APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-2527

IN RE: ROBBIN L. FULTON,
Debtor-Appellee,

APPEAL OF: CITY OF CHICAGO,

Appeal from the United States Bankruptcy Court
for the Northern District of Illinois, Eastern Division.
No. 18-02860 - **Jack B. Schmetterer**, *Bankruptcy Judge.*

No. 18-2793

IN RE: JASON S. HOWARD,
Debtor-Appellee,

APPEAL OF: CITY OF CHICAGO,

Appeal from the United States Bankruptcy Court
for the Northern District of Illinois, Eastern Division.
No. 17-25141 - **Jacqueline P. Cox**, *Bankruptcy Judge.*

No. 18-2835

IN RE: GEORGE PEAKE,
Debtor-Appellee,

APPEAL OF: CITY OF CHICAGO,

Appeal from the United States Bankruptcy Court
for the Northern District of Illinois, Eastern Division.
No. 18-16544 - **Deborah Lee Thorne**, *Bankruptcy Judge.*

No. 18-3023

IN RE: TIMOTHY SHANNON,
Debtor-Appellee,

APPEAL OF: CITY OF CHICAGO,

Appeal from the United States Bankruptcy Court
for the Northern District of Illinois, Eastern Division.
No. 18-04116 - **Carole A. Doyle**, *Chief Bankruptcy Judge.*

ARGUED MAY 14, 2019 - DECIDED JUNE 19, 2019

Before FLAUM, KANNE, and SCUDDER, *Circuit Judges.*

FLAUM, *Circuit Judge.* In this consolidated appeal of four Chapter 13 bankruptcies, we consider whether the City of Chicago may ignore the Bankruptcy Code's automatic stay and continue to hold a debtor's vehicle until the debtor pays her outstanding parking tickets. Prior to the debtors' filing for bankruptcy, the City impounded each of their vehicles for failure to pay multiple traffic fines. After the debtors filed their Chapter 13 petitions, the City refused to return their vehicles, claiming it needed to maintain possession to continue perfection of its possessory liens on the vehicles and that it would only return the vehicles when the debtors paid in full their outstanding fines. The bankruptcy courts each held that the City violated the automatic stay by "exercising control" over property of the bankruptcy estate and that none of the exceptions to the

stay applied. The courts ordered the City to return debtors' vehicles and imposed sanctions on the City for violating the stay.

This is not our first time addressing this issue: in *Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009), we held that a creditor must comply with the automatic stay and return a debtor's vehicle upon her filing of a bankruptcy petition. We decline the City's request to overrule *Thompson*. We therefore affirm the bankruptcy courts' judgments relying on *Thompson*, and we also agree with the bankruptcy courts that none of the exceptions to the stay apply.

I. Background

The Chicago Municipal Code permits creditor-appellant the City of Chicago to immobilize and then impound a vehicle if its owner has three or more "final determinations of liability," or two final determinations that are over a year old, "for parking, standing, compliance, automated traffic law enforcement system, or automated speed enforcement system violation[s]." Municipal Code of Chicago ("M.C.C.") § 9-100-120(b); *see also id.* § 9-80-240(a) (providing for impoundment of vehicles "operated by a person with a suspended or revoked driver's license"). The fines for violations of the City's Traffic Code range from $25 (*e.g.*, parallel parking violation) to $500 (*e.g.*, parking on a public street without displaying a wheel tax license emblem). *Id.* § 9-100-020(b)-(c). Failure to pay the fine within twenty—five days automatically doubles the penalty. *Id.* § 9-100-050(e). After a vehicle is impounded, the owner is further subjected to towing and storage fees, *see id.* § 9-64-250(c), and to the City's costs and attorney's fees for collection activity. *Id.* §§ 1-19-020, 2-14-132(c)(1)(A). To retrieve her vehicle, an owner may either pay the

fines, towing and storage fees, and collection costs and fees in full, *id.* § 2-14-132(c)(1)(A), or pay the full amount via an installment plan over a period of up to thirty-six months, provided she makes an initial payment of half the fines and penalties plus all of the impoundment, towing, and storage charges. *Id.* § 9-100-101(a)(2)-(3).

In 2016, the City amended the Code to include: "Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle." *Id.* § 9-92-080(f). Based on this provision, the City began refusing to release impounded vehicles to debtors who had filed Chapter 13 petitions. That is just what occurred in these four cases.

A. *In re Fulton*

Debtor—appellee Robbin Fulton uses a vehicle to commute to work, transport her young daughter to day care, and care for her elderly parents on weekends. On December 24, 2017, three weeks after she purchased a 2015 Kia Soul, the City towed and impounded the vehicle for a prior citation of driving on a suspended license. Fulton filed a Chapter 13 bankruptcy petition on January 31, 2018 and filed a plan on February 5, treating the City as a general unsecured creditor. The City filed a general unsecured proof of claim on February 23 for $9,391.20. After the court confirmed Fulton's plan on March 21, she requested the City turn over her vehicle. The City then amended its proof of claim to add impound fees, for a total of $11,831.20, and to assert its status as a secured creditor; it did not return Fulton's vehicle.

On May 2, Fulton filed a motion for sanctions arguing the City was required to turn over her vehicle pur-

suant to *Thompson* and that its failure to do so was sanctionable conduct. The City countered that Fulton must seek turnover through an adversary proceeding. It asserted it was retaining possession to perfect its possessory lien and was thus excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(3).

On May 25, the bankruptcy court held that the City was required to return Fulton's vehicle under *Thompson* and that the City was not excepted from the stay under § 362(b)(3). The court ordered the City to turn over Fulton's vehicle no later than May 29, imposed a sanction of $100 for every day the City failed to comply, and sustained Fulton's objection to the City's claim as a secured creditor. The City moved to stay the order in the district court pending appeal; the district court denied the stay request on September 10. Eventually, the City returned Fulton's vehicle. At no point did the City initiate proceedings to protect its rights under § 363(e).

B. *In re Shannon*

The City impounded debtor—appellee Timothy Shannon's 1997 Buick Park Avenue on January 8, 2018 for unpaid parking tickets. Shannon filed a Chapter 13 petition on February 15. On February 27, the City filed an unsecured proof of claim for $3,160 in fines dating back to 1999. Shannon, in turn, filed a proposed plan that did not include the City as a secured creditor, to which the City did not object, and the court confirmed the plan on May 1. When Shannon sought the return of his vehicle, the City amended its proof of claim, adding fines, storage, and towing fees for a total of $5,600, and stated the claim was secured by its possession of Shannon's vehicle.

Shannon filed a motion for sanctions on June 12, asserting the stay required the City to turn over his vehi-

cle. The court granted his motion on September 7; it held the City's claim was unsecured because it did not object to the plan that characterized the debt as such. It also determined the City violated the stay by failing to return Shannon's vehicle, that the §§ 362(b)(3) and (b)(4) exceptions to the stay did not apply, and that the City further violated § 362(a)(4) and (a)(6) by retaining the vehicle. The court noted the City was free to file a motion seeking adequate protection of its lien. The City returned Shannon's car and did not file any such motion.

C. *In re Peake*

Debtor—appellee George Peake relies on his car to travel approximately forty—five miles from his home to work. The City impounded his 2007 Lincoln MKZ for unpaid fines on June 1, 2018. Peake filed a Chapter 13 petition on June 9. In response, the City filed a secured proof of claim for $5,393.27 and asserted a possessory lien on his vehicle. After the City refused Peake's request to return his vehicle, he filed a motion for sanctions and for turnover. On August 15, the bankruptcy court granted the motion; it held that neither § 362(b)(3) nor (b)(4) applied, so the City's retention of Peake's vehicle violated the stay, and it ordered the City to release his vehicle immediately. The City filed a motion to stay the order pending appeal, which the court denied on August 22. The same day, Peake filed a motion for civil contempt based on the City's refusal to release his vehicle. The court granted the motion and entered an order requiring the City to pay monetary sanctions—$100 per day from August 17 through August 22 and $500 per day thereafter until the City returned his vehicle. The City filed an emergency motion for a stay pending appeal in our Court, which we denied. Finally, the City released Peake's vehicle. At no point did the City file a motion to protect its interest in the vehicle.

D. *In re Howard*

The City immobilized debtor—appellee Jason Howard's vehicle on August 9, 2017 and impounded it soon after. Howard filed a Chapter 13 petition on August 22. The City filed a secured proof of claim on August 23 for $17,110.80. The court confirmed Howard's plan on October 16, which included a nonpriority unsecured debt of $13,000 owed to the City for parking tickets. Though the Code did not impose an automatic stay when Howard filed his petition due to his prior dismissed bankruptcy petitions, *see* 11 U.S.C. § 362(c)(4)(A), the court granted Howard's motion to impose a stay when it confirmed his plan on October 16. The City did not object to its treatment as unsecured under the plan and did not appeal the confirmation order; rather, it simply refused to release Howard's vehicle unless he paid 100% of its claim.

On January 22, 2018, the court issued a rule to show cause to the City why it should not be sanctioned for refusing to release Howard's vehicle in accordance with *Thompson*. The court rejected the City's argument that it was excepted from the stay under § 362(b)(3) and, on April 16, 2018, ordered sanctions of $50 per day beginning August 22, 2017 for the City's violation of the stay.

After the City filed its opening appellate brief, Howard filed notice of his intention not to participate in the appeal. His counsel explained Howard's bankruptcy case had been dismissed and the City disposed of his vehicle. He has since filed a new bankruptcy case to address his parking tickets but has abandoned interest in the vehicle that was the subject of the relevant Chapter 13 petition in the bankruptcy court below. However, "issues related to an alleged violation of the automatic stay" are not mooted by dismissal of a bank-

ruptcy petition, *Denby—Peterson v. Nu2u Auto World*, 595 B.R. 184, 188 (D.N.J. 2018); a court "must have the power to compensate victims of violations of the automatic stay and punish the violators, even after the conclusion of the underlying bankruptcy case." *In re Johnson*, 575 F.3d 1079, 1083 (10th Cir. 2009) (citing *In re Davis*, 177 B.R. 907, 911-12 (B.A.P. 9th Cir. 1995)).

* * *

In each of these four cases, the City appealed the bankruptcy courts' orders finding the City violated the stay. These cases have been consolidated for appeal.

II. Discussion

The main question before us is whether the City is obligated to return a debtor's vehicle upon her filing of a Chapter 13 bankruptcy petition, or whether the City is entitled to hold the debtor's vehicle until she pays the fines and costs or until she obtains a court order requiring the City to turn over the vehicle. We review a bankruptcy court's factual findings for clear error and conclusions of law de novo. *In re Jepson*, 816 F.3d 942, 945 (7th Cir. 2016).

A. The Automatic Stay

Section 362(a)(3) of the Bankruptcy Code provides that a Chapter 13 bankruptcy petition "operates as a stay, applicable to all entities, of … any act to obtain possession of property of the estate or of property from the estate or to *exercise control* over property of the estate." 11 U.S.C. § 362(a)(3) (emphasis added). We applied this provision to a very similar factual situation in *Thompson v. General Motors Acceptance Corp.* There, a creditor seized a debtor's car after he defaulted on payments. 566 F.3d at 700. The debtor filed a Chapter 13 petition and attempted to retrieve his car,

but the creditor refused. *Id.* We considered two issues relating to § 362(a)(3): whether the creditor "exercised control" of property of the bankruptcy estate by failing to return the vehicle after the debtor filed for bankruptcy, and whether the creditor was required to return the vehicle prior to a court determination establishing the debtor could provide adequate protection for the creditor's interest in the vehicle. *Id.* at 701.

1. "Exercise Control"

First, we observed in *Thompson* there was no debate the debtor has an equitable interest in his vehicle, and "as such, it is property of his bankruptcy estate." 566 F.3d at 701 (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983)); *see* 5 Collier on Bankruptcy ¶ 541.01 (16th ed. 2019) ("Congress's intent to define property of the estate in the broadest possible sense is evident from the language of the statute which, in section 541(a)(1), initially defines the scope of estate property to be all legal or equitable interests of the debtor in property as of the commencement of the case, wherever located and by whomever held."). We then rejected the creditor's argument that passively holding the asset did not satisfy the Code's definition of exercising control: "Holding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within th[e] definition, as well as within the commonsense meaning of the word." *Thompson*, 566 F.3d at 702. As we explained, limiting the reach of "exercising control" to "selling or otherwise destroying the asset," as the creditor proposed, did not fit with bankruptcy's purpose: "The primary goal of reorganization bankruptcy is to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts; this necessarily extends to all property, even property law-

fully seized pre—petition." *Id.* (citing *Whiting Pools*, 462 U.S. at 203-04).

Additionally, Congress amended § 362(a)(3) in 1984 to prohibit conduct that "exercise[d] control" over estate assets. We determined this addition suggested congressional intent to make the stay more inclusive by including conduct of "creditors who seized an asset pre—petition." *Id.*; *see In re Javens*, 107 F.3d 359, 368 (6th Cir. 1997) ("The fact that 'to obtain possession' was amended to 'to obtain possession … or to exercise control' hints [] that this kind of 'control' might be a broadening of the concept of possession … It could also have been intended to make clear that [§ 362](a)(3) applied to property of the estate that was not in the possession of the debtor." (first alteration in original)); *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir. 1996) (The 1984 amendment "broaden[ed] the scope of § 362(a)(3) to proscribe the mere knowing retention of estate property."). We therefore held that in retaining possession of the car, the creditor violated the automatic stay in § 362(a)(3). *Thompson*, 566 F.3d at 703.

2. Compulsory Turnover

Next, we concluded § 362(a)(3) becomes effective immediately upon filing the petition and is not dependent on the debtor first bringing a turnover action. *Id.* at 707-08. In so concluding, we relied on a plain reading of §§ 363(e) and 542(a) and the Supreme Court's decision in *Whiting Pools*.

Section 363(e) provides:

> [O]n request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased … by the trustee, the court, with or without a

> hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e). The creditor acknowledged, and we agreed, that it has the burden of requesting protection of its interest in the asset under § 363(e). "However, if a creditor is allowed to retain possession, then this burden is rendered meaningless—a creditor has no incentive to seek protection of an asset of which it already has possession." *Thompson*, 566 F.3d at 704. For § 363(e) to have meaning then, the asset must be returned to the estate prior to the creditor seeking protection of its interest. *Id.; cf. In re Sharon*, 234 B.R. 676, 684 (B.A.P. 6th Cir. 1999) ("[T]he Bankruptcy Code does not elevate [the creditor's] adequate protection right above the Chapter 13 debtor's right to possession and use of a car.").

Moreover, § 542(a) "indicates that turnover of a seized asset is compulsory." *Thompson*, 566 F.3d at 704. Section 542(a) requires that a creditor in possession of property of the estate "*shall deliver* to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. § 542(a) (emphasis added). We observed that a majority of courts had found § 542(a) worked in conjunction with § 362(a) "to draw back into the estate a right of possession that is claimed by a lien creditor pursuant to a pre—petition seizure; the Code then substitutes 'adequate protection' for possession as one of the lien creditor's rights in the bankruptcy case." *Thompson*, 566 F.3d at 704 (quoting *Sharon*, 234 B.R. at 683). Because "[t]he right of possession is incident to the automatic stay," *id.*, the creditor must first return the asset to the bankruptcy estate. Only then is "the bankruptcy court [] empowered

to condition the right of the estate to keep possession of the asset on the provision of certain specified adequate protections to the creditor." *Id.*; *see also* 11 U.S.C. § 362(d)(1) ("On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under [§ 362](a) … for cause, including the lack of adequate protection of an interest in property …."). The Supreme Court indicated as much in *Whiting Pools* when it explained that a "creditor with a secured interest in property included in the estate must look to [§ 363(e)] for protection, *rather than to the nonbankruptcy remedy of possession*." 462 U.S. at 204 (emphasis added).

3. Thompson *Controls*

Applying *Thompson* to the facts before us, we conclude, as each bankruptcy court did, that the City violated the automatic stay pursuant to § 362(a)(3) by retaining possession of the debtors' vehicles after they declared bankruptcy. *See In re Shannon*, 18-bk-04116, Mem. Op. at 11 (Bankr. N.D. Ill. Sept. 7, 2018), ECF No. 64 ("*Thompson* [] requires any secured creditor in possession of a debtor's vehicle to return it immediately and seek adequate protection …."); *In re Peake*, 18-bk-16544, Mem. Op. at 3 (Bankr. N.D. Ill. Aug. 15, 2018), ECF No. 40 ("[T]he City's conduct in retaining possession of the vehicle violates [§] 362(a)(3) as that section has been interpreted … in *Thompson* …."); *In re Fulton*, 18-bk-02860, Mem. Op. at 2 (Bankr. N.D. Ill. May 25, 2018), ECF No. 39 ("[T]he City is circumventing entirely the procedural burden imposed on it by *Thompson* and the protections provided to debtors by the automatic stay."); *In re Howard*, 17-bk-25141, Mem. Op. at 10 (Bankr. N.D. Ill. Apr. 16, 2018), ECF. No. 63 ("[Section 362(a)] does not authorize continued possession of impounded vehicles in contravention of the

Thompson ruling."). The City was required to return debtors' vehicles and seek protection within the framework of the Bankruptcy Code rather than through "the nonbankruptcy remedy of possession." *Whiting Pools*, 462 U.S. at 204.

The City acknowledges *Thompson* controls but asks us to overrule *Thompson* for three reasons: (1) property impounded prior to bankruptcy is not property of the bankruptcy estate because the debtors did not have a possessory interest in their vehicles at the time of filing; (2) the stay requires creditors to maintain the status quo and not take any action, such as returning property to the debtor, so the onus is on the debtor to move for a turnover action to retrieve her vehicle; and (3) the plain language of § 362(a)(3) requires an "act" to exercise control, and passive retention of the vehicle is not an "act."

We decline the City's request; *Thompson* considered and rejected these arguments. More fundamentally, the City's arguments ignore the purpose of bankruptcy—"to allow the debtor to regain his financial foothold and repay his creditors." *Thompson*, 566 F.3d at 706; see also 5 Collier on Bankruptcy ¶ 541.01 ("[The] central aggregation and protection of property [] promote[s] the fundamental purposes of the Bankruptcy Code: the breathing room given to a debtor that attempts to make a fresh start, and the equality of distribution of assets among similarly situated creditors according to the priorities set forth within the Code."). To effectively do so, a debtor must be able to use his assets "while the court works with both debtor and creditors to establish a rehabilitation and repayment plan." *Thompson*, 566 F.3d at 707; *see also Whiting Pools*, 462 U.S. at 203 ("[T]o facilitate the rehabilitation of the debtor's business, all the debtor's property must be included in the reorganization estate."). This is why

§ 542 compels the return of property to the estate, including "property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced." *Whiting Pools*, 462 U.S. at 205; *see In re Weber*, 719 F.3d 72, 79 (2d Cir. 2013) ("*Whiting Pools* teaches that the filing of a petition will generally transform a debtor's equitable interest into a bankruptcy estate's possessory right in the vehicle."). Thus, contrary to the City's argument, the status quo in bankruptcy is the return of the debtor's property to the estate. In refusing to return the vehicles to their respective estates, the City was not passively abiding by the bankruptcy rules but actively resisting § 542(a) to exercise control over debtors' vehicles.

What's more, the position we took in *Thompson* brought our Circuit in line with the majority rule, held by the Second, Eighth, and Ninth Circuits. *See Weber*, 719 F.3d 72; *Del Mission* 98 F.3d 1147; *In re Knaus*, 889 F.2d 773 (8th Cir. 1989). Although the Tenth Circuit recently adopted the City's view, *see In re Cowen*, 849 F.3d 943 (10th Cir. 2017), that position is still the minority rule. Our reasoning in *Thompson* continues to reflect the majority position and we believe it is the appropriate reading of the bankruptcy statutes. At bottom, the City wants to maintain possession of the vehicles not because it wants the vehicles but to put pressure on the debtors to pay their tickets. That is precisely what the stay is intended to prevent.[1]

The City, though, pleads necessity; it claims that, without retaining possession, it is helpless to prevent

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[1] The *In re Shannon* court further found that § 362(a)(4) and (a)(6) also prohibit the City's continued retention of debtors' vehicles. Because the City is bound by the stay under § 362(a)(3), we do not reach the applicability of the additional stay provisions.

the loss or destruction of the vehicles. It did not attempt in any of these cases, however, to seek adequate protection of its interests through the methods available under the Bankruptcy Code, and at oral argument, the City asserted it did not have "the opportunity" to request such protection before the bankruptcy courts ordered it to return the vehicles. The record belies this statement. In each case, the parties engaged in motion practice, often over the course of months, before the courts held the City to be in violation of the stay. At any point the City could have sought adequate protection of its interests, but it chose not to avail itself of the Code's available procedures. *See*, *e.g.*, 11 U.S.C. § 362(d)(1) (court may relieve creditor from the stay if debtor cannot adequately protect creditor's interest in the property); *id.* § 362(f) (court may relieve creditor from stay "as is necessary to prevent irreparable damage to the interest of an entity in property"); *id.* § 363(e) (creditor may request court to place limits or conditions on trustee's power to use, sell, or lease property to protect creditor's interest).

We recognize that once the City complies with the automatic stay and immediately turns over vehicles, it will need to seek protection on an expedited basis. Though we leave it to the City and the bankruptcy courts to fashion the precise procedure for doing so, we note the following: The City will have notice of the bankruptcy petition when the debtor requests her vehicle, if not sooner. At that time, the City may immediately file an emergency motion for adequate protection of its interest in a debtor's vehicle, which may be heard within a day or so, and the City can even file such motions ex parte if necessary. *See id.* § 363(e); Fed. R. Bankr. P. 4001(a)(2); *see also* 11 U.S.C. § 362(d)(1), (f); Bankr. N.D. Ill. R. 9013- 9(B)(9)(d) (motion for relief

from stay under § 362 where movant alleges security interest in vehicle "ordinarily [] granted without hearing"). It will be the rare occasion where a single day's delay will have lost the City the value of its security. Regardless, the Code is clear that it is the creditor's obligation to come to court and ask for protection, not, as the City advocates, the debtor's obligation to file an adversary proceeding against every creditor holding her property at the time she files for bankruptcy. *Cf. In re Lisse*, 921 F.3d 629, 639 (7th Cir. 2019) ("The basic premise [of Chapter 13] is to facilitate the debtor's ability to pay his creditors ….").

The City's argument that it will be overburdened with responding to Chapter 13 petitions is ultimately unavailing; any burden is a consequence of the Bankruptcy Code's focus on protecting debtors and on preserving property of the estate for the benefit of *all* creditors. It perhaps also reflects the importance of vehicles to residents' everyday lives, particularly where residents need their vehicles to commute to work and earn an income in order to eventually pay off their fines and other debts.[2] It is not a reason to permit

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[2] We additionally note that the "flood" of Chapter 13 filings is evidence of the disproportionate effect of the City's traffic fines and fees on its low-income residents, an issue that is not unique to Chicago. *See, e.g.*, Maura Ewing, *Should States Charge Low-Income Residents Less for Traffic Tickets?*, The Atlantic (May 13, 2017), https://www.theatlantic.com/politics/archive/2017/05/traffic-debt-california-brown/526491/ (California); Sam Sanders, *Study Finds The Poor Subject To Unfair Fines, Driver's License Suspensions*, NPR: The Two-Way (Apr. 9, 2015), https://www.npr.org/sections/thetwo-way/2015/04/09/398576196/study-find-the-poor-subject-to- unfair-fines-drivers-license-suspensions (Missouri and California); Melissa Sanchez & Sandhya Kambhampati, *How Chicago Ticket Debt Sends Black Motorists Into Bankruptcy*, ProPublica Illinois (Feb. 27, 2018), https://features.propublica.org/driven-into-

the City to ignore the automatic stay and hold captive property of the estate, in contravention of the Bankruptcy Code.

Furthermore, if a debtor files a bankruptcy petition in bad faith and immediately dismisses her case, as the City claims many debtors do solely to retrieve their impounded vehicles, the City has recourse: it may file a bad faith motion against the debtor. If the court finds bad faith, it may immediately dismiss the case and may even sanction the debtor. 11 U.S.C. § 1307(c); *see, e.g.*, *Lisse*, 921 F.3d at 639-41 (affirming sanctions and dismissal of Chapter 13 petition filed in bad faith to collaterally attack state court judgment); *In re Bell*, 125 F. App'x 54, 57 (7th Cir. 2005) (affirming dismissal of Chapter 13 petition with prejudice where debtors filed multiple petitions "solely to impede the foreclosure sale" of their home).

B. Exceptions to the Stay

The City next argues that even if the stay applies, it is excepted under § 362(b)(3) and (b)(4). "We construe the Bankruptcy Code 'liberally in favor of the debtor and strictly against the creditor.'" *Village of*

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debt/chicago-ticket-debt-bankruptcy/ ("[African-American] neighborhoods account for 40 percent of all debt, though they account for only 22 percent of all the tickets issued in the city over the past decade—suggesting how the debt burdens the poor."); *see also* Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 Harv. C.R.-C.L. L. Rev. 189, 217-22 (2016) ("The consequences of fines and fees can be dramatic and unforgiving: unemployment, loss of transportation, homelessness, loss of government or community services, and poor credit. And without the ability to accumulate wealth or capture even the smallest windfall for themselves, the poor become poorer, unable to climb out of an economic chasm.").

San Jose v. McWilliams, 284 F.3d 785, 790 (7th Cir. 2002) (quoting *In re Brown*, 108 F.3d 1290, 1292 (10th Cir. 1997)). The automatic stay is "one of the fundamental debtor protections provided by the bankruptcy laws." *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986) (quoting S. Rep. No. 95-989, at 54 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840). We therefore narrowly construe exceptions "to give the automatic stay its intended broad application." *In re Grede Foundries, Inc.*, 651 F.3d 786, 790 (7th Cir. 2011); *see In re Stringer*, 847 F.2d 549, 552 (9th Cir. 1988) ("Congress clearly intended the automatic stay to be quite broad. Exemptions to the stay, on the other hand, should be read narrowly to secure the broad grant of relief to the debtor." (footnotes omitted)).

