finally, the Court held that there was no conflict between Section 525 and the Communications Act.

NextWave has enormous practical effect by shifting the focus away from governmental activity that is protected by Section 362(b)(4) to the strict limitations on governmental power contained in Section 525(a). A great deal of wealth today arises as the result of governmental largesse evidenced by licenses, permits, etc.; Section 525(a) recognizes the economic necessity of protecting such wealth for debtors and creditors, and *NextWave* places a good deal of meat upon the good bones of that section.

[4]—Lessors of Real Property

Section 362(b)(10) excepts from the automatic stay "any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property."

Without this subsection, if the debtor's right to continue in possession of real or personal property under a lease had terminated by reason of the expiration of the stated term of the lease either before or after the commencement of the bankruptcy case, the lessor or landlord would be prevented by Section 362(a) from seeking to repossess the property, absent permission of the

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[63] 11 U.S.C. § 525(a).

[64] See § 4.03[3][b] *supra*.

[65] *FCC v. NextWave Personal Communications, Inc.*, N. 61 *supra*, ___ U.S. at ___, 123 S.Ct. at 839.

bankruptcy court. This is not true with respect to nonresidential real property leases.[66] However, if a lease of personal property or lease of residential real property has expired before or after the commencement of the bankruptcy case, the lessor or landlord is not free to repossess the property absent the permission of the bankruptcy court, since such activity would violate Section 362(a)(3), which prohibits "any act to obtain possession of property of the estate or property from the estate."

[5]—Property Tax Liens

The 1994 legislation[67] added a new exception to the stay. Section 362(b)(18)[68] excepts from the operation of Section 362(a)

> "the creation or perfection of a statutory lien for an ad valorem property tax[69] imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition."

The amendment was necessitated by a series of cases that held that Section 362(a)(4)[70] prevented real property taxes accruing during the case from becoming liens on estate property.[71] The

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[66] See § 6.05[4][b] *infra* for a summary of the cases defining the otherwise undefined term, "nonresidential real property." See generally, Erickson v. Polk, 921 F.2d 200 (8th Cir. 1990). No separate order modifying the stay is necessary in order for the lessor to commence a state court eviction action. In re Urbanco, Inc., 122 B.R. 513 (Bankr. W.D. Mich. 1991).

[67] Section 401 of the Bankruptcy Reform Act of 1994, Pub. L. 103-394 (1994). See § 1.03 *supra*.

[68] 11 U.S.C. § 362(b)(18).

[69] What constitutes an "ad valorem" tax is a matter of federal law. In re LTV Steel Co., 264 B.R. 455 (Bankr. N.D. Ohio 2001). *LTV* also held that this exception was designed to apply to local governments, not state agencies or departments.

[70] See § 4.01[5] *supra*.

[71] *Second Circuit:* Lincoln Savings Bank, FSB v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n, Inc.), 880 F.2d 1540 (2d Cir. 1989), *cert. denied* 493 U.S. 1058 (1990).

Third Circuit: Equibank, N.A. v. Wheeling-Pittsburgh Steel Corp., 884 F.2d 80 (3d Cir. 1989).

Fifth Circuit: Pointer v. City of Commerce Branch (In re Pointer), 113 B.R. 285 (Bankr. N.D. Texas 1990).

Sixth Circuit: Watervliet Paper Co. v. City of Watervliet (In re Shoreham Paper Co.), 117 B.R. 274 (Bankr. W.D. Mich. 1990).

Contra:

First Circuit: Black v. Peoples Heritage Savings Bank (In re Martin), 106 B.R.335 (Bankr. D. Me. 1989).

legislative history states quite specifically that it was Congress' intention to overrule these cases.[72]

[6]—Other Exceptions

Another exception to the stay is not found in Section 362(b) at all, but instead is found in Section 1110 of the Bankruptcy Code,[73] which provides that the automatic stay does not operate to prevent the repossession of transportation equipment by conditional sellers, lessors and lenders under certain circumstances.

Section 362(b)(11) makes the stay inapplicable to "the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument." Presumably, Section 362(b)(11), which is intended "to make it clear that the automatic stay is not intended to interfere with the rights of a holder of a negotiable instrument to obtain payment,"[74] will permit an assignee of the debtor's accounts receivable to present for payment checks written by the debtor's account debtors, so that the checks do not become stale. Applying the proceeds against the debt *would* violate the stay.

Fourth Circuit: Maryland National Bank v. Mayor and City Council of Baltimore, 723 F.2d 1138 (4th Cir. 1983).

Some cases held that such taxes were entitled to an administrative priority:

Third Circuit: Gline v. Horn & Co. (In re Isley), 104 B.R. 673 (D.N.J. 1989).

District of Columbia Circuit: Perpetual Am. Bank v. District of Columbia (In re Carlisle Court, Inc.), 36 B.R. 209 (Bankr. D.D.C. 1983).

[72] Among other things, Congress believed that cases cited in the preceding note "create a windfall for secured lenders, who would otherwise be subordinated to such tax liens, and significantly impair the revenue collecting capability of local governments. This section overrules these cases . . . ." 140 Cong. Rec. H 10771 (daily ed. Oct. 4, 1994). Being as targeted as it is, the amendment should not change the result in cases such as PBGC v. Reorganized CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators of Utah, Inc.), 179 B.R. 704 (D. Utah 1994), holding that the stay precluded a statutory lien from arising as a consequence of the debtor's failure to make certain postpetition contributions to an ERISA plan. But see 229 Main Street Limited Partnership v. Massachusetts Department of Environmental Protection (In re 229 Main Street Limited Partnership), 262 F.3d 1 (1st Cir. 2001), discussed at §4.03[2] *supra*.

[73] 11 U.S.C. § 1110. Section 1110 is fully discussed in § 6.05[12] *infra*.

[74] H.R. Rep. No. 1195, 96th Cong., 2d Sess. 11 (1980).