1. Section 362(b)(3)

Section 362(b)(3) provides that a Chapter 13 bankruptcy petition does not operate as a § 362(a) automatic stay:

> of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of [the Bankruptcy Code] or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of [the Bankruptcy Code].

11 U.S.C. § 362(b)(3). Section 546(b) limits a trustee's power to avoid a nonperfected lien by making that power subject to any nonbankruptcy law that "permits perfection of an interest in property to be effective against an entity that acquires rights in such property

before the date of perfection," or "provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation." 11 U.S.C. § 546(b)(1). The classic example of this exception is for a creditor who has a grace period for perfecting its interest, such as under the Uniform Commercial Code. *See* 3 Collier on Bankruptcy ¶ 362.05 (explaining § 362(b)(3) permits a purchase—money secured creditor to retroactively perfect under the twenty—day grace period provided in Article 9 of the U.C.C. and permits the filing of continuations of financing statements under U.C.C. § 9-515).

As the *In re Shannon* court explained, through §§ 362(b)(3) and 546(b), "Congress sought only to prevent a trustee from avoiding the lien of a creditor when only the intervening bankruptcy stopped the creditor from perfecting or continuing perfection of its lien." Thus, the purpose of these sections is to prevent creditors from losing their lien rights because of the bankruptcy; they do not permit creditors to retain possession of debtors' property. Indeed, if the nonbankruptcy law requires a creditor to seize property after the filing of a bankruptcy petition to perfect or maintain the perfection of a lien, § 546(b)(2) replaces the seizure requirement with the giving of notice. *See* 3 Collier on Bankruptcy ¶ 362.05. "This assures that the trustee's right to maintain possession of the property will be unaffected by the creditor's right to perfect its interest." *Id.* And the (b)(3) exception permits a creditor to give notice under § 546(b)(2) without violating the automatic stay.

Here, the City argues the Chicago Municipal Code (a nonbankruptcy law) gives it the right to retain possession of a debtor's vehicle until the debt is paid, thereby creating a possessory lien on the vehicle. *See*, *e.g.*, M.C.C. §§ 9-92-080(f), 9- 100-120(b)-(c). It further asserts it must retain the vehicle to maintain perfection of its lien.

First, as to perfection, it is commonly understood that an interest in property is perfected when it is valid against other creditors who have an interest in the same property. *See Perfection*, Black's Law Dictionary (11th ed. 2019). The City's continued possession of a debtor's vehicle is one way to perfect its lien because it can demand the amount owed to it from any holder of an interest in the vehicle before it gives up possession, be that the debtor or another lienholder asserting its right to possession of the vehicle. *See* M.C.C. § 9-92-080(a), (c). However, possession is not the only way to perfect; the City can also perfect its lien by filing notice of its interest in the vehicle, such as with the Secretary of State or the Recorder of Deeds. And the Chapter 13 plan, itself, provides a public record of secured liens. *See* 11 U.S.C. § 1325(a)(5) (regarding the rights of secured creditors related to confirmation of the plan). Thus, the City does not need to retain possession of the vehicle to maintain perfection of its lien.

Second, despite its arguments to the contrary, the City's possessory lien is not destroyed by its involuntary loss of possession due to forced compliance with the Bankruptcy Code's automatic stay. The City did not indicate any intent to abandon or release its lien, so its possessory lien survives its loss of possession to the bankruptcy estate. *See In re Estate of Miller*, 556 N.E.2d 568, 572 (Ill. App. Ct. 1990) ("The law respecting common law retaining liens is that the involuntary

relinquishment of retained property pursuant to a court order does not result in the loss of the lien."); *see also In re Borden*, 361 B.R. 489, 495 (B.A.P. 8th Cir. 2007) ("[I]nvoluntary loss of possession does not defeat the [] lien."); Restatement (First) of Security § 80 cmt. c (1941) ("The lien is a legal interest dependent upon possession. Where the lienor voluntarily gives up the possession, his lien, at least so far as it is a legal interest, is gone. The lienor … does not lose his legal interest if he is deprived without his consent of his possession.").[3]

Because the City does not lose its perfected lien via the involuntary loss of possession of the debtors' vehicles to the bankruptcy estates, § 362(b)(3) does not apply to except it from the stay. To the extent the City has any doubt about the continuation of its lien, when it requests relief from the automatic stay and adequate protection, it could also ask the bankruptcy court to include in its order a notation of the City's continuing lien on the property.

2. Section 362(b)(4)

Alternatively, the City looks to § 362(b)(4) to except it from the stay. That section provides that a Chapter 13 bankruptcy petition does not operate as a § 362(a) automatic stay:

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[3] The City's attempt to distinguish between loss of possession due to compliance with a court order versus compliance with the automatic stay is in vain. Section 362 provides for the imposition of punitive damages for willful violations of the automatic stay. *See* 11 U.S.C. § 362(k)(1). This demonstrates that failure to comply with the stay may be punished even more severely than failure to comply with a court order and, correspondingly, there is no question the stay *compels* the City to return the vehicles.

> of the commencement or continuation of an action or proceeding by a governmental unit … 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.

11 U.S.C. § 362(b)(4). "This exception has been narrowly construed to apply to the enforcement of state laws affecting health, welfare, morals and safety, but not to 'regulatory laws that directly conflict with the control of the res or property by the bankruptcy court.'" *In re Cash Currency Exch, Inc.*, 762 F.2d 542, 555 (7th Cir. 1985) (quoting *In re Missouri*, 647 F.2d 768, 776 (8th Cir. 1981)). The City asserts its impoundment of vehicles is an exercise of its police power to enforce traffic regulations as a matter of public safety. The debtors respond that the impoundment of vehicles enhances the City's revenue collection rather than protects public safety, and it is therefore an enforcement of a money judgment which § 362(b)(4) does not permit.

Courts apply two tests to determine whether a state's actions fall within the scope of § 362(b)(4)—the pecuniary purpose test and the public policy test. *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385-86 (6th Cir. 2001); *In re First All. Mortg. Co.*, 263 B.R. 99, 107-08 (B.A.P. 9th Cir. 2001). Satisfying either test is sufficient for the exception to apply. *See First All. Mortg.*, 263 B.R. at 108; *see also* 3 Collier on Bankruptcy ¶ 362.05.

The pecuniary purpose test requires the court to "look to what specific acts the government wishes to

carry out and determine if such execution would result in an economic advantage over third parties in relation to the debtor's estate." *Solis v. Caro*, No. 11-cv-6884, 2012 WL 1230824, at *5 (N.D. Ill. Apr. 12, 2012) (quoting *In re Emerald Casino, Inc.*, No. 03-cv-05457, 2003 WL 23147946, at *8 (N.D. Ill. Dec. 24, 2003)). "[I]f the focus of the police power is directed at the debtor's financial obligations rather than the [government's] health and safety concerns, the automatic stay is applicable." *In re Ellis*, 66 B.R. 821, 825 (N.D. Ill. 1986) (quoting *In re Sampson*, 17 B.R. 528, 530 (Bankr. D. Conn. 1982)). Though the City says its impoundment laws are "designed to further the safety and welfare of Chicago residents" with just an "ancillary pecuniary benefit," we disagree. In retaining possession of the vehicles until it is paid in full, the City is "attempting to satisfy a debt outside the bankruptcy process," which would give it an advantage over other parties interested in the debtors' estates. *Emerald Casino*, 2003 WL 23147946, at *9. The City's act is focused on the debtor's financial obligation, not its safety concerns, and thus fails the pecuniary purpose test.

Alternatively, the public policy test considers whether the state action is principally to effectuate public policy or to adjudicate private rights. *Hosp. Staffing Servs.*, 270 F.3d at 38586; Caro, 2012 WL 1230824, at *4. The public policy the City highlights is enforcing its traffic ordinances against repeat offenders "for the safety and convenience of the public." It explains the traffic ordinance system gradually escalates, beginning with the issuance of fines then intensifying to immobilization and impoundment only after an individual ignores repeat citations. Without impoundment as a general deterrence, the City argues, it cannot enforce

its traffic regulations. *See Emerald Casino*, 2003 WL 23147946, at *6.

The debtors argue the balance between revenue collection and public safety weighs heavily toward the former. Additionally, prior to the 2016 Municipal Code amendment imposing a possessory lien on impounded vehicles, the City released impounded vehicles to Chapter 13 debtors. When the City recently amended the Code, it did not mention public safety concerns but rather stated the amendment was "in response to a growing practice of individuals attempting to escape financial liability for their immobilized or impounded vehicles." Chi., Ill., Ordinance, Amendment of M.C.C. § 9100-120 (July 6, 2017).

We are persuaded that, on balance, this is an exercise of revenue collection more so than police power. As debtors observe, a not insignificant portion of the City's annual operating fund comes from its collection of parking and traffic tickets. *See* City of Chicago, 2019 Budget Overview 29, 192 (2018), https://chicago.legistar.com/View.ashx?M=F&ID=6683992&GUID=CAEFBC7F-7C1A-4B2E-9F8B-0CB931B3EE88 (fines, forfeitures, and penalties—primarily from parking tickets—constitute approximately nine percent of the 2019 fund). Moreover, the kind of violations the City enforces are not traditional police power regulations; these fines are for parking tickets, failure to display a City tax sticker, and minor moving violations. Even tickets for a suspended license, a seemingly more serious offense, are often the result of unpaid parking tickets and are thus not related to public safety. And the City impounds vehicles regardless of what violations the owner has accrued, without distinguishing between more serious violations that could affect public safety versus the mere failure to pay for parking. Most notably, the City

imposes the monetary penalty on the owner of the vehicle, not the driver, which signals a seeming disconnect if the City actually has safety concerns about the offending driver. As the ordinance amending M.C.C. § 9-100-120 demonstrates, the City's focus is on the financial liability of vehicle owners, not on public safety.

But even if we assume that the adjudication of these violations is the result of the City's exercise of police and regulatory power, the City cannot enforce these final determinations of liability if they are "money judgment[s]" as the term is used in § 362(b)(4). *See* S. Rep. No. 95-989, at 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838 ("Since the assets of the debtor are in the possession and control of the bankruptcy court, and … 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."). A judgment is a "money judgment" that cannot be enforced without violating the automatic stay if it requires payment. 3 Collier on Bankruptcy ¶ 362.05 ("[T]he governmental unit still may commence or continue any police or regulatory action, including one seeking a money judgment, but *it may enforce only those judgments and orders that do not require payment*." (emphasis added)); *First All. Mortg.*, 263 B.R. at 107 (same); *see also* 3 Collier on Bankruptcy ¶ 362.05 ("Although a governmental unit may obtain a liability determination, it *may not collect* on any monetary judgment received." (emphasis added)); *SEC v. Brennan*, 230 F.3d 65, 71 (2d. Cir. 2000) ("[Section] 362(b)(4) permits the *entry* of a money judgment against a debtor … [but] *anything beyond the mere entry of a money judgment* against a debtor is prohibited by the automatic stay.").

The City claims it did not have money judgments "because it did not pursue the additional steps required to turn the citations into money judgments in the circuit court." We disagree. A "money judgment" is simply an order that identifies "the parties for and against whom judgment is being entered" and "*a definite* and *certain* designation of the amount … owed." *Penn Terra Ltd. v. Dep't of Envtl. Res.*, 733 F.2d 267, 275 (3d Cir. 1984). Prior to impounding a vehicle, the City must administratively adjudicate the debtor's violations, *see* M.C.C. § 9-100-010, and those adjudications result in a determination of final liability—*i.e.*, a judgment. Only after a debtor has two or three judgments against it does the Municipal Code authorize the City to impound the vehicle until the debtor pays the judgments and related costs and fees. *See id.* §§ 2-14-132(c)(1)(A), 9-92-080, 9-100-120(b). So, without any additional steps, the City had final determinations of liability requiring these particular debtors to pay it specific sums.

The City does not contest that it conditioned the release of the debtors' vehicles on payment of the amount specified in the final determinations of liability. *Cf. id.* § 9-100-100(b) ("Any fine and penalty … remaining unpaid after the notice of final determination of liability is sent shall constitute a debt due and owing the city ...."). The continued possession of the vehicles is the City's attempt to short-circuit the state court collection process and to enforce final judgments requiring monetary payment from the debtors. As such, the City is not excepted from the stay under § 362(b)(4). That the City is not excepted under § 362(b)(4) does not "permit[] debtors to park for free wherever they like, or to drive without a risk of fines for moving violations ...." *In re Steenes*, 918 F.3d 554, 558 (7th Cir.

2019). This just means the City needs to satisfy the debts owed to it through the bankruptcy process, as do all other creditors.

III. Conclusion

For the foregoing reasons, we AFFIRM the judgments of the bankruptcy courts.

APPENDIX B

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Bankr. No. 17-25141
Chapter 13
Judge Jacqueline Cox

IN RE JASON SCOTT HOWARD,
Debtor.

Filed April 19, 2018

SECOND AMENDED MEMORANDUM OPINION ON DEBTOR'S MOTION TO MODIFY PLAN and RULE TO SHOW CAUSE

Background

The Debtor Jason Scott Howard filed for relief under chapter 13 of the Bankruptcy Code on August 22, 2017. His modified chapter 13 plan was confirmed on October 16, 2017. It requires the Debtor to make monthly payments of $100.00 for 60 months to the chapter 13 Trustee, Thomas Vaughn. He scheduled a $13,000.00 non-priority unsecured debt owed to the City of Chicago for parking tickets on his schedule E/F, part 2, of creditors who have unsecured claims. Bankruptcy Case 17-25141, Docket No. 1, p. 25. Unsecured creditors were set to receive 10% of the amounts owed them. Docket No. 28, p. 4. On October 30, 2017 an order was entered increasing the monthly plan payment to $420.00. Docket No. 44.

Parking ticket fines and penalties payable to governmental units are not dischargeable in chapter 7 cases. *See* 11 U.S.C. § 523(a)(7). However, these debts are dischargeable in chapter 13 cases pursuant to 11 U.S.C. § 1328(a). *In re Banks*, 545 B.R. 241, 246-47 (Bankr. N.D. Ill. 2016).

The court notes that the City of Chicago filed a secured proof of claim for $17,110.80 on August 23, 2017. *See* Claim No. 1, Claims Register for Bankruptcy Case 17-25141.

The Debtor's chapter 13 bankruptcy case, 16-26667, where he represented himself, was filed on August 19, 2016; it was dismissed on September 21, 2016 for failure to file required documents. The Debtor filed another chapter 13 case, 17-03665, on February 8, 2017. That case was dismissed on July 19, 2017 for failure to pay filing fee. Docket No. 38. Attorney John A. Haderlein sought leave to appear on the Debtor's behalf on August 9, 2017; that request was withdrawn on August 16, 2017. Docket No. 46. The Debtor's pro se Motion to Reopen was also withdrawn on August 16, 2017. Docket No. 45.

When the Debtor filed this case, number 17-25141, no automatic stay came into existence pursuant to 11 U.S.C. § 362(a) because of the two bankruptcy cases dismissed in the prior twelve months. *See* 11 U.S.C. § 362(c)(4)(A).

On August 22, 2017 the Debtor filed a Motion to Impose the Automatic Stay. The automatic stay was imposed up to the October 16, 2017 10:30 a.m. confirmation hearing. The Motion to Impose an Automatic Stay was granted on October 16, 2017 when the Debtor's plan was confirmed. Docket Nos. 32 and 34.

Although the City of Chicago had notice of this case, evidenced by its Proof of Claim filed on August 23, 2017, it did not object to the treatment of its claim as unsecured or the amount of funds it was to receive under the plan. Creditors are required to address such issues before confirmation or be bound by the plan's terms. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 264 (2010) ("A proposed bankruptcy plan becomes effective upon confirmation, ... and will result in a discharge of the debts listed in the plan if the debtor completes the payments the plan requires ... "). Instead of objecting to its treatment in the plan before it was confirmed on October 16, 2017 or appealing the confirmation order, the City of Chicago simply refused to release the Debtor's vehicle unless it was paid 100% of its claim.

On December 29, 2017 the Debtor filed a Motion to Modify Plan in which he admitted that this case was filed to obtain release of his 1975 Buick Regal vehicle which had been impounded by the City of Chicago. He alleges that "[i]n order for the City of Chicago to release the vehicle, the Debtor's plan needs to pay the claim of the City of Chicago as secured." *See* Motion to Modify Plan, Docket No. 54 , p. 1, ¶ 3. The Proof of Claim notes that the City's debt was secured. The court notes, however, that the City of Chicago did not object that the confirmed plan treated its claim as unsecured. It is bound by the terms of the confirmed plan.

On January 22, 2018 the court issued a Rule to Show Cause directed to the City of Chicago to show cause why it should not be sanctioned for refusing to release the vehicle pursuant to *Thompson v. GMAC*, 566 F.3d 699 (7th Cir. 2009).

In *Thompson* the Seventh Circuit held that a secured creditor has to return collateral to the bankruptcy estate and then, if necessary, seek adequate protection of its interests from the bankruptcy court. According to the Seventh Circuit the secured creditor therein exercised control over a vehicle in violation of the automatic stay by refusing to return it upon request.

The City of Chicago has excepted itself from the operation of federal bankruptcy law by not objecting to its treatment in the plan before confirmation and refusing to return the debtor's vehicle unless its claim gets paid in full as a secured claim. In addition, the City is assuming that all of its claims are excepted from the imposition of the automatic stay by 11 U.S.C. § 362(b)(4) which states that the automatic stay does not cover the commencement or continuation of proceedings by governmental units to enforce its police and regulatory power including the enforcement of a judgment other than a money judgment. Proceedings and fines imposed under ordinances that protect the health and welfare of a city's citizens are excepted from the automatic stay. *Cash Currency Exchange v. Shine*, 762 F.2d 542, 555 (7th Cir. 1985). However, by not seeking adequate protection from the court this issue can not be reviewed.

Adequate Protection Issue

Debtors are required to give secured creditors some form of assurance that they will not suffer a decline in the value of their interest in a bankruptcy estate's property if they are stayed from enforcing their interest or the debtor is using, selling or borrowing against collateral. 11 U.S.C. § 361. If the creditor's interest declines in value while the debtor possesses it, the debtor or the bankruptcy estate must offset the de-

cline. Adequate protection payments may be calculated by examining the value of the collateral during the month the bankruptcy petition was filed and the month immediately after. *In re Marks*, 394 B.R. 198,202 (Bankr. N.D. Ill. 2008). Adequate protection may be periodic payments, replacement liens, or such other relief that results in the indubitable equivalent of a creditor's interest. The City of Chicago has not asked the court to order the debtor to provide adequate protection nor has it complained that its treatment in plan(s) proposed by the Debtor was improper for any reason under 11 U.S.C. § 1322(b)(2) regarding plan treatment of its secured claim, or under 11 U.S.C. § 1325(a)(5) regarding the Bankruptcy Code's lien retention provisions.

The City of Chicago is usurping the court's authority and responsibility to decide whether and how debtors have to provide adequate protection. In addition, the City of Chicago is ignoring its duty to return vehicles under the *Thompson* case.

Possessory Liens Under Illinois Law

The City argues that it has a possessory lien which allows it to refuse to return vehicles unless its claim gets paid in reliance on *In re Avila*, 566 B.R. 558, 561 (Bankr. N.D. Ill. 2017). This court disagrees. According to the Illinois Appellate Court, Illinois recognizes common-law possessory liens in limited situations. Illinois law at 810 ILCS 5/9-333 states:

> (a) "Possessory lien." In this Section, possessory lien means an interest, other than a security interest or an agricultural lien:
>
> (1) which secures payment or performance of an obligation for services or materials fur-

> nished with respect to goods by a person in the ordinary course of the person's business;
> (2) which is created by statute or rule of law in favor of the person; and
> (3) whose effectiveness depends on the person's possession of the goods.

The City of Chicago does not have a possessory lien as it has not supplied the Debtor with goods or services and it does not cite to a statute or rule of law in its favor.

A District Court ruled that federal bankruptcy law does not preempt Municipal Code of Chicago (hereinafter "MCC") § 9-92-80. That ordinance states that "Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle." MCC § 9-92-80(f). That Court stated that "[t]he General Assembly recently amended MCC § 9-92-80 to provide that 'any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle.'" *See Baines v. City of Chicago*, 2018 WL 1558557 * 1 (N.D. Ill. March 22, 2018). The legislation mentioned therein was enacted by the Chicago City Council, not the Illinois General Assembly. The City of Chicago, which enjoys authority as a home rule body, can not expand on Illinois lien law at 810 ILCS 5/9-333.

The Illinois Constitution provides that home rule units, those with a population in excess of 25,000:

> "Except as limited by this Section ... may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to li-

> cense to tax; and to incur debt. Illinois Constitution 1970, Art. VII,§ 6(a).

The power granted to home rule units need not be exclusive. Rather, home rule units may exercise power concurrently with the state.

> Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive. Illinois Constitution of 1970, Article VII, § 6(i).

Municipalities have authority to govern as they deem proper, unless limited by the Illinois Constitution or the General Assembly. *City of Wheaton v. Loerop*, 399 Ill.App.3d 433, 434 (2010). Historic regulation by a state in an area of law is one factor to review in determining whether an area is of local dimension in determining whether a municipality's actions are a valid exercise of home rule authority. *See* Paul P. Biebel, Jr., HOME RULE IN ILLINOIS AFTER TWO YEARS: AN UNCERTAIN BEGINNING, 6 John Marshall Journal of Practice and Procedure 253, 283-85 (1973).

In *City of Oakbrook Terrace v. Suburban Bank and Trust Co.*, 364 Ill.App.3d 506, 514 (2006) the Appellate Court applied a three-part test to determine whether a municipality's actions were a valid exercise of its home rule authority. First, it decided whether the exercise of power by the municipality pertained to its government and affairs. Second, it decided whether the legislature had specifically limited the local exercise of the power in issue or whether the legislature had specifically declared the State's exercise to be exclusive, totally preempting a home rule unit's exercise of its constitu-

tional power. That Court also decided that if no specific action had been taken, it had to determine the proper relationship between the local ordinance and state law. That Court held an Oakbrook Terrace zoning ordinance invalid because it precluded a just compensation remedy available to defendants under the Eminent Domain Law, 735 ILCS 5/7-101.

The City of East St. Louis enacted an ordinance that prohibited non-wage garnishment of City funds on deposit at institutions within the City. The City contended that the ordinance did not conflict with Article XII of the Constitution and that it enjoyed sovereign immunity because the Constitution stated that except as the General Assembly provided by law, sovereign immunity was abolished. *McLorn v. City of E. St. Louis*, 105 Ill.App. 3d 148, 151 (1982). The City argued that the provision should be construed to allow other legislative bodies to legislate in the immunity area. *Id.* The Appellate Court ruled that the City could not provide itself with sovereign immunity via the ordinance in issue and that only the General Assembly could do so. *Id.* at 152. The Court also ruled that the ordinance did not relate to the City's governance and affairs within the meaning of Article VII, section 6 of the Illinois Constitution. *Id.* at 153.

The Illinois Supreme Court has found that certain local governments' legislative enactments did not pertain to their government and affairs and for that reason were not appropriate subjects for municipal legislation or that home rule units have to enact ordinances that are consistent with state law. *McLorn*, 148 at 153, (*citing County of Cook v. John Sexton Contractors Co.*, 75 Ill.2d 494, 27 Ill.Dec. 489, 389 N.E.2d 553 (1979); *People ex rel. Lignoul v. City of Chicago*, 67 Ill.2d 480, 10 Ill.Dec. 614, 368 N.E.2d 100 (1977); *Ampersand, Inc. v.*

Finley, 61 Ill.2d 537,338 N.E.2d 15 (1975); and *City of Chicago v. Pollution Control Board*, 59 Ill.2d 484, 322 N.E.2d 11 (1974)).

In *Town & Country Utilities, Inc. v. Illinois Pollution Control Board*, 225 Ill.2d I 03, 108 (2007) the Illinois Supreme Court made clear that all units of local government, home rule and non-home rule alike, have concurrent jurisdiction with the Illinois Environmental Protection Agency in zoning land for landfill sites.

The City of Chicago's ordinance, MCC 9-92-80(f), does not incorporate the General Assembly's standards, the first of which is that the creditor holding a possessory lien be owed a debt for services or materials furnished in the ordinary course of his or her business. 810 ILCS 5/9-333. The vehicle owners do not owe the City for goods or services as required by that statute. The ordinance simply declares that the City of Chicago has a possessory lien in certain impounded vehicles. Neither the City's legislative enactment nor its pleadings herein address the three statutory elements needed to support its position that it has a possessory lien in impounded vehicles.

In *People ex rel. Lignoul v. City of Chicago*, 67 Ill.2d 480 (1977) regarding regulation of the banking industry, the Supreme Court held that a City of Chicago Financial Services Ordinance was unconstitutional because only the General Assembly could make branch banking possible. That Court said that the powers of home rule units relate to their own problems, not to those of the state or the nation. Their powers should not extend to such matters as divorce, real property law, trusts, contracts, etc. which are recognized as falling within the competence of state rather than local authorities. *Id.* at 485. The creation and imposition of

liens is a matter of statewide concern, it is not a matter pertaining to local units of government and their affairs. Statewide uniformity on these issues is paramount.

Another issue of statewide uniformity was addressed in *Ampersand, Inc. v. Finley*, 61 Ill.2d 537 (1975) where the Illinois Supreme Court ruled that a Cook County ordinance that directed the clerk of court to collect a $2.00 fee for the county law library at the time of filing of pleadings and appearances in civil cases was unconstitutional, finding that the county exceeded its home rule authority because the fee operated to charge admission to state courts, not to the county library. Illinois has a unified statewide court system which is not subject to regulation by local units of government.

City of Quincy v. Daniels, 246 Ill.App.3d 792 (1993) involved a Quincy municipal trespassing ordinance which created a criminal offense for conduct the state's criminal statute deemed to be noncriminal. The Court discussed the constitution's grant of home rule authority to certain units of government allowing them to "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare." *Id.* at 796 (*citing* the Illinois Constitution of 1970, Article VII, § 6(a)). The Court also noted that municipalities may exercise and perform concurrently with the State any power or function to the extent that the General Assembly does not specifically limit the concurrent exercise or declare the State's exercise to be exclusive. The Court quoted the committee on local government of the constitutional convention:

> If the state legislates but does not express exclusivity, home-rule units retain the power to act concurrently, subject to limitations provided by law. (This last phrase referring to statutory limitations is intended to cover the case where the legislature intends to permit concurrent local legislation, but only with limits that are consistent with the state statutory scheme. Surely if the state is permitted to exclude local governments from areas where the state has acted, it also should be able to restrict the nature and extent of concurrent local activity.)" *Id.* at 796 (*quoting* 7 Record of Proceedings, Sixth Illinois Constitutional Convention 1643-44).

The City's Ordinance is not consistent with Illinois law on possessory liens.

Perfection of Liens Under 11 U.S.C. § 362(b)(3)

The City contends that it can maintain possession of impounded vehicles to perfect their liens as an exception to the automatic stay under 11 U.S.C. § 362(b)(3) which states that the automatic stay of section 362(a) does not apply to any act to perfect, maintain or continue the perfection of an interest in property. This provision does not authorize continued possession of impounded vehicles in contravention of the *Thompson* ruling. Perfection of liens encompasses recording notes and mortgages, not possession of collateral. If the City of Chicago had a lien, which it does not, it could perfect it by filing a notice of its interest with the Recorder of Deeds or the Secretary of State.

The City of Chicago overstepped its authority when it gave itself a possessory lien without reference to how state law defines possessory liens.

A recent Illinois Appellate Court opinion recognized a possessory lien on behalf of a shop keeper who worked on a vehicle. "Our supreme court has observed that Illinois recognizes the validity of the common-law possessory lien, known in certain instances as the 'artisan's possessory lien.'" Ally *Financial Inc. v. Pira*, 2017 IL App.(2d) 170213. Before 810 ILCS 5/9-333 was enacted, possessory liens were available to "two categories of persons: (1) artisans who impart added value to the property; and (2) common carriers who are bound by law to accept and carry the goods." *Id.* at 7 (citations omitted).

The *Baines* court noted that under basic preemption principles any attempt to alter the balance struck by Congress between the relative rights of debtors and creditors in bankruptcy would interfere with the nation's bankruptcy laws, frustrating their effectiveness. *Baines*,* 2. In *Butner v. US.*, 440 U.S. 48, 55 (1979) our Supreme Court noted that property rights are created by state law unless some federal interest required a different result. The City of Chicago enactment does not reflect Illinois law.

Conclusion

The Motion to Modify Plan will be denied. The Debtor does not have to provide the City of Chicago 100% of its claim. The City of Chicago should have objected to its treatment in the Debtor's plan before it got confirmed.

The City of Chicago does not have a possessory lien.

The City of Chicago has failed to return the vehicle as required by the *Thompson* ruling since this case was

filed on August 22, 2017. It is fined $50.00 a day for this wilful violation of the automatic stay.

This Amended Opinion reflects the court's findings of fact and conclusions of law. Separate amended orders will be entered on the Motion to Modify Plan and the Rule to Show Cause.

Nunc Pro Tunc to:

Dated: April 19, 2018 **ENTERED:**

/s/ Jacqueline P. Cox
Jacqueline P. Cox
United States Bankruptcy Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 18 BK 02860
Chapter 13
Judge: Hon. Jack B. Schmetterer

IN RE: ROBBIN L. FULTON,

Debtor.

Filed May 25, 2018

MEMORANDUM OPINION ON (A) DEBTOR'S MOTION FOR SANCTIONS AGAINST CITY OF CHICAGO FOR VIOLATION OF AUTOMATIC STAY AND FOR TURNOVER [DKT NO. 23] AND (B) DEBTOR'S OBJECTION TO CLAIM #1 OF THE CITY OF CHICAGO [DKT. NO. 28]

Debtor Robbin L. Fulton ("Debtor") moves to Impose Sanctions upon the City of Chicago ("the City"), specifically requiring the City to turnover Debtor's vehicle. Debtor's vehicle was seized and impounded prepetition by the City. Debtor now seeks to impose sanctions upon the City for violating the automatic stay pursuant to 11 U.S.C. § 362(a) because it continues to hold her vehicle postpetition despite her request for turnover for five months in violation of the Seventh Circuit ruling in *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009). As relief for this allegedly sanctionable conduct, Debtor seeks the

turnover of her vehicle and a daily monetary sanction so debtor can obtain other transportation.

Debtor has also objected to Claim No. 1 filed by the City, because the City is not a secured creditor because its purported possessory lien is not valid under Illinois law. Additionally, Debtor contends that the City has failed to itemize expenses and fees, and failed to provide evidence of perfection or the nature of each citation in contravention of Fed. R. Bankr. P. 3001. Debtor seeks the disallowance of City's Claim #1-2 as a secured claim and a reduction of that claim from $11,831.20 to $6,090.40.

These matters, based on the same set of facts and related legal arguments, will be considered together.

INTRODUCTION

The Seventh Circuit opnion in *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009) placed the burden squarely upon creditors to initiate a showing as to why they should be allowed to retain vehicles of bankruptcy debtors that were seized prepetition. Unless such showing is initiated, creditors must surrender the vehicle because of the automatic stay.

The City of Chicago has completely disregarded this obligation, choosing instead to continue holding vehicles of debtors postpetition and waiting many months until proceedings are brought by debtor against it in bankruptcy and then assert a response that its purported possessory lien grants it an exception to the automatic stay. The City has taken this tactical delay position to coerce debtors to pay traffic fines quickly and fully in their bankruptcy plan and also to avoid paying filing fees required for the filing of motions for relief

from the automatic stay. In this way, the City is circumventing entirely the procedural burden imposed on it by *Thompson* and the protections provided to debtors by the automatic stay. The City must comply with the requirements of *Thompson* so that debtors may, unless some cause is shown, recover their vehicles in bankruptcy, allowing them to continue working and making payments under their Chapter 13 plans.

UNDISPUTED FACTS

1. Debtor filed her petition for Chapter 13 bankruptcy relief on January 31, 2018. (Dkt. No. 23).
2. Prior to filing for bankruptcy, Debtor's vehicle, a 2015 Kia Soul, was towed and impounded by the City of Chicago on December 24, 2017. (Dkt. No. 23).
3. The Debtor filed a plan on February 5, 2018, treating the City of Chicago as a general unsecured creditor. (Dkt. No. 23).
4. The City filed a general unsecured proof of claim on February 23, 2018 valued at $9,391.20. (Dkt. No. 23.)
5. The Debtor's modified plan was confirmed on March 21, 2018. (Dkt. No. 23.)
6. Upon confirmation, Debtor's counsel requested that the City turnover the Debtor's vehicle. (Dkt. No. 23).
7. On April 27, 2018, after the Debtor requested turnover of her vehicle, the City amended its proof of claim, adding impound fees and asserting its status as a secured creditor. The total amount of the claim was $11,831.20. (Dkt. No. 23).

8. Debtor filed her instant Motion for Sanctions on May 2, 2018. She argues that pursuant to Seventh Circuit authority, the City must turnover her vehicle upon her request. Their failure to do so to this point is sanctionable conduct due to its violation of 11 U.S.C. § 362(a). She also argues that the City does not have a possessory lien upon which to rely, and thus, 11 U.S.C. § 362(b)(3) is inapplicable. (Dkt. No. 23).

9. The City responded on May 8, 2018. It argues that the Motion must be denied because all matters regarding turnover must be pursued through adversary proceedings, rather than by motion. The City also asserts that it has not violated the stay because it is simply retaining possession in order to maintain perfection of its possessory lien, and is thus excepted from the say pursuant to 11 U.S.C. § 362(b)(3). The City asserts that pursuant to 625 ILCS 5/11-208.3(c), it was empowered by the State of Illinois to create Municipal Code § 9-92-080(f), the provision creating its right to possessory liens, and is thus within its rights as a home rule unit to continuing enforcing that provision.

10. The Debtor filed her Reply on May 15, 2018. The Debtor argues that the City's assertion that *Thompson* is inapplicable is incorrect, and that turnover is required pursuant to Seventh Circuit precedent. Additionally, Debtor argues that the Seventh Circuit indicated in *Thompson* that motions for turnover were allowed in place of adversary proceedings. Finally, Debtor repeats her argument that recent case law indicates that the City does not have a possessory lien, and in the alternative, that mere possession of the vehicle does not

afford the City protection under 11 U.S.C. § 362(b)(3).

11. Also on May 8, 2018, Debtor filed her Objection to Claim No. 1 of the City of Chicago. Debtor argues that pursuant to the analysis of Judge Cox's recent opinion *In re Howard*, No. BR 17-25141, 2018 WL 1805587 (Bankr. N.D. Ill. Apr. 19, 2018), the City does not have a valid possessory lien under Illinois law. Additionally, the Debtor argues that the City's failure to file a *prima facie* secured claim under Fed. R. Bankr. P. 3001, including itemization of interest, fees, expenses, evidence of perfection or the nature of each citation listed, and is thus also barred from seeking status as a secured creditor. Finally, Debtor argues that City's calculation of its claim is incorrect, and that Debtor actually owes $6,090.40 based upon the tickets in the proof of claim and not $9,391.20 or $11,831.20 as listed in the City's initial claim and amended claim respectively. (Dkt. No. 28).

12. The City filed its Response to Debtor's Objection on May 14, 2018. It argues that contrary to Judge Cox's ruling in *In re Howard*, No. BR 17-25141, 2018 WL 1805587 (Bankr. N.D. Ill. Apr. 19, 2018), the City does have a valid possessory lien because it has been empowered by the State of Illinois to create its own system for dealing with traffic violations, pursuant to the 625 ILCS 5/11-208.3 and the liberal construction of such statute as it applies to home rule units in the Illinois Constitution. Furthermore, the City argues that *Howard* incorrectly chose the standard for possessory liens to be applied to the case at bar. The City argues that pursuant to pertinent Illinois case law, courts have found that impounded vehicles serve as collateral

for civil fines. *People v. Jaurdon*, 718 N.E.2d 647,663 (Ill. App. 1st Dist. 1999). The City further asserts that possession is the only mechanism available to it to ensure that their lien is satisfied. The City next asserts that Debtor's vehicle was impounded because she was driving without a license, and as home rule unit with authority to impound vehicles operated by persons without a license, the City was authorized both by ordinance and statute to impound Debtor's vehicle. The City argues that local governments have a strong interest in enforcing their own ordinances regarding traffic violations. The City also argues that because the Debtor's plan was silent as to whether the City's lien was to be stripped off, it's secured lien passed through the bankruptcy unaffected. *In re Swanson*, 312 B.R. 153, 162 (Bankr. N.D. Ill. 2004). Finally, the City asserts that its calculation of the value of its claim is correct, and Debtor is omitting fees related to towing and impoundment, as well as the fine levied against individuals who are found to be operating a vehicle without a license, in her $6,090.40 calculation.

JURISDICTION AND VENUE

Subject matter jurisdiction lies under 28 U.S.C. § 1334. The district court may refer bankruptcy proceedings to a bankruptcy judge under 28 U.S.C. § 157, and this proceeding was thereby referred here by Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. Venue lies under 28 U.S.C. § 1409. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(B) and (E).

A. DEBTOR'S MOTION FOR SANCTIONS

The City of Chicago argues that it does not have to turnover Debtor's vehicle pursuant to the Seventh Circuit's decision in *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009), because the act of retaining possession of a debtor's vehicle seized prepetition is not a violation of the automatic stay provisions of 11 U.S.C. § 362. The City asserts that its position is correct for two reasons. First, it argues (1) that 11 U.S.C. § 542 is merely an enabling statute that authorizes a trustee to seek turnover of the property of the debtor if the debtor had a substantive right to the property prior to the bankruptcy filing date, rather than a lien avoidance statute, and (2) that the Seventh Circuit has held that an adversary proceeding is necessary to require turnover of property. Second, the City argues that its right to possession during the pendency of the bankruptcy case is protected by 11 U.S.C. § 362(b)(3) because the City claims a possessory lien based upon its Ordinance granting it such a possessory lien, and that lien requires possession to continue perfection.

I. The City's Impoundment of Debtor's Vehicle is Not Excepted from the Automatic Stay Pursuant to 11 U.S.C. § 362(b)(3)

The City argues that even if the Debtor does have an equitable interest in the property such that she is allowed to seek turnover of the vehicle, turnover is not required pursuant to *Thompson* because the City's passive possession of the Debtor's vehicle is its means of maintaining perfection of its possessory lien, and thus, excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(3).

In *Thompson*, the Seventh Circuit held that creditors who exercised control over vehicles belonging to debtors by repossessing them prebankruptcy would have to turn over those vehicles upon the request of a debtor once a bankruptcy has been filed. 566 F.3d at 701. In that case, the secured creditor (the seller of the vehicle in question) refused to relinquish possession of the vehicle because it felt that the debtor could not adequately protect its interests as required by the Bankruptcy Code. *Id.* at 700. The secured creditor had repossessed debtor's vehicle prepetition. *Id* at 70l. The opinion held that the act of the creditor, "of passively holding onto an asset constitutes 'exercising control' over it, and such action violates section 362(a)(3) of the Bankruptcy Code." *Id.* at 703. As a result, the opinion determined that, "(t]he right of possession is incident to the automatic stay. A subjectively perceived lack of adequate protection is not an exception to the stay provision and does not defeat this right." *Id.* at 704. As a result, the holding was that, "upon the request of a debtor that has filed for of bankruptcy, a creditor must first return an asset in which the debtor has an interest to his bankruptcy estate and then, if necessary, seek adequate protection of its interests in the bankruptcy court. *Id.* at 708. In effect, the Circuit applied the automatic stay to the prebankruptcy repossession of the debtor's vehicle.

The *Thompson* opinion imposed a clear procedural burden upon creditors. A creditor who has repossessed the vehicle of a debtor prepetition is obligated to return that vehicle to the debtor once debtor has made such a request during the bankruptcy proceeding. A creditor may then seek adequate protection from the debtor. Alternatively, a creditor may file an emergency motion for relief from the automatic stay and attempt to initiate a

showing as to why they should be allowed to retain vehicles of bankruptcy debtors that were seized prepetition.

The City has not returned the Debtor's vehicle or filed any motion attempting to show that it should be allowed to retain Debtor's vehicle, in direct contravention of *Thompson*. It is ignoring its procedural burden to either return the vehicle or make a showing as to why it should be allowed to retain the vehicle, and thus violates the automatic stay. The City is instead choosing to wait until debtors in bankruptcy challenge their possession of the vehicle to assert that their possessory lien is excepted from the automatic stay. However, the panel in *Thompson* made it clear that a creditor is to turnover possession of the vehicle upon the request of the debtor or to immediately file a defense like the one the City is arguing. The *Thompson* opinion does not allow the City to delay the return of the vehicle without the filing of a motion, nor does it allow the City to rest on its heels and wait for a debtor to initiate an action against it and only then assert its defenses. Even if a higher court were to rule that the City's possessory lien is a valid exception to the automatic stay, debtors may still offer alternative, substantive liens in their plans that protect the City's right to payment and still allow for return of the vehicle. The City thus far has, since the bankruptcy case was filed in January, denied debtors the right to contest the City's defenses or offer alternative liens by retaining possession of the vehicles without initiating any procedure allowing it do so. It is abundantly clear that the City is ignoring the procedural requirements of *Thompson* and making life unnecessarily difficult for debtors who need their vehicles in order to get to work, earn money, and make payments on their Chapter 13 plans.

Instead, the City relies primarily on Judge Cassling's *In re Avila*, 566 B.R. 558 (Bankr. N.D. Ill. 2017) decision, wherein the City was just such a creditor, required to turnover vehicles upon request of a bankrupt debtor. In *Avila*, the City of Chicago sought a declaration that its continued postpetition retention of a Chapter 13 debtor's vehicle, seized prepetition, did not violate the automatic stay. 566 B.R. at 559. Judge Cassling held that "a creditor's post-petition possession of property necessary to the perfection of a prepetition lien does not violate the stay," because it could rely on the exception to the stay found in 11 U.S.C. § 362(b)(3), writing that because the City did not have an underlying consensual lien to fall back upon, as the creditor in *Thompson* did, it was necessary for the City to retain possession of the vehicle in order to maintain perfection of its possessory lien on the debtor's vehicle and was allowed pursuant to 11 U.S.C. 362(b)(3). *Id* at 562 (quoting *In re Ingram*, 508 B.R. 98, 102 (Bankr. E.D. Wis. 2014)). The City has since relied on *Avila* in cases such as this one where the Debtor's car was possessed pre-petition, and the City refuses to release the vehicle because doing so would result in the loss of its possessory lien. At least one District Court judge has since agreed with Judge Cassling's *Avila* opinion on appeal, vacating a bankruptcy court order requiring the City to turnover a debtor's vehicle under the automatic stay, *Chicago v. Kennedy*, No. 17 CV 5945, 2018 WL 2087453 (N.D. Ill. May 4, 2018).

That decision by a single District Judge is non-binding, and the undersigned respectfully disagrees with the logic of *Avila* for several reasons. First, § 362(b)(3)'s exception to the stay applies only to "acts" taken by creditors to maintain their perfection. Passive possession of a debtor's property for the purposes of maintaining possession does not constitute an "act,"

and courts that have held otherwise read that provision as if it included any acts *or omissions*. Moreover, requiring that the City immediately turnover the vehicle upon Debtor's request or file an emergency motion for relief from stay in order to determine if it can be adequately protected, either by retaining the vehicle or being granted some other replacement liens is an alteration of only the City's procedural rights, not its substantive rights.

The City argues that it must retain possession of the vehicle in order to maintain perfection of its possessory lien, and that no other lien would sufficiently protect its interests. The *Kennedy* opinion noted that the Supreme Court, in *Whiting Pools* explained that, "Congress contemplated this situation and decided that other provisions of the code would adequately protect, and therefore ***should replace***, a creditor's possessory interests." No. 17 CV 5945, 2018 WL 2087453 (Bankr. N.D. Ill. May 4, 2018) (emphasis added) (citing *United States v. Whiting Pools. Inc.*, 462 U.S. 198, 207 (1983)). Were the Debtor in this case to offer a replacement lien in her plan that ensured the City would be paid the amount it is owed, the City would be adequately protected, and such a result would comport with the Supreme Court's holding in *Whiting Pools*. 462 U.S. 198, 207 (1983). The City's assertion that no replacement lien will adequately protect its interest in the way that possession of the vehicle does is thus an empty argument.

II. The City Does Not Have a Valid Possessory Lien

However, Municipal Code § 9-92-080(t) actually does not grant the City of Chicago a valid possessory lien under Illinois state law.

Judge Cox's recent opinion, *In re Howard*, provides instructive analysis of the issue. No. BR 17-25141, 2018

WL 1905587 (Bankr. N.D. Ill. Apr. 19, 2018). In *Howard*, the opinion examined when Illinois courts have recognized common-law possessory liens. *Id.* Pursuant to 810 ILCS 5/9-333, which states that possessory liens in Illinois are secured by, "payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business," the opinion concluded that the City did not have a statutory right to a possessory lien. *Id.* As the City had not furnished any goods or services to the debtor in that case, the *Howard* opinion concluded that the City did not have a valid possessory lien pursuant to Illinois law. *Id.* Moreover, the *Howard* opinion stated that while the Illinois Constitution does allow for concurrent exercise of power between the State of Illinois and home rule units within it, such as the City of Chicago, Illinois courts have held that where the General Assembly or Illinois Constitution have limited their power to govern, home rule units cannot expand their authority unilaterally, in this case, by attempting to grant itself a possessory lien that the state expressly limited in scope. *Id.* (citing *City of Wheaton v. Loerop*, 399 Ill. App. 3d 433, 434 (2010)). Opinions by those courts required municipalities to show that (1) the exercise of power pertained to its government and affairs, (2) whether the legislature had specifically limited the local exercise of power on an issue or whether the State's exercise was exclusive, preempting the exercise of power by home rule units and (3) that if no specific action had been taken, a court must "determine the proper relationship between the local ordinance and state law." *Id.* (citing *City of Oakbrook Terrace v. Suburban Bank and Trust Co.*, 364 Ill. App. 3d 506, 514 (2006). The *Howard* opinion also analogized the City's enactment of Municipal Code § 9-92-080(f) to several Illinois Supreme Court cases wherein

the Illinois Supreme Court held that some functions of home rule units do not pertain to a unit's government and affairs, and are thus not appropriate for municipal legislation. *Id.* ("Those cases invalidated ordinances on the basis of statewide, rather than local interest in the subject matter of the ordinance.").

Ultimately, Judge Cox held that the, "(n]either the City's legislative enactment nor its pleadings," addressed the, "three statutory elements needed to support its position that it has a possessory lien in impounded vehicles," indicating that the, "creation and imposition of liens is a matter of statewide concern," not one pertaining to local units of government. *Id.* Thus, Judge Cox concluded that because the City of Chicago had not demonstrated that it had any possessory lien pursuant to Illinois law, the exception to the stay allowing creditors to take any act to perfect their liens, 11 U.S.C. § 362(b)(3), did not apply to the City's seizure and impoundment of the debtor's vehicle. *Id.*

While the City has appealed the *Howard* decision, and that appeal remains pending, its analysis is persuasive. The City has not shown that, pursuant to Illinois law, it has any possessory lien whatsoever, and thus, 11 U.S.C. § 362(b)(3) does not except its actions from the automatic stay. Moreover, even if the City could demonstrate that it has a valid possessory lien under Illinois law, the *Thompson* decision clearly requires secured creditors to turnover the property to the estate of the debtor upon request or seek adequate protection (for instance, a replacement lien offered in a plan) by emergency motion for relief from stay. *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699, 707 (7th Cir. 2009).

III. The City's Power to Control Traffic

The City further argues that pursuant to 625 ILCS 5/11-208.3, it has been provided by the State of Illinois with a mechanism to immobilize and enforce traffic regulations. While 625 ILCS 5/11-208.3(c) does empower municipalities to establish, "a program of vehicle immobilization for the purpose of facilitating enforcement of," regulations regarding, "vehicular standing, parking, compliance, automated speed enforcement system, or automated traffic law regulations," nothing in that statute allows the City to enact an ordinance granting it the right to a possessory lien that contravenes bankruptcy law and the Seventh Circuit's holding in *Thompson* requiring that upon the request of a debtor, a creditor must turn the vehicle over or seek stay relief. The City is correct that the Illinois Constitution grants it broad power to enact ordinances as a home rule unit, and that such power is to construed liberally. ILL. CONST. 1970, art. VII, § 6(a); *Palm v. 2800 Lake Shore Drive Condo. Ass'n*, 988 N.E.2d 75, 81 (Ill. 2013). However, the City is asking for an interpretation of 625 ILCS 5/11-208.3 that creates a right to impose possessory liens with priority over all other creditors and a right to retain possession over vehicles belonging to the estates of debtors which contravene federal bankruptcy law and also the Supremacy Clause of the Constitution. What the City is attempting to do then is use this state statute as a means to circumvent U.S. Bankruptcy law and the rights of debtors therein.

While the Supreme Court in *Whiting Pools* indicated that turnover pursuant to 11 U.S.C. § 542 cannot modify a creditor's substantive rights, that does not mean that the City cannot be granted some kind of replacement lien that satisfies its rights to payment just as well. *City of Chicago v. Kennedy*, No. 17 CV 5945,

2018 WL 2087453, at *4 (Bankr. N.D. Ill. May 4, 2018) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 207 (1983)). The City has not shown that only possession will protect it. Creditors, both secured and unsecured, receive payments in full or in partial satisfaction of the debts owing to them in bankruptcy without having to retain the property of the debtor or her estate. Indeed, it is undisputed that the City has authority to impound and hold a debtor's vehicle when they have committed violations and refused to pay their tickets. But, once that debtor enters bankruptcy, the City is bound by Bankruptcy Law and the ruling in Thompson to return the vehicle or seek protection by a motion. As the Seventh Circuit noted in *Thompson*, other remedies are available to creditors who believe they will not be adequately protected should they have to give up their right to possession, but they must look to bankruptcy remedies, rather than the non-bankruptcy right to possession. 566 F.3d at 704. That the City has not chosen to seek an alternative lien or some other means of adequate protection does not absolve them of their duty to turnover the Debtor's vehicle pursuant to *Thompson*.

The City is attempting to destroy a basic bankruptcy protection. It has no basis, either based upon its asserted possessory lien nor upon its argument that *Thompson* is inapplicable, to continue to hold vehicles of the Debtor, seized pre-petition, once the Debtor made the request for turnover. The City does not have a possessory lien pursuant to Illinois law, and even if it did, such lien would not be excepted from the automatic stay. In the event that some higher court should overrule opinions which have determined that the City does not have a possessory lien, the Supreme Court in *Whiting Pools* has made clear that a replacement lien, of-

fered in a debtor's plan, would not violate the prohibition of modifying a creditor's procedural rights in the course of turnover actions pursuant to 11 U.S.C. § 542.

IV. The Debtor has an Equitable Interest in the Vehicle Seized Prepetition by the City and May Seek Turnover Pursuant to 11 U.S.C. § 542 and Does Not Need to File an Adversary Proceeding

The City's arguments are premised upon its insistence that Municipal Code § 9-92-080(f) creates a valid possessory lien in favor of the City. As a result of this possessory lien, the City argues, the Debtor did not have the substantive interest in the vehicle prior to the petition date that would allow her to seek turnover of the prope1iy pursuant to 11 U.S.C. § 542.

The City's arguement that Debtor does not have the required substantive interest to request turnover of the vehicle pursuant to 11 U.S.C. § 542 is plainly incorrect. A Seventh Circuit panel held in *Thompson* that it is unquestionable that a debtor whose vehicle was seized prepetition had, "an equitable interest in the [vehicle], and, as such, it is property of his bankruptcy estate." *Thompson*, 566 F.3d at 701; *see also City of Chicago v. Kennedy*, No. 17 CV 5945, 2018 WL 2087453, at *4 (N.D. Ill. May 4, 2018). By that precedent, Debtor clearly has the right to request turnover of the vehicle pursuant to 11 U.S.C. § 542.

Moreover, she does not need to do so by way of filing an adversary proceeding. The City is correct that a Seventh Circuit panel held in *Matter of Perkins* that turnover actions must ordinarily be commenced by filing a complaint and initiating an adversary proceeding. 902 F.2d 1254, 1258 (7th Cir. 1990).

But, the City's position is incorrect on its face because Debtor's Motion seeks to impose sanctions for violation of the automatic stay, including the remedy of requiring the City to turnover the vehicle, and thus, this is not merely a motion for turnover. It is undisputed that a bankruptcy court may rely upon its inherent power to impose sanctions. *In re Rimsat, Ltd.*, 212 F.3d 1039, 1049 (7th Cir. 2000). Nothing in the Bankruptcy Code requires an adversary for the imposition of sanctions. Thus, while Debtor is seeking turnover of the vehicle as a remedy for the City's sanctionable conduct, the Motion itself is a Motion for Sanctions, and does not require the initiation of an adversary proceeding. To require an adversary proceeding would delay the remedy warranted for violation of the automatic stay and would weaken the entire concept of stay relief. The procedural ruling in *Thompson* is clearly inconsistent with any requirement for an adversary proceeding to compel the turnover required by the automatic stay.

B. DEBTOR'S OBJECTION TO CLAIM #1 OF THE CITY OF CHICAGO

The City argues in its Response to Debtor's Objection that it is entitled to status as a secured creditor pursuant to its rights as a possessory lienholder under Municipal Code § 9-92-080(f). It asserts that pursuant to Illinois law, it has been granted the right to enact a statutory scheme that grants it such a possessory lien and that its rights arising from such a lien cannot be modified in bankruptcy proceedings. The City also advances the argument that contrary to Debtor's calculations, it is entitled to the full value of its claim based upon the tickets, fines, and fees that have been levied upon the Debtor.

V. The City is Not Entitled to Secured Creditor Status Because it Does Not have a Valid Possessory Lien

The City's primary argument in response to Debtor's Objection is that, pursuant to relevant nonbankruptcy law, it has been empowered by the State of Illinois to enact an ordinance that allows it to retain possession over Debtor's vehicle in bankruptcy and that such a lien grants it status as a secured creditor of the Debtor. The City is incorrect with regards to both of those arguments.

It has already been explained above that the Seventh Circuit panel's decision in *Thompson v. Gen. Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009) plainly held that upon the request of a debtor in bankruptcy, the City is required to turnover the vehicle. On that basis alone, *Thompson* has clearly established that the City does not have a valid possessory lien over Debtor's vehicle because it was obligated to return the vehicle to the Debtor upon her request. If the City were able to show cause as to why its interest were in danger, it could then be granted a replacement lien after being required to immediately turnover the vehicle, or it could be allowed to retain the vehicle if no other adequate relief were possible. *City of Chicago v. Kennedy*, 17 CV 5945, 2018 WL 2087453, at *4 (Bankr. N.D. Ill. May 4, 2018) (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 207 (1983)). The City is ignoring the procedural burden imposed by *Thompson*. Moreover, it is clear that the City does not have a possessory lien pursuant to Illinois law. *In re Howard*, No. BR 17-25141, 2018 WL 1905587, at *3 (Bankr. N.D. Ill. Apr. 19, 2018).

The City's ancillary argument that confirmation of the Debtor's plan does not change the analysis of its status as a creditor is correct in the sense that the plan was silent on the issue of whether the asserted possessory lien was stripped off, if contrary to the argument above, it thus has been said a lien continues to exist. *In re Swanson*, 312 B.R. 153, 162 (Bankr. N.D. Ill. 2004); *In re Turner*, 558 B.R. 269, 284 (Bankr. N.D. Ill. 2016). However, given that it is clear that the City never had a valid possessory lien on Debtor's vehicle, the lien which continues to exist is merely an unsecured lien of the City, not its purported possessory lien.

VI. Debtor has Not Shown that the City is Entitled to Less than the Full Value of its Unsecured Claim

While it is clear that, based on Illinois law, the City does not have a valid possessory lien and is thus not a secured creditor in this case, Debtor has also failed to support her assertion the City's unsecured claim is worth less than what the City claims it to be, approximately $11,000.00. The City has amended its proof of claim to include itemization and explanations of all charges and descriptions of each of the tickets and violations that Debtor is alleged to have incurred. (Dkt. No. 35, Exh. C). Bankruptcy courts liberally allow amendments to proofs of claim, when the purpose of such amendments is to cure a defect in the claim as originally filed, to describe the claim with greater particularity, or to plead a new theory of recovery upon facts set forth in original claim. Fed.Rules Bankr.Proc.Rule 7015, 11 U.S.C.A.; Fed.Rules Civ.Proc.Rule 15(a), 28 U.S.C.A; *see also In re Xpedior Inc.*, 325 B.R. 392 (Bankr. N.D. Ill. 2005).

Debtor's bare assertion that the towing and storage fees should not be included in this calculation is un-

supported by any relevant legal authority. On the other hand, the City is clearly well within its rights to assert fines and violations against Debtor, including the fees incurred by the City for towing and storage of the vehicle, and the $1,000.00 fine that Debtor incurred for operating the vehicle without a license. Thus, Debtor has not articulated any reason why City's unsecured claim should be reduced from the $11,811.20 indicated in its most recent amended proof of claim.

Thus, Debtor's Objection as to the amount of the City's unsecured proof of claim will be overruled by separate order entered concurrently herewith.

CONCLUSION

For the foregoing reasons, Debtor's Motion will be granted by separate order entered concurrently herewith. The City will be required to turnover Debtor's vehicle within 24 hours of the entry of that order, and for each day it refuses to comply with such order by not releasing the vehicle, will pay Debtor a sanction of $50.00 until the vehicle is returned to the Debtor, so that Debtor may obtain transportation. Additionally, Debtor's Objection to Claim #I of the City of Chicago will be sustained to the extent that the City is deemed to be a secured creditor, and will be overruled to the extent that Debtor objects to the amount of the City's claim by separate order entered concurrently herewith.

ENTER:

/s/ Jack B. Schmetterer
Jack B. Schmetterer
United States Bankruptcy Judge

Dated this 25th day of May, 2018

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 18-16544
Hon. Deborah Thorne
Chapter 13

IN RE: GEORGE PEAKE,

Debtor.

Filed August 15, 2018

MEMORANDUM OPINION

Introduction

The facts in this case are familiar to thousands of debtors appearing in this district attempting to regain possession of their cars and pay accrued parking and red-light tickets through chapter 13 plans. The issue is not only important to each of these debtors but also to the City of Chicago (City), which relies upon collection of parking and red-light ticket revenue to fund approximately 7% of the City's budget.[1]

George Peake (Mr. Peake or Debtor) owns a 2007 Lincoln MKZ vehicle (MKZ) with approximately

[1] *See* George Peake's Reply to the City of Chicago's Response to Motion, Docket No. 24, Exh. D, at 5 (Lauren Nolan, Woodstock Institute, "Enforcing Inequality: Balancing Budgets on the Backs of the Poor," June 2018) ("Tickets issued in 2016 brought in $264 million, which was seven percent of the City's operating budget.").

200,000 miles and valued by him at $4,310. GO Financial holds a first priority lien on the MKZ securing a debt in the amount of $7,312.79. After Mr. Peake, as owner of the MKZ, accrued several final determinations of liability for parking and automated red-light violations, the MKZ was immobilized and later impounded by the City of Chicago.[2] The immobilization took place on May 31, 2018, and, a day later, the City towed and impounded the MKZ.

Mr. Peake works at an Amazon facility in Joliet, Illinois, approximately 45 miles from his southside of Chicago residence and relies upon the MKZ to drive to and from work. Without his car, he has been forced to pay others to drive him to Joliet. Like so many others in this district, Mr. Peake chose on June 9 to file a chapter 13 petition in an attempt to pay his outstanding traffic violation fines through his plan. Mr. Peake alleges that the City would not release his MKZ unless he complied with one of two options proposed by the City: (1) wait until his plan was confirmed treating the City as a fully secured creditor with a 60-month plan, or (2) provide treatment for the City as a fully secured creditor in a 60-month plan and pay as much as $1,250 immediately for release of the MKZ. George Peake's Motion for Turnover, Docket No. 16, at 4, ¶¶ 13-14. Mr. Peake did not agree to or was unable to comply with the demand for immediate payment for the release of

[2] Mr. Peake states that a certain number of tickets issued against him were issued based on the conduct of other people who were driving his MKZ. Whatever the merits of such a defense, as explained below, in order for the City to have booted his MKZ, it needed to have at least 2-3 final determinations of liability entered against him. Any defense Mr. Peake had to the entry of those final determinations could or should have been raised in the hearing(s) leading up to their entry.

the MKZ. He has treated the City's claim in his proposed amended plan as secured in section 3.2. George Peake's Plan, Docket No. 31, at § 3.2. Through confirmation of his proposed plan Mr. Peake would be able to drive his MKZ and use his disposable income to make payments to the City as well as other creditors.

After trying and failing to obtain the release of his vehicle by notifying the City of his bankruptcy filing, Mr. Peake filed this motion to enforce the automatic stay and to compel the City to tum over the MKZ. The narrow question presented in this case is whether the City's retention of possession of a vehicle in which the Debtor has an ownership interest on the petition date violates the automatic stay, in particular section 362(a)(3).[3] Unless one of the automatic stay exceptions, namely section 362(b)(3) or (b)(4), applies, the City's conduct in retaining possession of the vehicle violates section 362(a)(3) as that section has been interpreted by the Seventh Circuit Court of Appeals in *Thompson v. General Motors Acceptance Corp.*, 566 F.3d 699 (7th Cir. 2009) (*Thompson*). There, the Seventh Circuit held that the act of passively retaining an asset "constitutes exercising control over it, and such action violates section 362(a)(3) of the Bankruptcy Code." *Thompson*, 566 F.3d at 703.

For the reasons that follow, the court concludes that neither section 362(b)(3) nor section 362(b)(4) applies to

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[3] The Debtor raises in his reply brief, for the first time, a new legal argument under section 362(a)(6) of the Code. It is, however, well-established that new legal arguments may not be raised for the first time in a reply brief. *In re Meier*, 537 B.R. 880, 884 (Bankr. N.D. Ill. 2015), *aff'd sub nom. Bauch & Michaels, LLC v. Meier*, No. 15 CV 8812, 2016 WL 4611389 (N.D. Ill. Sept. 6, 2016); *see also Gold v. Wolpert*, 876 F.2d 1327, 1331 n.6 (7th Cir. 1989). The court will not therefore consider the Debtor's belated section 362(a)(6) argument.

the City's retention of the Debtor's vehicle in this case. The City, therefore, has violated the automatic stay by refusing to return the Debtor's car, and it must release the MKZ to the Debtor immediately.

Discussion[4]

I. *Thompson*

The City first asks the court to decline to follow the Seventh Circuit's ruling in *Thompson*, which held that, upon the request of a debtor in bankruptcy, a creditor must return the debtor's vehicle to him even though the creditor was lawfully in possession of the vehicle at the time of the petition, and that, after return of the vehicle, the creditor may seek an order of adequate protection of its property interest in the bankruptcy court. *Thompson*, 566 F.3d at 703, 708. This court, of course, is not at liberty to decline to follow a decision of the Court of Appeals for the circuit in which this court sits, at least unless subsequent events make it "almost certain" that the Court of Appeals would repudiate its prior decision. *See Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987); *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986); *United States v. Burke*, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985); *F.D.I.C. v. Mahajan*, 923 F. Supp. 2d 1133, 1139-40 (N.D. Ill. 2013). That certainty does not exist here, despite the fact that a circuit split has recently been created on the issue addressed by the court

[4] This court has jurisdiction to hear and finally determine this matter. *See* 28 U.S.C. §§ 1334(b), 157(a), 157(b)(2)(A); *In re Benalcazar*, 283 B.R. 514, 517 (Bankr. N.D. Ill. 2002). Since this proceeding, one to enforce the automatic stay, could not arise in the absence of a bankruptcy, this court has the constitutional authority to finally determine this matter. *Stern v. Marshall*, 564 U.S. 462, 499 (2011).

in *Thompson*. *See WD Equipment, LLC v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017). The City's request is therefore denied.

II. The City's Interest in Property

The City's primary argument is that it does not have a duty to tum over the Debtor's vehicle pursuant to section 362(a) and *Thompson* because its act of continuing to retain possession of the vehicle is an "act … to continue or maintain the perfection of [its] interest in property … " 11 U.S.C. § 362(b)(3). For this provision to apply, an "interest in property" must exist as of the petition date. *In re 229 Main St. Ltd. P'ship*, 262 F.3d 1, 5 (1st Cir. 2001). The Debtor argues in substance that the City has no interest in property because the City ordinances giving it an interest in property are not valid exercises of the City's Home Rule authority. Because the City's ordinance-scheme is a valid exercise of the express statutory authority granted to it by the State of Illinois, and because that ordinance scheme in this case resulted in the City having a possessory interest[5] in the Debtor's vehicle as of the date of the petition, the Debtor's argument is rejected.[6]

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[5] A possessory interest is defined as "[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner." *Possessory Interest*, BLACK'S LAW DICTIONARY 1353 (10th ed. 2014).

[6] Because the court concludes that the City's ordinances and the City's conduct acting pursuant thereto gave it an interest in property as of the petition date, and because those ordinances are valid exercises of the express statutory authority granted to the City by the State of Illinois, it does not need to reach the separate question as to whether the City's ordinances could stand as an exercise of the City's inherent Home Rule authority granted to it by the Constitution of the State of Illinois.

A. The City's Ordinances Provide the Mechanism for its Asserted Interest in Property

As the City notes, this case is a "boot and impound" case where the Debtor's vehicle was first immobilized and then towed to a City impound lot for accrued but unpaid parking and automated red-light violation tickets. The City first argues that its booting and impounding of the Debtor's vehicle is appropriate (1) under its ordinances and (2) under 625 ILCS § 5/11-208.2 *et seq.*, which is the portion of the Illinois Vehicle Code permitting municipalities like the City to administratively adjudicate "violations of traffic regulations concerning the standing, parking, or condition of vehicles, automated traffic law violations, and automated speed enforcement system violations." 625 ILCS § 5/11-208.3. Chicago's inherent Home Rule authority, while usually broad, has been explicitly curtailed in this area by the Illinois legislature, and the City may not implement ordinances that are inconsistent with the state statutory scheme. 625 ILCS § 5/11-208.2; *City of Chicago v. Roman*, 705 N.E.2d 81, 89 (Ill. 1998).

The statute provides:

> Any municipality or county may provide by ordinance for a system of administrative adjudication of vehicular standing and parking violations and vehicle compliance violations as described in this subsection, automated traffic law violations as defined in Section 11-208.6, 11-208.9, or 11-1201.1, and automated speed enforcement system violations as defined in Section 11-208.8.

625 ILCS § 5/11-208.3(a). The City has set up just such an administrative apparatus. *See* Municipal Code of Chicago (M.C.C.) § 9-100-010. The administrative scheme

used by the City avoids the necessity of seeking adjudication in the state courts. *See*, *e.g.*, *Saukstelis v. City of Chicago*, 932 F.2d 1171, 1173 (7th Cir. 1991) (noting the change from judicial to quasi-judicial administrative proceedings); *cf. Horn v. City of Chicago*, 860 F.2d 700, 700-01 (7th Cir. 1988) (describing a parking ticket as being in part a notice of a complaint initiated in state court); *Stone St. Partners, LLC v. City of Chicago Dep't of Admin. Hearings*, 12 N.E.3d 691, 695 (Ill. App. Ct. 2014) (describing the change in the context of non-traffic municipal ordinance violations), *aff'd*, 88 N.E.3d 699 (Ill. 2017). The City's ordinances further provide that:

> The violation of any provision of the traffic code prohibiting or restricting vehicular standing or parking, or establishing a compliance, automated speed enforcement system, or automated traffic law enforcement system violation, shall be a civil offense punishable by fine, and no criminal penalty, or civil sanction other than that prescribed in the traffic code, shall be imposed.

M.C.C. § 9-100-020(a).

After being given notice of the violation, a vehicle owner is granted the opportunity to contest the violation either in person at a hearing or by way of mail correspondence. M.C.C. §§ 9-100-055, 070, 080. If the vehicle owner loses or otherwise does not contest the violation, a determination of liability is entered. M.C.C. § 9-100-090. At that point, the decision may be appealed under the Administrative Review Law of Illinois. *Id.*; 735 ILCS § 5/3-101 *et seq.*; *Van Harken v. City of Chicago*, 713 N.E.2d 754, 759 (Ill. App. Ct. 1999).

If administrative review of the decision is not sought or is not fruitful for the vehicle owner, the de-

termination of liability becomes final. M.C.C. § 9-100-100. Once a determination of liability becomes final, the fine becomes a "debt due and owing the municipality … and, as such, may be collected in accordance with applicable law." 625 ILCS § 5/11-208.3(e).

From here, the City could commence a proceeding in the state circuit court to have the final determination turned into a formal money judgment. The role of the judge in such a proceeding is minimal. She may only verify whether the final determination of liability has been entered in accordance with the Illinois Vehicle Code and the applicable City ordinances. 625 ILCS § 5/11-208.3(f). If the judge is so satisfied, a money judgment is entered, which would unlock all of the judicial collections procedures afforded by "applicable law." 625 ILCS § 5/11-208.3(t) ("The judgment shall have the same effect and may be enforced in the same manner as other judgments for the recovery of money.").[7]

Then, if the City wanted to take the judgment debtor's vehicle in satisfaction of its judgment debt, it

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[7] In this respect, the administrative adjudication apparatus authorized for both Home Rule and non-Home Rule municipalities by the Illinois Vehicle Code differs slightly from that authorized for Home Rule municipalities by the Illinois Municipal Code in that the latter treats administratively adjudicated final determinations of liability *as money judgments in their own right.* 65 ILCS § 5/1-2.1-8(a)-(b); *Vill. of Lake in Hills v. Niklaus*, 11 N.E.3d 26, 33-34 (Ill. App. Ct. 2014); *Stone St. Partners*, 12 N.E.3d at 694 n. 1. Though the City in this case does not cite Division 2.1 of the Illinois Municipal Code as a justification for its ordinance scheme, the City's ordinances themselves do (in addition to citing the Illinois Vehicle Code). M.C.C. § 9-100-010(a). Because the issue has not been raised or briefed, the court does not reach the question as to whether the City's administrative adjudication system is statutorily authorized by the Illinois Municipal Code in addition to the Illinois Vehicle Code.

could proceed either by way of supplementary proceedings or by way of normal execution process. *See* 735 ILCS §§ 5/2-1402(c)(1), (e), 5/12-111, 112, 158, 166. Under the former method, the court could order the judgment debtor to deliver up the vehicle to the sheriff to be sold in satisfaction of the City's judgment. 735 ILCS § 5/2-1402(c)(1), (e). Under the latter method, a copy of the judgment could be delivered to the sheriff who could then forcibly seize the judgment debtor's vehicle in order to sell it in satisfaction of the City's judgment. *See In re Marriage of Logston*, 469 N.E.2d 167, 172 (Ill. 1984) ("If the judgment goes unpaid, it may be enforced through the remedy of execution, whereby as much of the debtor's property may be taken and sold as is necessary to satisfy the obligation."); *see also* 735 ILCS § 5/2-1501 (noting that a copy of the judgment performs the function of the now obsolete writ of execution).

But the Illinois legislature has authorized municipalities to take a short-cut on the path to the effective enforcement of their final determinations of liability where those final determinations are for violations of ordinances concerned with standing, parking, and automated traffic law violations. The legislature has provided that:

> [a]ny municipality or county establishing vehicular standing, parking, compliance, automated speed enforcement system, or automated traffic law regulations under this Section may also provide by ordinance for a program of vehicle immobilization for the purpose of facilitating enforcement of those regulations. The program of vehicle immobilization shall provide for immobilizing any eligible vehicle upon the public way by presence of a restraint in a manner to prevent operation of the vehicle.

625 ILCS § 5/11-208.3(c).

A vehicle is only eligible for immobilization where the registered owner has accumulated a certain number of unpaid "final determinations of … liability," *see* 625 ILCS § 5/11-208.3(c)(1),[8] and, as indicated above, a final determination of liability may only be entered against the registered owner after the registered owner has contested or failed to contest the City's charges in the administrative proceeding and exhausted or failed to exhaust the opportunity for judicial review of the determination of liability entered in those proceedings, *see* M.C.C. § 9-100-100; 625 ILCS § 5/11-208.3(b)(7). The number of final determinations required before a vehicle is eligible for immobilization is determined by local ordinance. 625 ILCS § 5/11-208.3(c)(1). The City's ordinances set the number at two or three, the former number being used only if the final determinations of liability have been outstanding for over a year. M.C.C. § 9-100-120(b). Going back to the Illinois statute, the law provides for both immobilization and towing/impoundment following an immobilization. 625 ILCS § 5/11-208.3(c)(3), (4).

Given the statute's express linkage with final determinations of liability, *see* 625 ILCS § 5/11-208.3(c)(I), it is clear that the State of Illinois has authorized municipalities like the City to bypass the traditional panoply of collection remedies in a narrowly defined set of circumstances. In essence, where the final determinations are for standing, parking, or automated traffic or-

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[8] The statute also discusses "incomplete traffic education programs," but the City's ordinances do not appear to provide for the imposition of traffic education programs on vehicle owners as penalties for violations, nor does this case concern any such programs.

dinance violations, the City may act as sheriff on behalf of itself as victorious litigant (judgment creditor) and forcibly levy on a vehicle owned by the person against whom the final determinations have been entered. *Cf. Saukstelis*, 932 F.2d at 1172 (describing an earlier iteration of the City's ordinances as a "form of pre-trial attachment"); *United States v. Whiting Pools, Inc.*, 674 F.2d 144, 156 (2d Cir. 1982) (describing the IRS's statutory power to levy on tangible property as largely indistinguishable from the ordinary judicial procedures used to obtain possession of tangible property, "except for the fact that the IRS can make its own levy without need of the assistance of a sheriff, marshal or similar officer"), *aff'd*, 462 U.S. 198 (1983).

The City's ordinances provide for such a result. After two or three unpaid final determinations of liability remain outstanding, the City may immobilize the owner's vehicle by placing a restraint on it. M.C.C. § 9-100-120(a)-(b). The restraint may only be released by paying the full amount of the debt owed to the City (hereinafter referred to as the "judgment debt"). M.C.C. § 9-100-120(d).[9] Once 24 hours have elapsed, the vehicle becomes eligible for towing and impoundment. M.C.C. § 9-100-120(c); *see also Robledo v. City of Chicago*, 778 F. Supp. 2d 887, 889 (N.D. Ill. 2011). Once impounded, the vehicle may only be released by paying the judgment debt, any applicable collection costs as provided for by ordinance, and any applicable towing and storage fees (plus ostensibly any unpaid immobilization fees).

[9] Any immobilization fee must also be paid, as well as the City's costs of collecting the judgment debt, with collection costs being separately provided for in M.C.C. §§ 1-19-010-1-19-030.

M.C.C. § 9-92-080(a).[10] If no payment is forthcoming, the City may sell or dispose of the vehicle. M.C.C. §§ 9-100-120(f), 9-92-100; *see also Robledo*, 778 F. Supp. 2d at 889-90.

Thus, the City, by its seizure, at once obtains (1) the possession of the vehicle, (2) the right to retain the possession of the vehicle until the debt owed is paid, *see* M.C.C. §§ 9-100-120(d), 9-92-080(a), and (3) the contingent right to sell or dispose of the vehicle if the debt owed is not timely paid, see M.C.C. §§ 9-100-020(f), 9-92-100.

B. The City's Interest in Property Considered

The City argues that these rights are really what gives it an "interest in property" under section 362(b)(3), not necessarily the "possessory lien" language it later added to its ordinances.[11] In evaluating this contention, the court notes that property interests

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[10] The one exception is that a lienholder claiming through a conditional sales agreement may obtain release by paying only the towing and storage fees. *See* M.C.C. § 9-92-080(c). A lienholder claiming through a conditional sales agreement very likely means a lienholder with a purchase money security interest. *Alger v. Davis*, 76 N.W.2d 847, 850 (Mich. 1956) (defining conditional sales agreement); 810 ILCS §§ 9-109(a)(5), 9-110, 2-401(1); *In re Mohawk Indus., Inc.*, 49 B.R. 376, 380 (Bankr. D. Mass. 1985); *Mayor's Jewelers of Ft. Lauderdale, Inc. v. Levinson*, 349 N.E.2d 475, 477 (Ill. App. Ct. 1976).

[11] The City, in 2016 and 2017, passed ordinances adding language expressly giving it a "possessory lien" on any vehicle immobilized/impounded up to the amount necessary to secure the vehicle's release. As indicated in the discussion below, it is unclear why the language was added, since the City, by the time of the immobilization or impoundment of a specific vehicle, already has a lawful right to possess the vehicle pending payment of the debt(s) owing to it, which is all that the label "possessory lien" denotes.

are generally created and defined by state law. Barnhill v. Johnson, 503 U.S. 393, 398 (1992); *Butner v. United States*, 440 U.S. 48, 55 (1979).

"Property … is not the physical thing which may be the subject of ownership, but is the right of dominion, possession, and power of disposition which may be acquired over it." *Transcon. Oil Co. v. Emmerson*, 131 N.E. 645, 647 (Ill. 1921) (internal quotations and citations omitted); *cf. United States v. Gen. Motors Corp.*, 323 U.S. 373, 377-78 (1945) (echoing this statement and noting that traditional property interest labels are merely shorthand terms for certain groups of rights in things or objects/items of property). A right to immobilize is a right to possess, and therefore an interest in property, since the act of placing a restraint on a vehicle and immobilizing it is an outward act to assert dominion and control over the vehicle and to hinder those who might otherwise be in possession from continuing or asserting their dominion and control over the vehicle. *Cf. Windmiller v. Chapman*, 28 N.E. 979, 980 (Ill. l891); *see also Possession*, BLACK'S LAW DICTIONARY 1351 (10th ed. 2014).

By its ordinance, the City's right to immobilize a given vehicle accrues after (1) the registered vehicle owner has had three final determinations of liability entered against him which remain unpaid;[12] (2) a notice of impending immobilization is sent to the vehicle owner; (3) twenty-one days elapse without the registered vehicle owner paying the outstanding fines/penalties and with the registered vehicle owner failing to contest the City's right to immobilize on the grounds that the registered vehicle owner has not had the requisite number of final determinations issued against him; and (4) the

[12] Or two if the determinations are over a year old.

vehicle is found located on City-owned property or on the "public way." M.C.C. § 9-100-120(a)-(b). The City's right to possess specific vehicles accrues under state law at this point in time, which would give it a possessory interest in those vehicles at that moment. *See Transcon*, 131 N.E. at 647.

As far as section 362(b)(3) goes, the City's interest in property is created no earlier than when it actually immobilizes a specific vehicle. This is due to the fact that, up to the point of the restraint actually being placed on the vehicle, the City's right to place that restraint could be "erased or altered" by the simple expedient of removing the vehicle from the "public way" or from City-owned property. M.C.C. § 9-100-120(a); *In re Grede Foundries, Inc.*, 651 F.3d 786, 792-93 (7th Cir. 2011); *In re Parr Meadows Racing Ass'n, Inc.*, 880 F.2d 1540, 1548 (2d Cir. 1989). Thus, the City has no real and identifiable interest in any specific vehicle, and therefore no interest in property under section 362(b)(3), until it actually effectuates an immobilization of that specific vehicle.[13]

In this case the City had already immobilized and impounded Mr. Peake's MKZ by the time his petition was filed. The City had, as of the commencement of this case, (1) the possession of the Debtor's vehicle and (2) the right to possess the Debtor's vehicle, at least

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[13] The idea that no specific property interest in any specific vehicle exists until a restraint is placed on the vehicle is somewhat analogous to early holdings and statements of the Illinois Supreme Court that a sheriff or other judicial officer has no property interest in specific chattels capable of supporting a possessory action until a levy on those chattels is actually made. *Mulheisen v. Lane*, 82 Ill. 117, 118-19 (1876); *Broadwell v. Paradice*, 81 Ill. 474, 475 (1876); *Frink v. Pratt*, 22 N.E. 819, 820 (Ill. 1889).

until the debt(s) owed to it have been paid.[14] Considered in the aggregate, these boil down to the City's lawful right to *retain* the possession of the vehicle until the debt(s) owed to it by the Debtor have been paid. That right constitutes its interest in the property, and this interest in property would likely be considered a lien under Illinois law, *see In re Avila*, 566 B.R. 558, 560-61 (Bankr. N.D. Ill. 2017); *Gaskill v. Robert E. Sanders Disposal Hauling*, 619 N.E.2d 235, 238 (Ill. App. Ct. 1993), a lien analogous to the bare common law lien on chattels, *see Knapp, Stout & Co. Co. v. McCaffrey*, 177 U.S. 638, 645 (1900); Ex parte Foster, 9 F. Cas. 508, 513 (C.C.D. Mass. 1842) (No. 4,960) ("A lien is a right in one man to retain that which is in his possession, belonging to another, till certain demands of him, the person in possession, are satisfied.") (quoting *Hammonds v. Barclay*, 102 Eng. Rep. 356, 359 (K.B. 1802)).

The analogy to the common law possessory lien breaks down only when one considers the forceful and nonconsensual manner in which the City first actually obtained the possession of the vehicle in this case, since the common law possessory lien ordinarily gives one the right to detain chattels that had initially been delivered *voluntarily* into one's possession. *See* JOSEPH J. DARLING, A TREATISE ON THE LAW OF PERSONAL

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[14] After a period of time in possession of the vehicle, the City also accrues the separate "power [to dispose]" of the vehicle. *Transcon*, 131 N.E. at 647; M.C.C. §§ 9-100-120(f), 9-92-100; 625 ILCS § 5/4-208(a). That period of time did not run prior to the bankruptcy petition being filed, *see* City's Response, Docket No. 19, at 2, so this is not an issue in this case. The court will therefore confine its analysis to the City's right to retain the possession of the vehicle pending payment of the debt(s) owed to it by the Debtor.

PROPERTY 44-51 (1891). When considering the manner in which the City's possession, and thus its resulting possessory interest in property, was first obtained, a comparison to liens obtained by way of nonconsensual levy is more apt. *See In re Ohakpo*, 494 B.R. 269, 278 (Bankr. E.D. Mich. 2013) (noting that, under Michigan law, a levy under a writ of execution creates a "possessory lien": "[T]he lien in such circumstances arises upon the taking of possession of the judgment debtor's property. It is a possessory lien attaching to the seized personal property to pay the judgment debt."); 1 WILLIAM HOUSTON BROWN & LAWRENCE R. AHERN III, THE LAW OF DEBTORS AND CREDITORS § 6:53 (2018) (noting the existence of jurisdictions where a levy on personal property creates a lien).

No matter the precise characterization of the City's interest under state and local law,[15] the City's interest in the MKZ at the time of the petition was an "interest in property" under section 362(b)(3) because, by the time the vehicle had been immobilized and impounded, the only way to lawfully defeat the City's possessory interest was to pay the amounts required to release the vehicle. That is, the City's interest in the MKZ at the time of the petition was real and identifiable and could not be erased or altered by subsequent events. *Grede Foundries. Inc.*, 651 F.3d at 792-93; *Parr Meadows Racing Ass'n, Inc.*, 880 F.2d at 1548.[16] The City's possessory interest in the MKZ was, therefore, an "interest in proper-

[15] Though that characterization is relevant to the discussion below regarding the continued existence and perfection of the interest.

[16] To be sure, the City's interest could be defeated by paying the amounts necessary to obtain the release of the vehicle, but that is a subsequent event that is built in to the very definition of the City's interest in the vehicle.

ty" under section 362(b)(3) at the time of the petition. *Grede Foundries*, Inc., 651 F.3d at 792-93.[17]

The Debtor's contention that the City does not have a lien or other interest in property under state law is therefore rejected. The City has the authority, by express state statute as effectuated by its ordinances, to immobilize and impound a vehicle where there are more than two or three final determinations of liability outstanding against the vehicle owner. This is what happened in this case. The City's right to retain the possession of the Debtor's MKZ pending payment of the debt(s) owed to it is an interest in property under state law analogous to a common law possessory lien where the possession has, in the first instance, been obtained in a manner akin to a levy made pursuant to a writ of execution. This interest may in some instances be referred to as a lien in the discussion below, since it is an interest at least in the nature of a lien. With this interest defined, the court now turns to the relevant provisions of the Bankruptcy Code.[18]

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[17] To say that the City had a possessory interest under state law means that it had a right to the possession of the vehicle as of the petition date, which is a property interest existing on the petition date supporting the application of section 362(b)(3). *See 229 Main St.* 262 F.3d at 5 (noting that the application of section 362(b)(3) requires an interest in property to exist as of the petition date). As discussed below, if one of the section 362(b) exceptions does not apply, then the automatic stay, in tandem with other provisions, suspends the right to immediate possession that otherwise exists in favor of the City under state law on the petition date and draws that right back to the estate even though the City's interest in the vehicle persists.

[18] The Debtor also argues that the City's ordinances are preempted by the Bankruptcy Code. This argument was earlier rejected by the District Court. *Baines v. City of Chicago*, 584

III. Section 362(b)(3)

Section 362(b) provides exceptions to the automatic stay. The City argues that if it falls within the exception in section 362(b)(3), it may continue its possession of the MKZ to maintain and continue both its interest in the impounded MKZ and the perfection of that interest. The City argues that it does fall within the exception because its continued possession of the MKZ is an act to continue or maintain the perfection of its interest in the MKZ. Section 362(b)(3) provides:

> The filing of a petition … does not operate as a stay—under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

11 U.S.C. § 362(b)(3).

A. "Perfection"

Perfect or perfection is not defined in the Bankruptcy Code, but an interest in property is perfected when it attains effectiveness or durability against third-party interest-takers or interest-holders in the same item of property. *See generally In re Bates*, 270 B.R. 455, 468 (Bankr. N.D. Ill. 2001); *Perfection*, BLACK'S LAW DICTIONARY 1318 (10th ed. 2014); *see also Matter of Freedom Grp., Inc.*, 50 F.3d 408, 411 (7th Cir. 1995). The City's right to possess the vehicle is

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B.R. 723 (N.D. Ill. 2018). The court agrees with the analysis therein. The Debtor's argument on this point is therefore rejected.

perfected as long as the City retains possession because it may demand the amounts owing to it under its ordinances in exchange for giving up its right to possession, and, importantly, it may enforce its right to possess, by demanding the amounts owing to it, against *any* holder of an interest in the vehicle. M.C.C. § 9-92-080(a), (c).[19] Thus, the City's continued retention of possession maintains or continues the perfection of its interest in the vehicle. 11 U.S.C. §§ 362(b)(3), 546(b)(1)(B); *In re Hayden*, 308 B.R. 428, 432 (B.A.P. 9th Cir. 2004); *In re Boggan*, 251 B.R. 95, 99-100 (B.A.P. 9th Cir. 2000).

The Debtor argues that the City's right to possess the vehicle is not destroyed if the City loses possession under certain circumstances. The Debtor is correct. The City's right to possess the vehicle continues where the loss of possession occurs under circumstances not indicating an intent to abandon, release, or waive the lien, such as where possession is given up involuntarily due to forced compliance with a statute or court order, where possession is given up under circumstances indicating an implied agreement to continue the lien, or where possession is given up by way of trick, fraud, artifice, or mistake. *See In re Borden*, 361 B.R. 489, 494-95 (B.A.P. 8th Cir. 2007); *In re Burke*, 5 B.R. 368, 371 (Bankr. E.D. Pa. 1980); *Gen. Motors Acceptance Corp. v. Colwell Diesel Serv. & Garage, Inc.*, 302 A.2d 595, 596-97 (Me. 1973); *Brauer v. Hotel Assocs., Inc.*, 192 A.2d 831, 835 (N.J. 1963); *State v. Dyer*, 259 P. 212, 216 (Okla. 1927); *In re Estate of Miller*, 556 N.E.2d 568, 572 (Ill. App. Ct. 1990); *Braden v. Cline*, 196 P. 913, 914 (Cal. Ct. App. 1921) ("The important fact is that he *vol-*

[19] As indicated above in note 10, if the interest-holder is claiming its interest through a conditional sales agreement, the amount that the City can demand under its ordinances is reduced.

untarily relinquished possession and control of the property, by reason of which the *lien due to the levy of the writ was lost* …") (emphasis added); *In re Atlas Iron Const. Co.*, 46 N.Y.S. 467, 469 (App. Div. 1897); 17 RULING CASE LAW 611-12 (William M. McKinney & Burdett A. Rich eds., 1917); 19 THE AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 27 & n.10 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1901); BASIL MONTAGU, A SUMMARY OF THE LAW OF LIEN 9-10 (1821); *see also Manufacturers' & Traders' Nat. Bank of Buffalo v. Gilman*, 7 F.2d 94, 97 (1st Cir. 1925); *Underground Elec. Rys. Co. of London v. Owsley*, 176 F. 26, 38 (2d Cir. 1909); *Wiswall v. Sampson*, 55 U.S. 52, 65 (1852); Eugene R. Wedoff, *The Automatic Stay Under § 362(a)(3)—One More Time*, 38 No. 7 Bankruptcy Law Letter NL 1 (July 2018) (discussing the Restatement of Security's general rule that an interest is not lost where the possession is given up involuntarily); *cf. Wilson v Kymer*, 105 Eng. Rep. 59, 61 (K.B. 1813) ("I should hold that if goods are taken out of the hands of the party by operation of law, he shall not be prejudiced by it, but the law will retain his lien for him."); *Ward v. Felton*, 102 Eng. Rep. 195, 197 (K.B. 1801). That is, the right to possession of the item of property remains with the lienor despite the lienor's having been forced to give up actual possession of the item.[20]

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[20] Where the possession is lost involuntarily due to the commencement of a bankruptcy proceeding, due to which the lienor is forced to comply with the Bankruptcy Code, this result comports with the fundamental notion that interests in property existing on the petition date are not destroyed unless they are positively avoided, ruled upon negatively by the court in the application of a Code provision such as section 506, or otherwise detrimentally treated in the debtor's plan of reorganization. *See, e.g., Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991); *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 738 (1931); *Zartman v. First Nat. Bank of Wa-*

The Debtor's argument only proves the point that the City's interest requires possession to remain perfected. Why? If the City were to lose actual possession where its right to possession remained intact,[21] it would

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terloo, 216 U.S. 134, 135 (1910); *Yeatman v. New Orleans Sav. Inst.*, 95 U.S. 764, 766-67 (1877); *Matter of Penrod*, 50 F.3d 459, 462--64 (7th Cir. 1995); *Matter of Pence*, 905 F.2d 1107, 1110 (7th Cir. 1990); *Lockhart v. Garden City Bank & Tr. Co.*, 116 F.2d 658, 661 (2d Cir. 1940); *In re Toms*, 101 F.2d 617, 619 (6th Cir. 1939). Turning the vehicle over due to the operation of the automatic stay does not require a court ruling on the validity of the City's interest in property, nor is the automatic stay a positive avoidance provision, such as those provisions found in chapter 5 of the Code. Neither is the automatic stay a provision of the Code delineating the legal effect of a reorganization plan.

[21] In a bankruptcy proceeding where the possessory lienor has to give up possession due to the operation of the automatic stay (see below on why neither section 362(b)(3) nor (b)(4) applies to the City's conduct in this case), the right to *immediate* possession that might otherwise continue to exist in a non-bankruptcy context is held in abeyance until the stay is lifted or the bankruptcy proceedings otherwise cease. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988) (noting that a secured party's right to immediate possession under state law is "suspended by the stay"); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 206 (1983) (noting that "bankruptcy law … modifies the procedural rights available to creditors to protect and satisfy their liens"); *Thompson*, 566 F.3d at 703-04 (noting that various provisions of the Bankruptcy Code work in tandem with the automatic stay to draw back into the estate the right to the immediate possession of an item of property); *In re DiGregorio*, 458 B.R. 436, 443-44 (Bankr. N.D. Ill. 2011) (discussing *Thompson*). The ultimate right to possession remains in the lienor, and that right may be asserted following the lifting of the stay or the dismissal of the bankruptcy proceedings. The lienor's ultimate light to possession may, of course, be defeated in the meantime by full payment of the debt(s) secured by the right, or by the avoidance, invalidation, or modification of the interest, or its transfer or fixing, during the bankruptcy proceedings. *See*, *e.g.*, 11 U.S.C. §§ 522(f)(1), 547(b), 1322(b)(2); *In re Brinson*, 485 B.R. 890,

not be able to enforce its right to possession against all interest-takers in the vehicle. In particular, future creditors extending credit at the time that the City is out of possession would obtain an execution lien superior to the City's interest if they had no actual notice of the City's interest at the time they became creditors. *See* RESTATEMENT (FIRST) OF THE LAW OF SECURITY § 80(3)-(4), cmt. d (1941); *Yellow Mfg. Acceptance Corp. v. Bristol*, 236 P.2d 939, 946-47 (Or. 1951); *Rehm v. Viall*, 185 Ill. App. 425, 426 (1914) (abstract); *Nw. Bank v. Mckee Family Farms, Inc.*, No. 3:15-CV-01576-MO, 2016 WL 2841205, at *3 (D. Or. May 12, 2016); *cf. Century Pipe & Supply Co. v. Empire Factors Corp.*, 153 N.E.2d 298, 30102 (Ill. App. Ct. 1958) (discussing the importance of possession to the durability of an execution lien as against third-parties; noting that "[a]ny act of a creditor diverting an execution from its purpose renders it *inoperative against other creditors and clothes them with priority* … The act of levying is the *effective method of notice to all* that the personal property is subject to a claim secured by a lien") (emphasis added); *Havely v. Lowry*, 30 Ill. 446, 451 (1863) ("He made no change of its possession, by placing a custodian over it, or removing it from the premises. It was at most a mere pen and ink levy, and was wholly insufficient to affect the rights of third persons."); *Conn v. Caldwell*, 6 Ill. 531, 536-37 (1844) (noting that third parties might take free of an execution lien where the property is allowed to remain in the hands of the judgment debtor even though the lien might continue to subsist as between the sheriff and the judgment debtor). What this means is that the execution lienor could

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900-02 (Bankr. N.D. Ill. 2013) (discussing section 1322(b)(2)); *In re Ginther*, 427 B.R. 450, 453-54 (Bankr. N.D. Ill. 2010) (discussing section 1322(b)(2)).

defeat the City's right to possession *without* paying the sums due to the City under its ordinances. For that reason, the City could not enforce its right to possession against that lienor. Thus, instead of being able to enforce its right to possession against *all* interest-takers, as it may while in possession, there would exist one class of interest-takers against which the City's right to possession would lose effectiveness if the City were to lose possession. And for that reason, the City's lien becomes unperfected when it loses possession, even if the lien lives on.

Thus, possession is an implied, if not express, perfection requirement for the City's interest, and this is not changed by the fact that there are circumstances under which the City's lien would survive a loss of possession, at least as against the owner of the impounded vehicle. *See Hayden*, 308 B.R at 434 ("[A]lthough not specifically stated in the statute, possession is necessary for the lien to retain its priority, especially where the statute provides that the vehicle 'may not be released' until the applicable towing and storage costs are paid."). The City's continued retention of possession thus "continues or maintains" the perfection of its interest.

With that being said, the court turns to the purposes behind section 362(b)(3). Then, the court explains why the City's continued maintenance of the perfection of its interest is not an act to continue or maintain the perfection of that interest within the meaning of section 362(b)(3).

B. The Purposes of Section 362(b)(3)

Section 362(b)(3) has two purposes. First, section 362(b)(3) protects lienors or interest holders from the

danger of non-perfection following the dismissal or closure of a bankruptcy case. If, for example, a financing statement lapses during the pendency of the bankruptcy case, a lienor's lien might remain perfected during the bankruptcy. *See In re Paul*, 67 B.R. 342, 347 (Bankr. D. Mass. 1986) (noting that an interest perfected as of the date of the petition remains perfected by the vesting of all of the debtor's property in the bankruptcy estate); *Commercial Credit Bus. Loans, Inc. v. Northbrook Lumber Co.*, 22 B.R. 992, 995-96 (N.D. Ill. 1982) (applying this rationale in a case under chapter 11 where the debtor, not a trustee, remained in possession of property of the estate). But unless a new financing/continuation statement is filed or some other act to perfect is taken the *very day* that the bankruptcy case is dismissed, the lienor runs the risk of having its lien subordinated or eliminated as against a subsequent interest-taker during the time period between dismissal of the bankruptcy case and the time that he files a new financing statement or otherwise perfects the interest. *See* 810 ILCS §§ 5/9-308(a), 5/9-310(a), 5/9-515; *In re Wilkinson*, No. 10-62223, 2012 WL 1192780, at *4 (Bankr. N.D.N.Y. Apr. 10, 2012) ("Secured creditors are now permitted—but not required to—file continuation statements notwithstanding the pendency of a bankruptcy proceeding. In this Court's view, a secured creditor who fails to file a post-petition continuation statement is protected within the bankruptcy proceeding but accepts the risk that the debtor's bankruptcy proceeding may fail, thus leaving them to contend with competing parties under the [U.C.C.] in the aftermath of an unsuccessful bankruptcy proceeding."). Section 362(b)(3) therefore allows the lienor to protect itself from that post-bankruptcy contingency during the pendency of the bankruptcy case. *See Wilkinson*, 2012 WL 1192790, at *4.

Second, section 362(b)(3) protects lienors or interest holders who have no *perfected* lien or interest in property at the time of the bankruptcy petition but who have the ability to take an act to perfect and have that act of perfection relate back to a time prior to the commencement of the bankruptcy case, usually the date of the creation of the interest in property. *In re Grede Foundries, Inc.*, 651 F.3d 786, 791 (7th Cir. 2011); *see also* 625 ILCS § 5/3-202(b) (allowing a 30-day relation-back period whereby the date of perfection is deemed to have occurred when the interest in property was created). Indeed, this latter situation has been described as "[t]he narrow purpose of section 362(b)(3)." *Grede Foundries*, 651 F.3d at 791.[22]

Thus, there are two distinct situations addressed by section 362(b)(3). The first is where a lienor or interest holder has a perfected interest in property as of the date of the bankruptcy petition and wishes to continue his perfection under *nonbankruptcy law* during the pendency of the bankruptcy case notwithstanding his continued perfection under bankruptcy law during the pendency of the bankruptcy case. This gives effect to the "act … to maintain or continue the perfection of …" language of the subsection. *See* 11 U.S.C. § 362(b)(3). The second is

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[22] That the other purpose for the exception was not mentioned in *Grede* might be explainable by the fact that the court relied on two pre-1994 opinions from the Second and Third Circuit Courts of Appeals for its explanation of purpose. *See Grede Foundries*, 651 F.3d at 791 (citing *In re Parr Meadows Racing Ass'n, Inc.*, 880 F.2d 1540, 1546 (2d Cir. 1989); *Makoroff v. City of Lockport, N.Y.*, 916 F.2d 890, 891-92 (3d Cir. 1990)). The subsection was amended in 1994 to add the phrase "or to maintain or to continue the perfection of," which is the phrase that implicates the other purpose for the exception. *See* 3 COLLIER ON BANKRUPTCY ¶ 362.LH[4][e] (Alan N. Resnick and Henry Sommers eds., 3d ed. 2018); *In re Doolan*, 447 B.R. 51, 60 n.7 (Bankr. D.N.H. 2011).

the situation where a lienor or interest holder has an interest in property that is not perfected as of the date of the bankruptcy petition but who may, under nonbankruptcy law, take acts necessary for the perfection of its lien and have that date of perfection relate back to a time prior to the commencement of the bankruptcy petition, usually the date of the creation of the interest in property. The "act to perfect" language of the subsection applies in this situation. *See id.*

The City's interest would fit the first purpose if the City's argument were accepted. It had a perfected interest in property as of the petition date and it wishes to continue or maintain the perfection of that interest by retaining its possession of the property. The Debtor argues, however, that the City's passive retention of the vehicle is not an act to continue or maintain the perfection of its interest in the vehicle because section 362(b)(3) contemplates a definite, positive act to continue or maintain perfection, such as filing a continuation statement under the Uniform Commercial Code. The City counters that the language in section 362(b)(3) is broad enough to cover its continued retention of possession and that a ruling to the contrary would be inconsistent with *Thompson*, which held that the passive retention of property constituted an "act … to exercise control" over that property under section 362(a)(3). Thompson, 566 F.3d at 703.

C. The Meaning of the Phrase "act … to continue or maintain the perfection of …"

The plain meaning of section 362(b)(3), which refers to and must be read in conjunction with section 546(b), requires that an act to continue or maintain the perfection of an interest in property be a definite, positive act, such as filing a continuation statement under the Uni-

form Commercial Code.[23] When interpreting statutes, courts strive to give effect to the plain meaning of the statutory text. *Patterson v. Shumate*, 504 U.S. 753, 760 (1992); *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). In searching for the plain meaning of a statute, every clause and word must be given effect; the court must consider not only the bare meaning of words in isolation, but also their "placement and purpose in the statutory scheme." *Khan v. United States*, 548 F.3d 549, 554 (7th Cir. 2008).

i. The Plain Meaning of the Phrase "act … to continue or maintain the perfection of …"

The focus naturally turns first to the word "act" in the subsection. The term "act" is ordinarily defined in at least two ways. *See Clark v. Rameker*, 134 S. Ct. 2242, 2246 (2014) (looking to a dictionary when giving a term its ordinary meaning). First, it is the "doing of a thing," a "deed."[24] This definition tends to encompass positive, definite acts, which is in accord with the Debtor's argument. But the tennis also defined as "the process of doing something," which covers continuing actions, such as the City's retention of possession following its initial taking of possession.[25]

The term, of course, must be placed in its wider context, including the real-world situations to which

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[23] The court thus agrees with that part of the decision in *In re Fulton* stating that the passive retention of property does not amount to an *act* to continue or maintain the perfection of an interest in property. *In re Fulton*, No. 18 BK 02860, 2018 WL 2570109, at *5 (Bankr. N.D. Ill. May 31, 2018).

[24] *See Act*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/act (last visited July 17, 2018).

[25] *Id.*

the language pertains. *Matter of Handy Andy Home Improvement Centers, Inc.*, 144 F.3d 1125, 1128 (7th Cir. 1998). The addition of the words "maintain or continue the perfection of" in the subsection does not support either definition, however. Perfection may be maintained or continued solely by taking a single positive, definite, act, such as filing a continuation statement under the U.C.C. *See, e.g.*, 810 ILCS §§ 5/9-308(a), 5/9-310(a), 5/9-515. On the other hand, the continuing process of retaining possession also maintains or continues the perfection of an interest in property. Here, for example, the City's maintaining possession continues the perfection of its interest, since it may demand the sums of money defined in its ordinances in exchange for its right of possession, and, importantly, it may do this unequivocally as against *all* interest-takers in the vehicle, prior or future. *See supra* Part Ill.A.

The meaning of section 362(b)(3)'s "act … to continue or maintain the perfection of …" language becomes plain, however, when considered in the context of section 546(b), which is expressly referred to in section 362(b)(3). *See Khan*, 548 F.3d at 554. Section 362(b)(3) only excepts an act to continue or maintain the perfection of an interest in property where "the trustee's rights and powers are subject to such perfection under section 546(b) …" *See* 11 U.S.C. § 362(b)(3). The trustee's rights and powers are subject to any generally applicable law that

> provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the *date on which action is taken* to effect such maintenance or continuation.

11 U.S.C. § 546(b)(l)(B) (emphasis added). A "date" is defined as the "time at which an event occurs."[26] This is the only definition of the term that makes sense in context, because the remainder of the statutory phrase, namely, "on which action is taken" plainly contemplates the occurrence of an event, namely, the taking of an action. *See* 11 U.S.C. § 546(b)(1)(B) ("on which action is taken").

The term "act" in section 362(b)(3), therefore, must be referencing a single, positive, definite act, such as the filing of a continuation statement. If this is not true, and the City's continued retention of possession is an "act" to continue or maintain the perfection of its interest, there is no sensible way to apply the language of section 546(b)(1)(B) as that language appears on the face of the provision, because the time at which the City's "action is taken" is constantly updating, second by second, as long as it retains the possession of the property in which it claims an interest, and there is therefore no actual "date" on which action is taken to effect the maintenance or continuation of the perfection of its interest in property. There is, instead of a date, a never-ending passage of time.

The City's argument is also difficult to square with that part of section 362(b)(3) referencing section 547(e)(2)(A), which reads "to the extent *such act is accomplished within the period* provided under section 547(e)(2)(A) of this title." 11 U.S.C. § 362(b)(3). That language, as it appears on the face of the provision, plainly contemplates an action being accomplished within a definite time period. According to the City's argument, its "act" to continue or maintain the perfec-

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[26] *See Date*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/date (last visited Aug. 1, 2018).

tion of its interest would by definition never be accomplished for as long as it retained possession. Thus, again, the statutory scheme points to a single, definite, positive act, namely one that occurs at a definite time and that may be sensibly tested as having fallen either within or without the 30-day period provided for in section 547(e)(2)(A).

In sum, therefore, the court concludes that the plain meaning of section 362(b)(3) requires that an act to continue or maintain the perfection of an interest in property be a definite, positive act, such as filing a continuation statement under the Uniform Commercial Code. Even if the court were to apply canons of statutory construction or consult legislative history, however, the result would be the same.

ii The Automatic Stay's Exceptions are Construed Narrowly to Further the Automatic Stay's Purposes

The automatic stay is one of the fundamental debtor protections provided by the Bankruptcy Code. *Midlantic Nat. Bank v. New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 503 (1986). One of the main purposes of the automatic stay is to give the debtor a breathing spell from his creditors and to allow him to attempt a repayment or reorganization plan. *In re Ionosphere Clubs, Inc.*, 111 B.R. 423, 430 (Bankr. S.D.N.Y. 1990) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong. 2d Sess. 49 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5963, 6296-97). The automatic stay is broadly construed to effectuate its purposes. *Grede Foundries*, 651 F.3d at 790; *Vill. of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir. 2002) ("We construe the Bankruptcy Code liberally in favor of the debtor and strictly against the

creditor.") (internal quotation marks omitted); *see also Zedan v. Habash*, 529 F.3d 398, 406 (7th Cir. 2008).

Conversely, the automatic stay's exceptions are narrowly construed in order to secure the broad grant of relief provided by the automatic stay to the debtor. *Grede Foundries*, 651 F.3d at 790 ("Courts interpret these exceptions narrowly to give the automatic stay its intended broad application."); *In re Stringer*, 847 F.2d 549, 552 (9th Cir. 1988) ("Congress clearly intended the automatic stay to be quite broad. Exemptions to the stay, on the other hand, should be read narrowly to secure the broad grant of relief to the debtor.").

It is, therefore, natural to give the word "act" as used in section 362(b)(3) its narrower dictionary meaning and to read the phrase "act … to continue or maintain the perfection of …" to encompass only definite, positive acts to continue or maintain the perfection of an interest in property. Doing so secures "the broad grant of relief to the debtor," *Stringer*, 847 F.2d at 552, by enabling the debtor to take full advantage of section 362(a)'s protections regardless of the possessory or nonpossessory nature of a given creditor's interest in property, and regardless of the particular method by which that creditor has chosen to perfect its interest in property, and to therefore more speedily and effectively secure the goal of a successful rehabilitation, where all creditors benefit. *Cf. In re Philadelphia & Reading Coal & Iron Co.*, 117 F.2d 976, 978 (3d Cir. 1941) (noting that the debtor's opportunity to reorganize and the "effective administration" of the relevant bankruptcy law should not depend on legal distinctions between pledgees and mortgagees nor between real and personal property); *see also Thompson*, 566 F.3d at 702 ("The primary goal of reorganization bankruptcy is to group all of the debtor's property together … An asset ac-

tively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot.").

Giving the term its narrower meaning does not have an impact on the other primary purpose of the automatic stay, namely protecting creditors from one another and deterring a race to the courthouse in the run-up to and during a debtor's bankruptcy proceeding. *Ionosphere Clubs*, 111 B.R. at 430 (discussing this other purpose). As discussed above, it is only *after* dismissal of the bankruptcy case that this narrower reading could incentivize the City to act to repossess the vehicle that had been impounded on the petition date and re-instate the perfection of its specific possessory interest in the vehicle to the extent that that interest rode through the bankruptcy unaffected. *See, e.g.*, *Wilkinson*, 2012 WL 1192790, at *4; *see also supra* Parts Ill.A-B (discussing the continued existence of the City's interest in property despite that interest's loss of perfection under nonbankruptcy law; also discussing the period of time following the dismissal of a bankruptcy case where the City's interest in the vehicle would be vulnerable to a later interest-taker in the vehicle).

iii. Legislative History

This interpretation is supported by the legislative history surrounding the 1994 amendment to section 362(b)(3):

> The section sets forth an amendment to sections 362 and 546 of the Bankruptcy Code to confirm that certain actions taken during bankruptcy proceedings pursuant to the Uniform Commercial Code to maintain a secured creditor's position as it was at the commencement of

> the case do not violate the automatic stay. *Such actions could include the filing of a continuation statement and the filing of a financing statement.* The steps taken by a secured creditor to ensure continued perfection merely maintain the status quo and do not improve the position of the secured creditor.

H.R. Rep. 103-835, at 45 (1994) (emphasis added); *see also In re 201 Forest St., LLC*, 422 B.R. 888, 894 n.7 (B.A.P. 1st Cir. 2010).

Plainly, the retention of possession is not the same thing as the filing of a continuation statement or the filing of a financing statement. The filing of those statements constitutes a single, definite, and positive act that continues or maintains the perfection of an interest in property. That Congress was concerned with financing and continuation statements is also supported by the fact that, prior to the amendment in 1994, the Uniform Commercial Code (not considering the state-specific enacted versions of that code) contained a section expressly tolling the lapse of a financing statement after a bankruptcy petition had been filed. *See* U.C.C. § 9-515 cmt. 4. Following the 1994 amendment to the Bankruptcy Code, however, the tolling provision in the non-state specific Uniform Commercial Code was removed. *Id.*; *see also In re Miller Bros. Lumber Co., Inc.*, No. 1:12CV720, 2013 WL 5755052, at *7 (M.D.N.C. Oct. 23, 2013) (discussing the North Carolina U.C.C.).[27] The legislative history contains no reference to posses-

[27] The fact that that provision in the Uniform Commercial Code was removed does not directly bear on Congress's intent in passing the 1994 amendment to section 362(b)(3), but it is some evidence of the relationship of the two provisions as that relationship might have been known and understood by Congress at the time of the amendment to section 362(b)(3).

sory liens, nor is there any indication that Congress intended creditors with possessory liens to be placed in a superior position to that of any other secured creditor. Hence, the legislative history supports the court's interpretation of section 362(b)(3).

iv. *Thompson*

Nothing in *Thompson* requires a different result. The same words appearing in a statute, especially when the words are close together, are presumed to carry the same meaning. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003); *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996); *Arreola-Castillo v. United States*, 889 F.3d 378, 386 (7th Cir. 2018); S*tate Farm Mut. Auto. Ins. Co. v. Comm'r*, 698 F.3d 357, 370 (7th Cir. 2012). And *Thompson* interpreted the term "act" in section 362(a)(3) to cover the passive retention of property, at least impliedly. *Thompson*, 566 F.3d at 703. In *Thompson*, however, the Seventh Circuit was not just interpreting the term "act," it was interpreting the entire phrase "act … to exercise control." *Id.* What might constitute an "act … to exercise control" is not necessarily the same as an "act … to maintain or continue the perfection of an interest in property." Compare 11 U.S.C. § 362(a)(3), *with* 11 U.S.C. § 362(b)(3); *see also Thompson*, 566 F.3d at 702 (focusing on the plain meaning of the phrase "exercising control").

Moreover, the rule that like terms are presumed to have the same meaning is not a rigid one. *Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427, 2441 (2014); *Envtl. Def v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007). It "readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different in-

tent," even where the terms appear "in the same section." *See Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932).

Here, the statutory scheme of which section 362(b)(3) is a part, including section 546(b), counsels that the phrase "act … to continue or maintain the perfection of an interest in property" plainly means a definite, distinct, and positive act to continue or maintain the perfection of an interest in property. Section 362(a)(3), the section that the court in *Thompson* was interpreting, does not reference section 546(b) at all, nor does it contain the separate language referencing acts accomplished within definite time periods, as section 362(b)(3) does in reference to section 547(e)(2)(A).

Moreover, when applying the appropriate canons of construction, it is natural to give the term "act" its broadest meaning when construing the expansively-interpreted language in section 362(a)(3), and then to give the term "act" its narrower meaning given the narrow construction properly to be given to section 362(b)(3) in light of that section's negative impact on the automatic stay's purposes (1) to give the debtor a breathing spell and (2) to facilitate a successful reorganization. *See Grede Foundries*, 651 F.3d at 790; *Stringer*, 847 F.2d at 552.

Thus, the court concludes that the phrase "act … to continue or maintain the perfection of" in section 362(b)(3) requires a positive, distinct action, such as filing a continuation statement under the U.C.C., and therefore that a passive retention of estate property is not an "act … to maintain or continue the perfection of an interest in property." The City's continued retention of the Debtor's vehicle therefore does not fall with-

in the exception to the automatic stay under section 362(b)(3).

IV. Section 362(b)(4)

The City also argues that its retention of the possession of the Debtor's vehicle is excepted under section 362(b)(4), which provides:

> The filing of a petition … does not operate as a stay—(4) … of the commencement or continuation of an action or proceeding by a governmental unit … to enforce such governmental unit'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 …

11 U.S.C. § 36 2(b)(4).[28]

Here, as seen above from the discussion in Part II, the City's continued retention of possession of the Debtor's vehicle constitutes the enforcement of a judgment obtained in an action or proceeding. The action or proceeding was the administrative adjudication of the Debtor's parking, standing, and/or automated red-light traffic violations, and it may be assumed for the sake of argument that the actual adjudication of those violations resulted from the City's exercise of its police and regulatory power. That administrative adjudication (or those adjudications) resulted in the entering of final determinations of liability, which are the administrative equivalent of judgments. Those final

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[28] The City has not argued that its conduct is excepted under section 362(b)(1).

determinations of liability were what enabled the City to immobilize and impound the Debtor's car in the first instance.

The City's continued impoundment of the vehicle constitutes one aspect of its enforcement of those final determinations of liability. The only question is whether those final determinations are "money judgments" as that term is used in section 362(b)(4), because the enforcement of money judgments does not fall within the section 362(b)(4) exception, even if that enforcement also constitutes an exercise of the governmental unit's police and regulatory power. *United States v. Colasuonno*, 697 F.3d 164, 179 & n.7 (2d Cir. 2012); *In re Halo Wireless, Inc.*, 684 F.3d 581, 587 (5th Cir. 2012); *S.E.C. v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000); *N.L.R.B. v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 & n.5 (7th Cir. 1991); *N.L.R.B. v. Cont'l. Hagen Corp.*, 932 F.2d 828, 834-35 (9th Cir. 1991); *Penn Terra Ltd. v. Dep't of Envtl. Res.*, 733 F.2d 267, 272 (3d Cir. 1984).

In determining whether a judgment is a money judgment, and therefore incapable of enforcement without violating the automatic stay, the relevant inquiry is whether the judgment or order being enforced requires payment. See 3 COLLIER ON BANKRUPTCY, ¶ 362.05[5][b] (Richard Levin & Henry J. Sommer eds., 16th ed. 2018); *see also In re First All. Mortg. Co.*, 263 B.R. 99, 107 (B.A.P. 9th Cir. 2001); *In re Guardia*, 522 B.R. 734, 735 (Bankr. S.D. Fla. 2014); *In re Jester*, 344 B.R. 331, 337-38 (Bankr. E.D. Pa. 2006), *aff'd*, No. CIV.A. 06-02126, 2007 WL 781900 (E.D. Pa. Mar. 8, 2007). Here, there can be no doubt that the final determinations of liability in this case are judgments or orders requiring payment of a sum certain, namely the amount of the fines, penalties, sanctions, and/or costs imposed by the "administrative law officer's order."

See 625 ILCS § 5/11-208.3(e); M.C.C. §§ 9-100-100(b), 2-14-103(a); *see also Penn Terra*, 733 F.2d at 275 (noting the significance of the judgment or order being for the payment of a sum certain). There can also be no doubt that the City's continued retention of possession of the Debtor's vehicle constitutes the enforcement of its judgments or orders requiring payment, because the release of the Debtor's vehicle is expressly conditioned on the payment of the amounts liquidated in the final determinations of liability. *See* M.C.C. § 9-92-080(a). Since the City's continued retention of possession of the Debtor's vehicle constitutes the enforcement of a judgment or order requiring payment, its continued retention of possession is not excepted from the operation of the automatic stay by virtue of section 362(b)(4).

Conclusion

The City's continued retention of the possession of the Debtor's vehicle is not excepted from the operation of the automatic stay under either section 362(b)(3) or section 362(b)(4). For that reason, the City has violated and is in violation of section 362(a)(3), and therefore the City must release the Debtor's vehicle immediately.[29] A separate order will be issued consistent with this opinion.

Dated: 8/15/2018

/s/ Deborah L. Thorne
Deborah L. Thorne
United States Bankruptcy Judge

[29] The Debtor has asked neither for sanctions under section 105 nor for damages under section 362(k).

APPENDIX E

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 18 B 04116
Judge Carol A. Doyle
Chapter 13

IN RE: TIMOTHY SHANNON,

Debtor.

Filed September 7, 2018

MEMORANDUM OPINION

Timothy Shannon, the debtor in a chapter 13 bankruptcy case, seeks the return of his car from the City of Chicago. The City impounded Shannon's car before he filed his bankruptcy petition. He filed a plan treating the City's claim as unsecured. The City filed an unsecured proof of claim and did not object to the plan, which was confirmed. After confirmation, however, the City refused to return the car. The City then filed an amended proof of claim asserting a secured claim instead of an unsecured claim.

Shannon filed a motion alleging that the City violated the automatic stay by refusing to return the car. The City responds, in effect, that it can ignore the terms of the confirmed plan because its possessory lien on Shannon's car passes through the bankruptcy unaffected. The City contends that two exceptions to the automatic stay apply: the exception in § 362(b)(3) for

certain types of liens and the exception in § 362(b)(4) for governmental units enforcing their police power. The City therefore argues that it need not return the car and can demand payment of the full amount owed.

Neither argument has merit. First, the City is bound by the terms of the confirmed plan. The City is only entitled to payment as an unsecured creditor in this case. Second, the automatic stay requires the City to return the car to Shannon because neither exception to the automatic stay applies in this case. The City should have released the car as soon as Shannon requested it after the bankruptcy case was filed.

I. Background

Shannon filed a chapter 13 bankruptcy petition on February 15, 2018. The City seized Shannon's car sometime before he filed for bankruptcy. In his Schedule A/B, Shannon disclosed that he owns a 1997 Buick Park Avenue with 130,000 miles and worth $2,675. He scheduled the City as an unsecured creditor owed $1,645 for "fines." He filed a proposed chapter 13 plan with his petition. The plan contained no provision for payment to the City as a secured creditor. Two weeks later, on February 27, 2018, the City filed an unsecured claim in the amount of $3,160 for "parking tickets." Attached to the proof of claim was a list of what appear to be tickets issued on three different license plates over the course of many years, some from as far back as 1999. In April 2018, Shannon filed an amended plan that again did not provide for the City to be paid as a secured creditor. The City did not object to the plan. It was confirmed on May 1.

After confirmation, Shannon's counsel contacted the City to arrange for return of the car. The City re-

fused to return the car unless Shannon modified his plan to treat the City's claim as secured and pay it in full under the plan. On May 2, the City filed an amended proof of claim in which it increased the amount of its claim to $5,600 owed for "parking tickets" and asserted that the claim was "secured" by a motor vehicle. The basis for perfection stated in the proof of claim was: "Vehicle Possessory Lien—1997 Buick." The attachments were the same ones attached to the original claim and showed the same $3,160 amount due, but there was an additional page that said:

Impound Debt	
Fine	$ 1,000
Tow	$ 150
Storage	$ 2,190
Total	$ 2,440

The City filed a second amended claim on July 3, 2018. It asserted that $5,600 was owed for "Fines for violations of the Chicago Municipal Code, and related fees" and that it was secured by a possessory lien on the Buick. The claim said that the City has a lien on a motor vehicle as follows: "Possessory Lien in vehicle plate no. AG61417." The asserted basis for perfection is "possession." There were no attachments to this amended claim.

After the City refused to return the car, Shannon filed a motion alleging that the City willfully violated the automatic stay by refusing to release the car. He relies on a decision of the Seventh Circuit Court of Appeals holding that the automatic stay requires a secured creditor with possession of a chapter 13 debtor's vehicle before the petition date to return the vehicle as soon as the petition is filed. *See Thompson v. GMAC*,

LLC, 566 F.3d 699 (7th Cir. 2009). Shannon notes that the City relies on a decision of one bankruptcy judge in this district who concluded that the exception to the automatic stay in § 362(b)(3) applies to its possessory lien and permits the City to keep the car. Shannon argues that the City ignores three other decisions from bankruptcy judges in this district who concluded on various grounds that the automatic stay requires the City to return the cars of chapter 13 debtors in these circumstances.

The City responds to Shannon's motion for sanctions with a number of arguments. The City contends that the automatic stay does not apply because: (1) *Thompson* was wrongly decided, (2) the exception to the automatic stay in § 362(b)(3) for certain types of post-petition lien perfection applies, and all bankruptcy court decisions holding otherwise are incorrect, and (3) the police power exception in § 362(b)(4) also applies. The City argues as well that the confirmed plan has no impact on it because the plan did not strip its lien, so the lien passed through the confirmation process unaltered. The City therefore asserts that it is free to hold the car despite the confirmed plan and can force Shannon to pay the full amount the City now claims it is owed—$5,600—based on its pre-petition seizure of a nearly twenty-year old car worth $2,675.[1]

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[1] Shannon also filed an objection to the City's claim. He argues that the ordinance granting the City a possessory lien on seized cars is invalid based on *In re Howard*, 584 B.R. 252 (Bankr. N.D. Ill. 2018), and that the City failed to provide an itemization to support the amount Shannon allegedly owes. That objection will be addressed in a separate opinion. It is worth noting here, however, that any secured claim of the City is necessarily limited to the value of the collateral under § 506(a), in this case presumably $2,675.

To resolve this dispute, the court must first determine the effect of the confirmed plan on the City's rights. The court must then decide whether the automatic stay applies to stop the City from keeping possession of the car to collect on the debt owed by Shannon.

II. Binding Effect of Confirmed Plan

Shannon argues that the City is bound by the terms of the confirmed plan that treats the City's claim as an unsecured debt. He asserts that the City itself filed an unsecured claim before confirmation and did not object to the plan even though it treated the City as an unsecured creditor.[2] Shannon seems to argue that the City has given up any rights it may have had as a secured creditor, and must therefore return the car and receive payment under the plan as an unsecured creditor.

The City responds that the plan does not contain provisions required to strip a lien so its lien was not eliminated through the confirmation process. The City therefore contends that the lien "passed through" the bankruptcy unaltered and that it is free to keep possession and demand full payment of the $5,600 amount alleged in the second amended claim. The City pays lip service to the principle that it is bound by the terms of a confirmed plan as every creditor is. But the City also asserts that its lien passed through the confirmation process unaltered, that it could amend its proof of claim post-confirmation because it did so before the govern-

[2] The plan does not directly address the City's claim; the City is not listed in any provision of the plan. The effect of this omission is that the City's claim is treated as unsecured. Part 3 of the national plan form (Official Form 113) used in this district requires debtors to specify all secured creditors to be paid under the plan. If a creditor is not specifically listed in one of those paragraphs, it will be paid only as an unsecured creditor.

ment bar date, and that the automatic stay does not require the car to be returned. The City therefore contends that it is free to refuse to return the car until the debtor amends its plan to pay the entire amount of the amended claim as a secured claim. The net effect of the City's positions, if upheld, would allow the City to ignore the confirmation process and force a debtor to pay it in full after confirmation based on the City's possession of a vehicle no matter what the plan says.

The City is correct that its lien was not stripped off through confirmation of the plan. The national plan form used in this district requires a debtor who seeks to "strip off" a lien, pay less than the allowed amount of the secured claim, or avoid certain types of liens, to give the secured creditor notice of this intention in several ways. First, in Part 1 of the plan, the debtor must check one of the three boxes stating "Included," which notifies the creditor that the debtor seeks to limit the amount paid on a secured claim or avoid a lien. Then, the debtor must expressly request the relief sought by completing paragraphs 3.2, 3.4 or 8 of the plan, in which the debtor must identify the creditor and the proposed treatment. If the debtor fails to check the appropriate "Included" box in Part 1, then the treatment of a secured creditor named in sections 3.2, 3.4, or 8 of the plan will not be effective. Finally, if the debtor seeks to strip down or strip off a lien (i.e., pay less than the total amount owed because the value of the collateral is lower) in section 3.2 of the plan, he must serve the plan on the secured creditor in accordance with Rule 7004 of the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Bankr. P. 3012(b), 3015(d).

Here, Shannon did not check any box in Part 1 of the plan to give notice of an attempt to affect the lien of a secured creditor. He also failed to identify the City as

a secured creditor anywhere in the plan. The City is therefore correct that confirmation of the plan did not eliminate its lien on Shannon's car. A lien that is not treated in a plan generally passes through the bankruptcy case unaffected. *See*, *e.g.*, *In re Pajian*, 785 F.3d 1161, 1163 (7th Cir. 2015); *In re Penrod*, 50 F.3d 459, 461 (7th Cir. 1995); *In re Turner*, 558 B.R. 269, 278 (Bankr. N.D. Ill. 2016).

This does not mean, however, that the City could ignore the confirmation process and force Shannon to amend the confirmed plan to pay the full amount it now seeks as a secured claim. Section 1327(a) of the Bankruptcy Code provides that the "provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). *In United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), the Supreme Court held that a provision in a confirmed plan bound a creditor who had actual notice of the bankruptcy, filed a proof of claim, but failed to raise a timely objection. *Id.* at 275. The Seventh Circuit was enforcing confirmed plans long before *Espinosa*. *See*, *e.g.*, *Bartlett v. Fifth Third Bank*, 619 F. App'x 525, 528 (7th Cir. 2015) (a confirmed plan can only be attacked by a party with no adequate notice of a bankruptcy proceeding); *In re Harvey*, 213 F.3d 318, 321 (7th Cir. 2000) (a confirmed plan is like a court-approved contract or consent decree and binds both the debtor and all the creditors); *In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990) (sophisticated creditor who allegedly did not receive notice of confirmation hearing but had actual notice of bankruptcy was not entitled to avoid binding effect of the reorganization

plan). The City is bound by the terms of Shannon's confirmed plan, and that plan treats its claim as unsecured.

The City cannot change its treatment under the confirmed plan by simply filing an amended claim after confirmation that asserts a secured claim. Its claim must instead be treated as unsecured. The City could amend its claim post-petition to claim a higher amount.[3] That claim would then be paid as an unsecured claim at whatever percentage unsecured creditors will ultimately receive under the plan, unless Shannon objected to the amended claim. Shannon has objected to the City's amended claim in a separate claim objection. He challenges the basis for the secured claim, but he also challenges the amount claimed. Those issues will be addressed in a separate opinion. The bottom line here is that the City is not entitled to payment as a secured creditor in this case because it filed an unsecured claim before confirmation and then accepted its treatment as an unsecured creditor by not objecting to the plan.

But that does not end the analysis. The City contends that despite the treatment of its claim as unsecured in the confirmed plan, it may keep Shannon's car and demand full payment of the amount owed because the automatic stay does not require it to return the car. The court must therefore determine how the stay operates in conjunction with the confirmed plan.

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[3] The Federal Rules of Bankruptcy Procedure set deadlines for filing proofs of claim but not for amending them. *See* Fed. R. Bankr. P. 3002(c). Although the rules of "relation back" generally apply to amendments of claims, those rules are not relevant here because the claims bar date for governmental entities like the City is 180 days after the petition date. Fed. R. Bankr. P. 3002(c)(1). The government bar date in this case is in September 2018, long after the City filed its second amended proof of claim.

III. The Automatic Stay

Although Shannon's confirmed plan treats the City's claim as unsecured and the City is bound by that plan, no plan provision requires the City to return his car. Only the automatic stay, 11 U.S.C. § 362(a), could do so. The question is whether it does.

A. Section 362(a)(3) and Thompson

Section 362(a)(3) provides that the filing of a bankruptcy petition operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." It is settled law in this circuit that a secured creditor holding the vehicle of a chapter 13 debtor on the petition date must immediately return it to the debtor upon the debtor's request. The creditor then bears the burden of filing a motion seeking adequate protection after it returns the vehicle to the debtor. *Thompson*, 566 F.3d at 703-08.

To reach this conclusion, the *Thompson* court began by analyzing the seminal Supreme Court decision in *U.S. v. Whiting Pools, Inc*, 462 U.S. 198 (1983). In *Whiting Pools*, the Court held that a secured creditor must return property of the debtor it had seized prepetition. The creditor can then seek adequate protection for its secured interest "rather than [relying on] the nonbankruptcy remedy of possession." *Id.* at 204. The Court explained that "[a]lthough Congress might have safeguarded the interests of secured creditors outright by excluding from the estate any property subject to a secured interest, it chose instead to include such property in the estate and to provide secured creditors with 'adequate protection' for their interests." *Id.* at 203-204. As a result, the "Bankruptcy Code pro-

vides secured creditors various rights, including the right to adequate protection, and *these rights replace the protection afforded by possession*." *Id.* at 207 (emphasis added). To hold otherwise "would deprive the bankruptcy estate of the assets and property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions." *Id.* at 208.

Relying partly on *Whiting Pools*, Thompson first held that a creditor who seizes a chapter 13 debtor's car pre-petition is "exercising control" over it for purposes of § 362(a)(3) and is therefore violating the automatic stay. The court reasoned that "[h]olding onto an asset, refusing to return it, and otherwise prohibiting a debtor's beneficial use of an asset all fit within this definition" of 'exercising control.'" 566 F.3d at 702. The court explained that the primary goal of a reorganization is "to group *all* the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts," and that "[a]n asset actively used by a debtor serves a greater purpose to both the debtor and his creditors than an asset sitting idle on a creditor's lot." *Id.*

Thompson next addressed whether a secured creditor is required to return a car to a chapter 13 debtor or whether the debtor has the burden of seeking turnover of the car. The court concluded that the stay requires the creditor to return the vehicle immediately and then seek adequate protection from the court if it so desires. The court reasoned that the Bankruptcy Code places the burden on the creditor either to seek adequate protection under § 363(e) or move to lift the stay under § 362(d)(1). *Id* at 703-04. The court noted that § 542(a) makes return of a seized asset "compulsory" and that §§ 362(a) and 542(a) work together "to draw back into

the estate a right of possession that is claimed by a lien creditor pursuant to a pre-petition seizure; the Code then substitutes 'adequate protection' for possession as one of the lien creditor's rights in the bankruptcy case. [Citation omitted]." *Id.* at 704. The court observed that if a creditor is allowed to retain possession, the burden imposed on the creditor under §§ 362(d) and 363(e) "is rendered meaningless—a creditor has no incentive to seek protection of an asset of which it already has possession." *Id.* For § 363(e) to have meaning, "Congress must have intended for the asset to be returned to the bankruptcy estate before the creditor seeks protection of its interest." *Id.* The court therefore held that a creditor must first return the asset to the bankruptcy estate. If the debtor fails to show that he can adequately protect the creditor's interest, the bankruptcy court then "is empowered to condition the right of the estate to keep possession of the asset on the provision of certain specified adequate protections to the creditor." *Id.*

Thompson rejected all of the secured lender's arguments for putting the burden on the debtor to move for turnover and demonstrate that he can provide adequate protection rather than requiring the creditor to return the car and seek adequate protection. *Id.* at 7. The court held that the principles of *Whiting Pools* apply equally in reorganizations under chapter 11 and chapter 13, and that *any* post-petition retention of a debtor's property violates the automatic stay and is sanctionable. *Id.* at 706. The court explained that the stay allows "a debtor free use of his assets while the court works with both the debtor and creditors to establish a rehabilitation and payment plan," and that leaving the debtor's car in the hands of a creditor "could hamper the debtor from either attending or find-

ing work, which is crucial for garnering the funds necessary to pay off his debts." *Id.* at 707.

Thompson, then, requires any secured creditor in possession of a debtor's vehicle to return it immediately and seek adequate protection if it wants protection beyond what the Code provides automatically. Although *Thompson* involved a consensual lien created by contract, the court also contemplated that its decision would apply to creditors holding possessory liens. The court cited and quoted *Colortran, Inc.*, 210 B.R. 823 (BAP 9th Cir. 1997), *rev'd on other grounds*, 165 F.3d 35 (9th Cir. 1998), which applied the principles of *Whiting Pools* to possessory liens.

In *Colortran*, Expeditors, a shipper for the debtor, claimed a possessory lien arising from a contract on goods it was shipping when Colortran filed a bankruptcy petition. Expeditors refused to release the goods without payment, asserting that possession was necessary to retain its lien. The court concluded that Expeditors violated the automatic stay by exercising control over property of the estate. The court described the issue as follows: "When the creditor's perfection of its security interest is dependent on possession of estate property, the question arises how the creditor can comply with §§ 362 and 542 and still protect its perfected security interest." 210 B.R. at 827-28. It then held:

> A creditor who requires possession in order to achieve or maintain perfection has the right to file a motion for relief from the stay and request adequate protection such that its lien rights are preserved. However, the creditor must tender the goods or face sanctions for violation of the stay. The creditor has a right to and may request terms of adequate protection

> while simultaneously returning the goods. However, while the creditor may suggest terms of adequate protection, it may not unilaterally condition the return of the property on its own determination of adequate protection.

Id.

This passage from *Colortran* was quoted in full in *Thompson*. 566 F.3d at 704. Thus, the City and all possessory lien holders were on notice that *Thompson* required them to return vehicles to chapter 13 debtors as soon as petitions are filed, as all lien holders must. The burden is then on the creditor to seek adequate protection of its lien interest. This permits the debtor to use his vehicle for the benefit of all creditors while protecting the lien interest of the lien holder. Here, by refusing to give back Shannon's car, the City has violated § 362(a)(3).

B. Section 362(a)(6)

As an *amicus* brief points out, the City has also violated the stay in another way: by demanding payment as a precondition to releasing Shannon's car. Section 362(a)(6) prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of a case under this title." 11 U.S.C. § 362(a)(6). This prohibition includes a passive refusal to cooperate with a debtor in order to coerce the payment of a pre-petition debt. *See, e.g.*, *In re Sportfame of Ohio, Inc. v. Wilson Sporting Goods Co. (In re Sportfame of Ohio, Inc.)*, 40 B.R. 47 (Bankr. N.D. Ohio 1984) (supplier's refusal to ship goods to debtor for cash unless debtor paid 100% of its pre-petition debt violated § 362(a)(6)); *In re Parkman*, 27 B.R. 460 (Bankr. N.D.

Ill. 1983) (University's refusal to allow debtor to attend classes until full payment of pre-petition debt violated § 362(a)(6)), *overruled on other grounds*, *Wilson v. Harris Trust & Sav. Bank*, 777 F.2d 1246 (7th Cir. 1985); *In re Haffner*, 25 B.R. 882 (Bankr. N.D. Ind. 1982) (Department of Agriculture's refusal to enter into transaction with debtor-farmer unless debtor paid its pre-petition debts violated § 362(a)(6)).

In the typical case involving a car that the City impounded pre-petition, the City will not release a debtor's car without a lump sum payment (often over $1,000) and treatment in the debtor's plan as a fully secured creditor for the remainder of the amount claimed. In this case, the City apparently did not realize it was holding Shannon's car until after confirmation and so did not demand payment from Shannon until after confirmation when Shannon asked for his car back.[4] That demand was an act to collect a pre-petition debt that violated § 362(a)(6).

The City argues that it did not violate § 362(a)(6) because it did not demand a lump sum payment in this case and, to the extent it demands such a payment in other cases, it is merely seeking adequate protection of its interest. This argument has no merit. Refusing to return Shannon's car unless he moves to amend his confirmed plan and pay the entire amount the City alleges he owes was an attempt to collect a pre-petition debt, whether the City demanded a lump sum up front or not. To the extent the City wanted adequate protection of its interest in the car, it had to file a motion with the court. Although the City is free to negotiate with a

[4] The City states that it relied on the Shannon's schedules, which listed the City as an unsecured creditor, instead of searching its own records.

debtor to reach agreement on the adequate protection it will seek, it cannot decide on its own what constitutes adequate protection and withhold the car until a debtor gives it what it demands. *See*, *e.g.*, *Whiting Pools*, 462 U.S. at 204; *Thompson*, 566 F.3d at 705; *In re Sharon*, 234 B.R. 676, 685 (BAP 6th Cir. 1999). That is an act to collect a debt in violation of § 362(a)(6).

C. Section 362(a)(4)

The City is also violating the stay in yet another way. Section 362(a)(4) prohibits "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4). A possessory lien may be enforced by the retention of possession. *See*, *e.g.*, *Bull v. Mitchell*, 114 Ill. App. 3d 177, 181, 448 N.E.2d 1016, 1019 (3rd Dist.1983). The City's continued possession of Shannon's car, combined with its demand for payment before it will release the car, is an act to enforce its lien. See In re Peake, No. 18 B 16544, 2018 WL 3946169, at *16 (Bankr. N.D. Ill. August 15, 2018); *In re McFarland*, No. 07 00058, 2008 WL 4550378 (Bankr. M.D. Fla. July 24, 2008) (§ 364(a)(4) violated by building code enforcement board that issued order assessing administrative fine every day until compliance); *In re Microfab, Inc.*, 105 B.R. 152, 160 (Bankr. D. Mass. 1989) (State violated § 364(a)(4) when it recorded an environmental "superlien" against the debtor's property); *In re Serbus*, 53 B.R. 187 (Bankr. D. Minn. 1985) (creation of possessory lien violates sec. 362(a)(4)). The City violates the automatic stay every day that the City refuses to return possession of the car to Shannon for the purpose of enforcing its lien.

Thus, by refusing to return Shannon's car to him, the City has violated at least three provisions in the au-

tomatic stay—§ 362(a)(3), § 362(a)(4), and § 362(a)(6)—and the dictates of *Thompson*.

IV. The City's Arguments to Avoid *Thompson*

The City seeks to avoid *Thompson* in several ways. None is persuasive.

A. Thompson Questioned

First, the City argues that *Thompson* was wrongly decided. Obviously, all lower courts in the circuit are bound by *Thompson*. *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004).[5]

The City also argues that a more recent Seventh Circuit decision, *In re Thorpe*, 881 F.3d 536 (7th Cir. 2018), conflicts with *Thompson*. This argument has no merit. The two decisions address different issues. As discussed above, *Thompson* confronted head-on the application of the automatic stay to a creditor holding a chapter 13 debtor's vehicle. *Thompson* held that the stay required the creditor to return the car to the debtor, and concluded that the debtor need not file an adversary proceeding seeking turnover. Instead, the burden was on the creditor to request adequate protection if it wanted to protect its interest in the car.

Thorpe, by contrast, did not address the automatic stay at all. In *Thorpe*, a chapter 7 trustee and the debt-

[5] It is worth noting that theories advanced in two articles cited by the City were persuasively rebutted in a recent article in the same publication. *See* Eugene Wedoff, *The Automatic Stay Under § 362(a)(3) – One More Time*, 38 No. 7 Bankruptcy Law Letter NL 1 (2018); Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay* (Part I), 33 No. 8 Bankruptcy Law Letter NL 1 (2013); Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay* (Part II), 33 No. 9 Bankruptcy Law Letter NL 1 (2013).

or's ex-spouse were battling over whether the debtor's interest in the marital home was property of the estate and therefore property the trustee could sell. The case involved state law property rights of spouses in a divorce proceeding filed before the bankruptcy case. The court held that under state law, any interest the debtor husband held in the property on the petition date was subject to the wife's interest that arose pre-petition under state law when the divorce petition was filed. The court reached the unremarkable conclusion that the bankruptcy estate included only the interests the debtor held under state law on the petition date, nothing more. The court noted that the trustee warned that this conclusion would undermine bankruptcy policy. *Id.* at 542. The court remarked that it had repeatedly held that the Bankruptcy Code is not intended to expand a debtor's rights beyond those existing at the commencement of the case under non-bankruptcy law. The court's statement, which the City quoted, reflects a fundamental bankruptcy principle set forth in Butner and countless other decisions. *Butner v. U.S.*, 440 U.S. 48, 99 S.Ct. 914 (1979). *Thorpe* has nothing to do with the automatic stay.

The City's argument that this decision somehow calls *Thompson* into question misuses a simple statement of long-standing bankruptcy law. The City contends that if it has to give Shannon's car back, it will lose a property right it had when the petition was filed, and Shannon will have gained one: possession. This argument confuses lien rights with ownership rights. A lien is defined in the Bankruptcy Code as a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). In other words, a lien is simply a means of securing payment of a debt; it does not confer owner-

ship of the property. *See*, *e.g.*, *In re Denby-Peterson*, 576 B.R. 66, 79 (Bankr. D.N.J. 2017) (enforcing debtor's ownership rights in a repossessed vehicle); *Hall v. Savary (In re Savary)*, 57 B.R. 298, 299 (Bankr. M.D. Fla.1986) (enforcing chapter 11 estate's ownership rights in a replevied tractor loader); *Troy Indus. Catering Service v. State of Michigan (In re Troy Indus. Catering Service)*, 2 B.R. 521, 523 (Bankr. E.D. Mich. 1980) (pre-bankruptcy seizure of restaurant equipment does not operate to transfer title). The City took possession of Shannon's car to perfect its lien, but the City did not become the owner of the vehicle when it did so. Possession was simply the means of perfecting the lien, not a bankruptcy-proof property right. As discussed above, *Whiting Pools* squarely rejected the City's contention that a secured creditor cannot be forced to give up possession of an asset the debtor still owns on the petition date. *Thorpe* in no way conflicts with the holding in *Thompson* that the automatic stay requires a secured creditor to return a chapter 13 debtor's car.

B. Section 362(b)(3)—Exception to Automatic Stay for Perfection of Certain Liens

Next, the City argues that *Thompson* does not require return of Shannon's car because the exception in § 362(b)(3) applies in this case. Section 362(b)(3) creates an exception to the automatic stay for "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title ... ." 11 U.S.C. § 362(b)(3). Section 546(b) limits a trustee's avoidance powers when a generally applicable law allows secured creditors to perfect or maintain perfection of liens against an earlier lien holder. Section 546(b)(1) provides:

> The rights and powers of a trustee under section 544, 545 and 549 of this title are subject to any generally applicable law that –
>
> > (A) permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection; or
> >
> > (B) provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

11 U.S.C. § 546(b)(1).

These provisions work together to permit a creditor to protect its lien from the avoiding powers of a trustee in limited circumstances after a bankruptcy is filed. They apply only if nonbankruptcy law would permit the later perfection or act to continue perfection to relate back to an earlier date before perfection, making the lien effective against parties who acquired an interest in the property before the lien was perfected (i.e., a chapter 7 trustee asserting avoiding powers of a hypothetical judgment creditor under § 544(b)(1), as discussed below). The classic example is a creditor with a security interest in goods under the Uniform Commercial Code ("UCC") that could be perfected by filing a financing statement during a specified period after the lien was created. If the financing statement is filed in that time, perfection relates back to the date the lien was created. *See, e.g.*, *In re Grede Foundries, Inc.*, 651 F.3d 786, 791 (7th Cir. 2011). The retroactive effect gives the creditor priority over other creditors who acquired an interest in the goods after the lien was

created but before it was perfected. The exception to the stay in § 362(b)(3) permits the creditor to file the financing statement post-petition to stop a trustee from avoiding what would otherwise be an unperfected lien.

The City argues that this exception applies to its rights under the Chicago municipal ordinances governing the impoundment of vehicles. The City raises over $260 million per year from parking and red light ticket violations, a significant portion of its budget.[6] As the City acknowledges, a number of years ago, debtors whose cars were seized and who were unable to pay the fines began to file chapter 13 bankruptcy cases. These debtors sought the release of their cars and to pay the fines over time through their chapter 13 plans. The City's initial practice was to release the cars under *Thompson*. City Response to Amicus Brief at 1. Then, in November 2016, the City adopted an ordinance giving itself what it calls a "possessory lien." The ordinance provides that any vehicle impounded by the City is subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle. Chi. Mun. Code § 9-92-080(f). The City then began refusing to return cars to chapter 13 debtors, arguing that it had a possessory lien that qualified for the exception to the stay in § 362(b)(3).

The City never specifically articulates why § 362(b)(3) applies in this case. It cites two decisions

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[6] *See* Lauren Nolan, Woodstock Institute, "Enforcing Inequality: Balancing Budgets on the Backs of the Poor," June 2018 ("tickets issued in 2016 brought in $264 million, which was seven percent of the City's operating budget.") The City apparently concedes that it raises $264 annually from tickets but it contends that this figure represents 2.6% of the City's budget. *See City of Chicago's Motion for Stay Pending Appeal*, n. 1, *In re Peake*, 18 B 16544, dkt. no. 47.

that agree with its position on this issue: *In re Avila*, 566 B.R. 558 (Bankr. N.D. Ill. 2017) and *City of Chicago v. Kennedy*, No. 17-5945, 2018 WL 2087453 (N.D. Ill. May 4, 2018). It then generally argues that § 362(b)(3) allows a creditor with a pre-petition lien to take any act to maintain perfection of that pre-petition lien without violating the stay. It states that "continued possession continues the perfection of that interest and thus is not a violation of the automatic say under § 362(b)(3)." City Resp. at 4. The City never parses the specific language of § 362(b)(3), § 546(b) on which it depends, or § 544 to which § 546(b) refers, nor does it explain how any specific provisions of the ordinance bring the City's actions within this exception to the stay.

Based on the citations of *Avila* and *Kennedy*, the court assumes the City contends that its ordinance allows its lien to prime the lien of prior lienholders, at least with respect to towing and storage costs (but not the actual fines and penalties owed by the vehicle owner). *See Avila*, 566 B.R. at 560. Section 2-14-132 of the Chicago Municipal Code allows the City to impound a vehicle until administrative penalties, towing charges, and storage fees are paid on all "outstanding final determinations" of parking and other violations. Chi. Mun. Code § 2-14-132. It also provides that a person with a lien recorded against a vehicle as to which foreclosure proceedings had begun can obtain possession if he pays the applicable towing and storage fees and agrees in writing to refund to the City the net proceeds of any foreclosure sale after all lien holders of record are paid. *Id.*, § 9-92-080(c). *Avila* held that because these provisions give the City priority over previous lien holders, they fall under § 546(b)(1) and therefore the exception to the automatic stay in § 362(b)(3) applies.

A closer look at these provisions, however, reveals that they do not apply here.

1. Section 362(b)(3) must be interpreted with § 546(b)

Section 362(b)(3) provides that the stay does not apply to any act to perfect or maintain or continue perfection of an interest in property to the extent that the trustee's rights and powers are subject to such perfection under § 546(b). Thus, the scope of the exception can only be determined by examining § 546(b).

Section 546(b) limits a trustee's avoiding powers under §§ 544, 545, and 549 of the Bankruptcy Code. The only one of these provisions that could potentially apply here is § 544.[7] It allows a trustee to avoid any interest in property that a judgment creditor holding a judgment lien that arose when the bankruptcy petition was filed could avoid under state law. 11 U.S.C. § 544(a)(1). Section 546(b)(1) provides that the trustee's rights and powers to avoid an interest in property under § 544 are "subject to"—meaning limited by—certain generally applicable laws that allow perfection of the interest to be effective against parties holding interests before the actual date of perfection.

2. Section 546(b)(1)(A)

In this case, a trustee's avoiding powers are not limited by ("subject to") the City's ordinances. Section 546(b)(1)(A) says that the trustee's power to avoid is limited by any generally applicable law that "permits

[7] Section 545 sets forth grounds for a trustee to avoid a statutory lien, none of which apply to the City's lien. Section 549 permits a trustee to avoid post-petition transfers of property. It also does not apply here.

perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection." 11 U.S.C. § 546(b)(1)(A) (emphasis added). This provision addresses the initial perfection of the lien. It does not apply here, though, because the City perfected its possessory lien pre-petition by taking possession of the car.

As the Seventh Circuit held when it interpreted § 363(b)(3) in conjunction with § 546(b)(1)(A), "the narrow purpose of this 'exception is to 'protect, in spite of the surprise intervention of [the] bankruptcy petition, those whom State law protects' by allowing [creditors] *to perfect* an interest they obtained before the bankruptcy proceedings began. (emphasis added)" *Reedsburg Utility Comm. v. Grede Foundries, Inc. (In re Grede Foundries, Inc.)*, 651 F.3d at 791 (citations omitted). The court further explained that "'if an interest holder against whom the trustee would have rights still has, under applicable nonbankruptcy law, as of the date of the petition, the opportunity to perfect his lien interest against an intervening interest holder, then he may perfect his interest against the trustee. (Citations omitted)." *Id.* The court noted that "[t]he paradigm § 546(b) case arises under the Uniform Commercial Code, where a perfected security interest relates back to either the filing of a financing statement or the date that the security interest attaches. ... If the creditor has a pre-petition unperfected interest in the debtor's property, this exception allows the creditor to take the steps necessary to perfect that interest because '[s]uch a *perfection* of a lien is not considered the *creation* of a lien." *Id.* (Citations omitted). Here, it is beyond question that the City already perfected its lien pre-petition by taking possession of Shannon's car. Section § 546(b)(1)(A) does not apply.

3. Section 546(b)(1)(B)

Section 546(b)(1)(B) does not apply either. That section provides that the rights of a trustee to avoid an interest in property under § 544 are subject to any generally applicable law that

> provides for the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation.

11 U.S.C. § 546(b)(1)(B). Section 362(b)(3) then lets a creditor take those acts permitted under generally applicable law to defeat the trustee's avoidance actions without violating the stay. It permits acts "to perfect, or to maintain or continue the perfection" of an interest, but only "*to the extent* that the trustee's rights and powers are *subject* to such perfection under § 546(b) ... ." 11 U.S.C. § 362(b)(3) (emphasis added).

The City's actions do not fall within these provisions for two reasons. First, the City's ordinance does not say anything about the continuation or maintenance of perfection. Second, the trustee could not avoid the City's lien interest under any circumstances so the section does not apply. The City does not keep debtors' cars so it can defend its liens against an attack by a trustee or anyone else. It keeps the cars to pressure debtors to pay the full outstanding debt despite the filing of a chapter 13 case, as it did in this case. That is exactly what *Thompson* prohibits.

a. City's Ordinances Do Not Fall Within § 546(b)(1)(B)

As noted above, the City adopted an ordinance in November 2016 creating a possessory lien for itself when it seized a vehicle for failure to pay traffic related fines and other charges. The 2016 ordinance declares: "Any vehicle impounded by the City or its designee shall be subject to a possessory lien in favor of the City in the amount required to obtain release of the vehicle." Chi. Mun. Code § 9-92-080(j).

Nothing in the ordinance or any other part of the Municipal Code addresses how long the lien continues or even whether possession is required to maintain it. The ordinance nowhere provides for the maintenance or continuation of the lien "being effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation."

In addition, as another decision recently concluded, the City's ordinances cannot fall within § 546(b)(1)(B) because there can be no "date on which action is taken to effect such maintenance or continuation" of the City's possessory lien. *In re Peake*, No. 18 B 16544, 2018 WL 3946169 (Bankr. N.D. Ill. August 15, 2018). This court agrees and adopts *Peake's* analysis on this issue. *See Peake*, 2018 WL 3946169 at *11-12.

Section 546(b)(1)(B) was intended to permit creditors to comply with laws like the UCC that require continuation statements or other notice to continue prepetition perfection of a security interest to prevent the initial perfection from lapsing. *See*, *e.g.*, 810 ILCS §§ 5/9-308(a), 5/9-310(a), 5/9-515; *In re Wilkinson*, No. 10 B 62223, 2012 WL 1192780, at *1 (Bankr. N.D.N.Y. Apr. 10, 2012); *Schafer v. Carolina Kitchen and Bath*,

Inc. (In re Orndorff Constr., Inc.), 394 B.R. 372, 376 (Bankr. M.D.N.C. 2008). *Whiting Pools*, decided in 1983, required a secured creditor with possession of collateral to return it to a debtor so the collateral can be used for the benefit of all creditors. Congress added § 546(b)(1)(B) to the Bankruptcy Code in 1994. Nothing in the language or in the legislative history suggests that it was intended to permit a creditor with a possessory lien perfected pre-petition to keep collateral and avoid complying with the automatic stay and the dictates of *Whiting Pools*.

b. Trustee Has No Right to Avoid City's Lien under § 544

Second, § 546(b)(1)(B) does not apply in any event because the trustee would have no right to avoid the City's possessory lien under § 544 in any scenario. The City had a valid, fully perfected possessory lien when Shannon filed his bankruptcy case. There is no avoidance action a trustee could bring under § 544 that would avoid the City's lien. The City therefore cannot rely on § 546(b)(2) to bring it within § 362(b)(3) to avoid complying with the automatic stay.

1. Trustee's Avoiding Powers Under § 544

Section 544, also known as the "strong arm provision," gives a trustee the rights of a hypothetical lien creditor, judgment creditor, or bona fide purchaser for value whose claim arose when the bankruptcy was filed. *See, e.g.*, *Musso v. Ostashko*, 468 F.3d 99, 104 (2nd Cir. 2006); *In re Wheaton Oaks Office Partners Ltd. P'ship*, 27 F.3d 1234, 1244 (7th Cir. 1994); *Zilkha Energy Co. v. Leighton*, 920 F.2d 1520, 1523 (10th Cir. 1990); *Reinbold v. Wells Fargo Bank, N.A. (In re Alvarado)*,

517 B.R. 880, 883 (Bankr. C.D. Ill. 2014); *In re Hunt's Pier Assoc.*, 154 B.R. 436, 449 (Bankr. E.D. Pa.1993). "Not only is a trustee empowered to stand in the shoes of a debtor to set aside transfers to third parties, but the fiction permits the trustee also to assume the guise of a creditor with a judgment against the debtor. Under that guise, the trustee may invoke whatever remedies provided by state law to judgment lien creditors to satisfy judgments against the debtor." *Zilkha Energy*, 920 F.2d at 1523. These remedies include avoiding liens that were not perfected on the petition date.

In this case, the City had a possessory lien that was fully perfected before the bankruptcy case was filed. Its lien would have a higher priority than the lien of a hypothetical judgment creditor whose rights arose as of the "commencement of the case." *See, e.g.*, *Stanziale v. Pratt & Whitney (In re Tower Air, Inc.)*, 319 B.R. 88, 99 (Bankr. D. Del. 2004) (a creditor with a fully perfected pre-petition possessory lien has priority over a trustee asserting hypothetical lien rights under §§ 544 and 545); *Plains Cotton Cooperative Assoc. v. Julien Co. (In re Julien Co.)*, 141 B.R. 359, 376 (Bankr. W.D. Tenn. 1992) (trustee's hypothetical judgment lien under § 544 would come ahead of party who failed to perfect possessory lien pre-petition); *In re DiPasquale*, 105 B.R. 187 (Bankr. D.R.I. 1989) (trustee could not avoid the pre-petition possessory lien of a creditor under §§ 544 or 545). Because the City's lien was perfected pre-petition when it took possession, a trustee could not assert any basis under § 544 for avoiding the City's lien.

2. No Avoidance Action Based on Loss of Possession

The City has not explained how it fits within § 546(b). But had the City contended it would lose its

lien rights if it gave up possession of the car post-petition so a trustee could then take action to avoid its lien under § 544, that contention would fail for two reasons. First, under non-bankruptcy law a creditor with a possessory lien who gives up possession of property involuntarily does not lose its possessory lien. Second, even if the City did somehow lose its lien by returning the car to the debtor post-petition, the trustee still would not have a valid avoidance action against it under § 544.

A. Effect of Involuntary Surrender of Possession

First, the City would not lose its lien if it gave up possession involuntarily to comply with the automatic stay. As the City acknowledges, courts have long held that a possessory lien is not lost when the holder gives up possession involuntarily. *See*, *e.g.*, *Steve Heathcott Arabians, LLC v. Griffith*, No. 16 – 0558, 2017 WL 6616371 (Ariz. Ct. App. Dec. 28, 2017) (plaintiff's possessory lien not defeated by defendant's covert removal of collateral); *Twin Falls County v. Coates*, 139 Idaho 442, 80 P.3d 1043 (2003) (the holders of a possessory lien did not lose their lien when the county took possession under its police power); *Air Ruidoso, Ltd., Inc. v. Executive Aviation Cntr., Inc.*, 122 N.M. 71, 920 P.2d 1025 (1996) (the holder of a possessory lien does not lose his priority when possession is taken without his consent); *Davis v. Sewell*, 696 S.W. 2d 247 (Tex. App. 1985) (a temporary loss of possession without consent does not defeat a possessory lien).

The rule is the same under the UCC, which codified common law. The UCC's general rule about perfection by possession is that "[i]f perfection of a security interest depends upon possession of the collateral by a se-

cured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession." 810 ILCS § 5/9-313(d). The exception is when circumstances outside the creditor's control interrupt possession. *Shapiro v. Family Bank of Hallandale*, 538 So. 2d 944 (Fla. Dist. Ct. App. 3rd Dist. 1989); *see also Edibles Corp. v. West Ontario Street Ltd. P'ship*, 273 Ill. App. 3d 550, 653 N.E.2d 45 (1st Dist. 1995) (a perfected possessory lien in a bank account was preserved even though the joint signatories to the account were both the secured party and the pledgor—the security agreement gave adequate notice to creditors that the pledgor no longer had unfettered control of the funds); *Raiton v. G & R Properties (In re Raiton)*, 139 B.R. 931, 937 (BAP 9th Cir. 1992) ("To hold that simple loss of possession by the secured party per se invalidates the security interest would invite uncertainty if not injustice: a secured creditor would automatically lose its security interest which is dependent on possession whenever collateral is misplaced, converted, or wrongfully surrendered by the bailee to whom the collateral is entrusted."); *Starr v. Bruce Farley Corp. (In re Bruce Farley Corp.)*, 612 F.2d 1197 (9th Cir. 1980).

Courts have uniformly held that loss of possession is involuntary when possession is lost through compliance with a court order. *See, e.g., Twin Sewer and Water, Inc. v. Midwest Bank and Trust Co.*, 308 Ill. App. 3d 662, 673, 720 N.E.2d 636, 644 (1st Dist. 1999) ("[T]he involuntary relinquishment of retained property pursuant to a court order does not result in a loss of the lien."); *In re Estate of Miller*, 197 Ill. App. 3d 67, 72, 556 N.E.2d 568, 572 (3rd Dist. 1990) (same). The same is true when possession is otherwise lost in connection with a judicial proceeding. *See, e.g., Braendle v. Braendle*, 46 Cal. App. 4th 1037, 54

Cal. Rptr. 2d 397 (Cal. Ct. App. 1996) (judgment creditor's writ of execution on stock certificates did not deprive the debtor's wife of her possessory lien on the certificates); *Nat'l Pawn Brokers Unlimited v. Osterman, Inc.*, 176 Wis.2d 418, 500 N.W.2d 407 (Wis. Ct. App. 1993) (police seizure of collateral pursuant to a search warrant did not interrupt the lienholders' possession for the purpose of their possessory liens); *Waterhouse v. Carolina Limousine Mfg., Inc.*, 96 N.C. App. 109, 384 S.E.2d 293 (1989) (sheriff's levy would not interrupt secured possessory interest but for party's failure to present the issue); *Walter E. Heller & Co., Inc. v. Salerno*, 362 A.2d 904, 907 (Conn. 1974) (security interest perfected by possession survived and had priority over a subsequent sheriff's levy).

Here, if the City gave up possession of Shannon's car to comply with *Thompson*, its possessory lien would not be lost because the surrender of the vehicle would be involuntary. The automatic stay operates like a court order, enjoining entities from pursuing their rights the same way a court-ordered injunction does. *See, e.g., Reed v. US Bank N.A.*, No. 14-cv-05437, 2015 WL 5042244 (N.D. Cal. August 25, 2015); *Johnston v. Parker (In re Johnston)*, 321 B.R. 262 (D. Ariz. 2005); *Thacker v. Etter (In re Thacker)*, 24 B.R. 835 (Bankr. S.D. Ohio 1982). If the City complied with *Thompson* by returning the car, it would involuntarily give up possession under the equivalent of a court-ordered injunction so its lien would be preserved under nonbankruptcy law. A trustee would have no basis to "avoid" the lien under § 544 based on the involuntary, postpetition loss of possession.

The important point here is that the City's ordinance is *not* what would prevent a trustee from avoiding its possessory lien. It is the law of possessory liens

that would stop the trustee and preserve the City's lien despite the involuntary loss of possession. At bottom, the City's ordinance is irrelevant. Because the avoiding powers of a trustee are not limited by—or "subject to"—the City's ordinance regarding maintaining or continuing perfection, the City cannot rely on § 362(b)(3) to justify its refusal to do what all other creditors with possession of a chapter 13 debtor's car must do: return it.

B. Section 546(b) Does Not Affect the Right to Possession

The key concept here is that § 546(b) does not create or preserve a creditor's right to possession at all; it only sets limits on the trustee's avoidance powers. This is made clear in § 546(b)(2). It addresses nonbankruptcy laws that require seizure to perfect a lien or to maintain or continue perfection of a lien when the lien was not perfected pre-petition.[8] When nonbankruptcy law

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[8] Section 546(b)(2) provides:

> (2) If –
>
> > (A) a law described in paragraph (1) requires seizure of such property or commencement of an action to accomplish such perfection, or maintenance or continuation of perfection of an interest in property; and
> >
> > (B) such property has not been seized or such action has not been commenced before the date of filing the petition;
>
> Such interest in property shall be perfected, or perfection of such interest shall be maintained or continued, by giving notice within the time fixed by such law for such seizure or such commencement.

11 U.S.C. § 546(b)(2).

requires "seizure" for a lien to be perfected (or for perfection to be maintained post-petition), but the property has not been seized pre-petition, the interest "shall" be perfected, or the perfection "shall" be continued, by issuing a notice, not by seizing the property. The notice is then sufficient to defeat any claim by a trustee asserting the rights of a judgment creditor that arose when the petition was filed. Section 362(b)(3), in turn, allows the notice to be issued without violating the automatic stay. That section operates, in effect, as a modification of § 546(b)(1)(A), which might otherwise allow a creditor to perfect a lien by seizing the debtor's property post-petition if it allowed the creditor to prime previous lien holders. It prevents the creditor from taking possession post-petition and allows the written notice to take the place of possession for purposes of any trustee avoidance action.

This provision illustrates the central purpose of § 546(b): to protect lien rights against avoidance by a trustee, not to protect rights to possession. Had Congress intended to allow creditors with possessory liens to keep possession of the collateral despite the automatic stay, it would have said so. Instead, in §§ 546(b) and 362(b)(3), Congress sought only to prevent a trustee from avoiding the lien of a creditor when only the intervening bankruptcy stopped the creditor from perfecting or continuing perfection of its lien. Congress wanted to prevent creditors from losing all lien rights because of an intervening bankruptcy, not from losing their right to possession.

The legislative history of § 546(b) makes this abundantly clear. "The Trustee's rights and powers under certain of the avoiding powers are limited by section 546 ... if an interest holder against whom the trustee would have rights still has, under applicable nonbank-

ruptcy law, and as of the date of the petition, the opportunity to perfect his lien against an intervening interest holder, then he may perfect his interest against the trustee." S. Rep. 95-989, 86, 1978 U.S.C.C.A.N. 5787, 5872. There is no mention in the legislative history of § 546(b)(1)(B) of any intent to permit possessory lienholders to keep possession of collateral.

C. Section 362(b)(3) Limited to Acts Necessary to Defeat Trustee

The City argues that the exception to the stay in § 362(b)(3) applies even if the City would retain its lien when it loses possession involuntarily. The City says that Congress took the question of whether the lien holder would have a common law defense to losing its lien "off the table by simply providing that a lienholder may take any act that it is allowed to take under non-bankruptcy law to continue perfection of its prepetition lien." City Resp. to *Amicus* Brief at 6-7.

In fact, the opposite is true. As discussed above, Congress expressly tied any action excepted from the stay to defeating the trustee's avoiding powers. Section 546(b)(1)(B) declares that "the rights and powers of a trustee under sections 544 ... are subject to" non-bankruptcy laws allowing maintenance or continuation of perfection to relate back. 11 U.S.C. § 546(b)(1)(B). Section 362(b)(3) then excepts from the stay any act to maintain or continue perfection but only "*to the extent* that the trustee's rights and powers are subject to such perfection under section 546(b) ... ." 11 U.S.C. § 362(b)(3) (emphasis added). The City's interpretation—that it can rely on the exception to the stay because its ordinance primes previous liens regardless of whether the ordinance creates a defense to an avoid-

ance action—writes out of both § 362(b)(3) and § 546(b) all those words tying the acts permitted to limits on the trustee's avoiding powers.

In a similar vein, the City argues that the doctrine that a lien holder does not give up its lien if it loses possession involuntarily cannot be invoked by debtors because it is intended as a shield for creditors, not a sword for debtors. But it is precisely because this doctrine is a shield, in fact a complete defense, to any avoidance action that the exception to the stay does not apply. This doctrine, not the City's ordinances, is what protects the City from a trustee's avoidance action based on a loss of post-petition possession.

D. City's Lien Preserved against Later Acquired Interests

The City next contends that even though an involuntary surrender does not eliminate a possessory lien, the surviving lien is not effective against an intervening third party who acquires an interest in the property without notice of the lien. For this proposition the City cites only a section of Corpus Juris Secundum on "Animals" and a 1939 New Mexico case involving a lien on livestock. In that case, the lienholder allowed livestock to be taken from his possession "over his objection" but failed to do anything to protect his lien until five months later, by which time an innocent third party had purchased the property. *Bell v. Dennis*, 43 N.M. 350, 93 P.2d 1003 (1939). The case is no help to the City. The New Mexico Supreme Court later recognized that when a possessory lien holder loses possession by force or fraud, "the possessory lien is not extinguished even though actual possession was lost." *Air Ruidoso, Ltd., Inc. v. Executive Aviation Cntr., Inc.*, 122 N.M. 71, 75, 920 P.2d 1025, 1029 (1996).

Here, the City would give up possession involuntarily in the context of a very public bankruptcy case. No party who acquired an interest in a debtor's car after the City surrendered it could be an "innocent" third party without notice of the City's lien. First, no interest in the car could be acquired while the bankruptcy case is pending. The automatic stay prohibits any act to create, perfect or enforce any lien against property of the estate. 11 U.S.C. § 362(a)(4). Any attempt to create such an interest would be void. *See*, *e.g.*, *In re Magallanez*, 403 B.R. 558, 561 (Bankr. N.D. Ill. 2009); *In re Serbus*, 53 B.R. 187, 189 (Bankr. D. Minn. 1985).

Second, the City's lien would be expressly preserved in the public record of the bankruptcy case, which would eliminate any potential claim to "innocent" status. The Bankruptcy Code requires a chapter 13 plan to preserve the lien of a secured creditor both during the pendency of the bankruptcy case and after bankruptcy if the case is converted to another chapter or dismissed without completion of the plan. Section 1325(a) governs the rights of all secured creditors in chapter 13. A plan cannot be confirmed under § 1325(a) unless one of the following conditions is met with respect to all secured claims: (1) the secured creditor consents, (2) the debtor surrenders the collateral, or (3) the plan contains certain required provisions to pay and protect the lien holder. Section 1325(a)(5)(B) requires the plan to provide that:

> (a) the holder of the claim *retains its lien* until the earlier of full payment of the underlying debt as determined by non-bankruptcy law or discharge, and
>
> (b) *if the case is dismissed or converted* without completion of the plan, *such lien shall also*

> *be retained by such holder* to the extent recognized by applicable non-bankruptcy law.

11 U.S.C. §§ 1325(a)(5)(B)(i)(I), (II).

Thus, the plan *must* provide that the City's lien is preserved if the case is dismissed before the plan is completed unless the secured creditor consents to other treatment. This required provision would give notice to the world of the continued existence of the City's lien if the bankruptcy case is dismissed before the debtor completes all payments.[9] The notice would eliminate any possibility that a party who later acquired rights in the vehicle could claim to be an innocent third party without notice of the City's lien. In fact, it would be much easier for a third party to get notice of the City's lien through a bankruptcy case than if the City had possession, which could not be determined from a public records search or any other generally available means.

The City may also give immediate notice of its preserved lien rights as soon as it learns of a bankruptcy case by filing a motion for adequate protection of its lien under § 363(e). It can assert its lien rights in the motion itself, which is a public record, and seek a court order confirming the preservation of its lien after the vehicle is returned to the debtor. This notice would eliminate any possibility of an innocent intervening creditor if a case is dismissed before a plan containing the language preserving the lien is filed. Thus, even if the City were correct that the involuntary loss of possession would not protect its lien as against intervening

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[9] Shannon's plan contains no such language in this case but the City did not object so it consented to its treatment as an unsecured creditor and the failure to include this language in the plan.

third parties without notice, the Bankruptcy Code provides various means that eliminate that possibility.[10]

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[10] To the extent *In re Peake* suggests that the City could lose its lien to a party who lacks actual notice of the City's lien and who acquires an interest in the vehicle after dismissal of the bankruptcy case, this court respectfully disagrees. A creditor who loses possession involuntarily does not lose its lien position in the property. This is true in bankruptcy, for all the reasons discussed above, and outside of bankruptcy. The City's interest would be higher in priority than any interest acquired in the property after dismissal of a bankruptcy case.

The authorities cited in *Peake* on this question, *see Peake*, 2018 WL 3946169 at *9, stand for the general proposition that a creditor with a possessory lien who loses possession may lose priority as to innocent third parties (although not as between the lienor and the debtor) because a third party would have no notice of the lien. But none of the cases cited discusses the exception that applies when the creditor loses possession involuntarily. The sole exception is *Yellow Mfg. Acceptance Corp. v. Bristol*, 193 Or. 24, 236 P.2d 939 (Or. 1951). *In Yellow Mfg.*, the court concluded that the lien is preserved when possession is lost involuntarily: "Priority of a possessory or nonpossessory lien over that of a chattel mortgage is not lost where the property is taken from the actual possession of the lien claimant *without his consent* by force or fraud, or where the property is taken from him involuntarily, as by a replevin action." 193 Or. at 41, 236 P.2d at 947 (emphasis in original).

The Restatement section cited in *Peake* also makes clear that when possession is lost involuntarily, the possessory lien trumps even a *bona fide* purchaser:

> The lien is a legal interest dependent upon possession. Where the lienor voluntarily gives up possession, his lien as least so far as it is a legal interest, is gone. The lienor ... does not lose his legal interest if he is deprived without his consent of his possession either by the bailor [owner] or a third person. If the lienor's surrender of possession is voluntary but obtained by fraud, the lienor can recover the chattel unless third person in the meantime have acquired interests. *Where possession is taken without the consent of the lienor, even a*

E. Possessory Liens Treated the Same as All Other Liens in Bankruptcy

The City also argues that if it gives up possession of a debtor's car, the lien is no longer possessory and therefore is an inadequate replacement for what it held pre-petition. It contends that its possessory lien would be replaced with an "equitable judicial lien." The City cites no authority for its contention that it would hold an "equitable judicial lien," nor does it describe the attributes of such a lien. The argument seems to assume that a possessory lien is materially different from other types of liens, and that the City cannot be deprived of that possessory right in bankrupty. But *Whiting Pools* squarely rejected the argument that nothing can substitute for possession:

> In effect, § 542 grants to the estate a possessory interest in certain property of the debtor that was not held by the debtor at the commencement of the proceedings. The Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession.

Whiting Pools, 462 U.S. at 207

Through this argument and all of its other arguments in this case, the City is really contending that possessory lien holders get better treatment in bankruptcy than other lien holders. Not so. As discussed above, all secured creditors in a chapter 13 case are en-

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> *bona fide purchaser is subject to the lien*, provided the chattel is non-negotiable.

Restatement (First) of Security § 80, Comment c. (1941).

titled to the same treatment. See 11 U.S.C. § 1325(a)(b)(B). Possession is simply the means by which the City perfected its lien on Shannon's car. The lien itself is a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37); Dircks v. Global Financial Credit, LLC (In re Dircks), 329 B.R. 687, 692 (Bankr. C.D. Ill. 2005); see U.S. v. Reed, 668 F.3d 978, 982 (8th Cir. 2012) ("A lien is a property right, usually a legal right or interest that a creditor has in a debtor's property"). This is true whether the lien is created by contract or statute and whether it is created or perfected by taking possession or some other means (such as filing a UCC financing statement). *Id.* at 983. The City's lien rights are neither superior to, nor treated any better than, the rights of any other secured creditor in chapter 13.

F. Decisions from Other Jurisdictions Construing § 362(b)(3)

The City cites several decisions from other jurisdictions for the general proposition that under §§ 362(b)(3) and 546(b)(1)(B), a creditor's post-petition possession of collateral to maintain perfection a possesory lien does not violate the automatic stay. *See, e.g., Hayden v. Wells (In re Hayden)*, 308 B.R. 428 (BAP 9th Cir. 2004); Bog*gan v. Hoff Ford, Inc. (In re Boggan)*, 251 B.R. 95 (BAP 9th Cir. 2000); *In re Ingram*, 508 B.R. 98 (Bankr. E.D. Wis. 2014). In each of these decisions, the court determined that a state law permitted the creditor to come ahead of previous lien holders and that it needed to maintain possession to keep its lien. None of these decisions analyzed the language in § 546(b) and § 362(b)(3) regarding limits on the trustee's avoiding powers. Nor did they address the

principle that the lien is preserved when possession is lost involuntarily, or that the Bankruptcy Code provides for the preservation of the liens after dismissal of a case without completion of the plan.[11]

3. No Trustee Avoidance Action In Any Event

Finally, the court notes that, as a technical matter, even if there were no law protecting the City from the loss of a lien (whether surrender was voluntary or involuntary), a trustee would have no avoidance action under § 544. The possessory lien would simply evaporate, and any subsequent lien holders would move up in their priority. There would be no lien to "avoid" under § 544. This is in contrast to a creditor who had a lien created by contract pre-petition but failed to perfect it post-petition under a nonbankruptcy law allowing the date of perfection to relate back to the date the lien was created. In that situation, the creditor would have a lien that continued to exist and the trustee could avoid under § 544 because the lien was never perfected. With a possessory lien, there would be no such remaining lien to avoid.

Thus, a trustee could not use any avoiding powers under § 544 to avoid the City's possessory lien. Since there are no avoiding powers of the trustee under § 544 that would be limited by—or "subject to"—the City's ordinances, the exception to the automatic stay in § 362(b)(3) does not apply.

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[11] The debtor in *Hayden* argued that the 9th Circuit BAP's holding in *Colortran* required the mechanics lien creditor to surrender the collateral. The *Hayden* court concluded that *Colortran* was not binding because it did not address the exception to the stay in § 362(b)(3). While that may be correct, the *Hayden* court did not consider the issues discussed above that require a different result here.

Section 362(b)(3) is a complicated provision that invokes § 546(b), which in turn invokes § 544. The City ignores these complications and simply asserts that because its ordinance lets it prime a lien of a previous lienholder for storage and towing costs, its lien falls within this very limited exception to the automatic stay. But the City cannot shoehorn itself into any provision of § 546(b) to qualify for § 362(b)(3), an exception intended only to let parties preserve their lien rights in bankruptcy, not to retain possession of the debtor's property. As *Peake* noted, courts must construe the automatic stay broadly to achieve the goals of reorganization, and must strictly construe exceptions to the stay. *See Peake*, 2018 WL 3946169, at *13; *In re Grede Foundries*, 651 F.3d at 790. Here, the City cannot use this narrow exception to deprive Shannon of use of an important asset for the benefit of all creditors.

C. The Police Power Exception to the Automatic Stay – § 362(b)(4)

The City also contends that the police power exception to the stay applies in this case. Section 362(b)(4) provides that the stay "under paragraph (1), (2), (3) or (6)" of § 362(a) does not apply to "an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power, including the enforcement of a judgment other than a money judgment ... ." 11 U.S.C. § 362(b)(4). This exception "has been construed narrowly to apply only to the enforcement of state laws affecting health, welfare, morals, and safety." *In re Sori*, 513 B.R. 728, 734 (Bankr. N.D. Ill. 2014) (citing *Cash Currency Exchange, Inc. v. Shine (In re Cash Currency Exchange, Inc.)*, 762 F.2d 542, 555 (7th Cir.1985)).

The City contends that keeping Shannon's car is an exercise of its police power to enforce traffic laws. This argument fails for three reasons. First, the City falls within the exception to the exception for collecting money judgments. Second, the exception does not apply to actions prohibited by § 362(a)(4). Finally, the City's purpose in this case is to collect money, which falls outside the police power exception.

Section 362(b)(4) expressly excludes from the exception the enforcement of a money judgment. See, *e.g.*, *United States v. Colasuonno*, 697 F.3d 164, 179 & n. 7 (2d Cir. 2012); *In re Halo Wireless, Inc.*, 684 F.3d 581, 587 (5th Cir. 2012); *N.L.R.B. v. P*I*E Nationwide, Inc.*, 923 F.2d 506, 512 & n. 5 (7th Cir. 1991); *Penn Terra Ltd. v. Department of Environmental Resources, Com. of Pa.*, 733 F.2d 267, 275 (3d Cir. 1984); *Peake*, 2018 WL 3946169. To determine whether the relief sought is a money judgment, courts consider whether the order or judgment requires payment. 2018 WL 3946169 at *16; *see In re First Alliance Mortg. Co.*, 263 B.R. 99, 107 (BAP 9th Cir. 2001); *In re Jester*, 344 B.R. 331, 337 (Bankr. E.D. Pa. 2006), *aff'd*, No. 06 – 02126, 2007 WL 781900 (E.D. Pa. Mar. 8, 2007). Here, the City has a money judgment that it is enforcing through impoundment of Shannon's car.

As the *Peake* court explained, an administrative process determines the City's right to payment under its traffic-related laws. This process results in a final determination of liability that permits the City to impound a car. The final determination is the administrative equivalent of a money judgment. *Peake*, 2018 WL 3946169 at *15. The City would be free to enforce this judgment through the usual state court processes for collecting a judgment but it can short-circuit that process by impounding a vehicle, as it has done in this case

and countless other cases. *Id.* at *3. Keeping Shannon's car and demanding full payment of the amount allegedly due is collecting on a money judgment. It is expressly excluded from the police power exception.

The police power exception also does not apply to acts prohibited by § 362(a)(4). It applies only to acts covered by § 362(a)(1), (2), (3), and (6). Section 362(a)(4) stays "any act to create, perfect, or enforce any lien against property of the estate; . . . ." 11 U.S.C. § 362(a)(4). As discussed above, the City violated § 362(a)(4) by continuing to enforce its lien against Shannon. There is no police power exception for the City's actions to enforce its lien. *See McFarland v. City of Jacksonville (In re McFarland)*, No. 07 00058, 2008 WL 4550378, at *4 (Bankr. M.D. Fla. July 24, 2008) ("although § 362(b)(4) permits a governmental unit to enforce its regulatory powers in certain circumstances, the creation, perfection or enforcement of a lien that is imposed by a governmental unit against property of the estate does not fall within the exception"); *In re Arsi*, 354 B.R. 770, 773 (Bankr. D.S.C. 2006) (subsection 4 of § 362(a) and the prohibition against the enforcement of a monetary judgment remain to constrain the exercise of police power in a bankruptcy case); *In re Microfab, Inc.*, 105 B.R. 152, 160 (Bankr. D. Mass. 1989) (Commonwealth of Massachusetts may not record an environmental "superlien" against the debtor's property because § 362(b)(4) does not include creation, perfection, or enforcement of lien in the police power exception).

Finally, the City would not fall within the exception in any event. Actions by governments to collect debts generally do not fall within the police power exception. Courts typically employ two tests to determine whether the exception applies: the "pecuniary purpose" test and the "public policy" test:

> Under the pecuniary purpose test, reviewing courts focus on whether the governmental proceeding relates primarily to the protection of the government's pecuniary interest in the debtor's property, and not to matters of public safety [or public policy]. Those proceedings which relate primarily to matters of public safety are excepted from the stay. Under the public policy test, reviewing courts must distinguish between proceedings that adjudicate private rights and those that effectuate public policy. Those proceedings that effectuate public policy are excepted from the stay.

Chao v. BDK Indus., L.L.C., 296 B.R. 165, 167 68 (C.D. Ill. 2003) (quoting *Chao v. Hosp. Staffing Servs., Inc.*, 270 F.3d 374, 385 86 (6th Cir.2001)); *see Cross v. City of Chicago (In re Cross)*, 584 B.R. 833 (Bankr. N.D. Ill. 2018); *Sori*, 513 B.R. 728. Both tests, as the City correctly notes, are means to ascertain the purpose of the act in question.

In this case, the City's purpose in impounding Shannon's vehicle is pecuniary. The City uses impoundment to collect fines and other charges owed for traffic-related violations. There is no other purpose to the seizure of the vehicle, which the ordinance ties directly and solely to the payment of money. Vehicles are released only upon the payment of all the money owed. It makes no difference what types of violations have been assessed against the vehicle owner. The ordinances do not distinguish between violations in which a driver has done something unsafe and violations of laws that are strictly money-raisers, like failing to pay for parking. In fact, even when a driver has done something unsafe, impounding the car does not prevent him from driving any car, it just prevents him from driving

the impounded car. The City has other remedies for taking unsafe drivers off the road. This ordinance does not do that. It is intended to collect money.

The City's own words reveal this intent. In a 2017 amendment to the Chicago Municipal Code that created a possessory lien in immobilized (booted) vehicles, the City described the 2016 ordinance creating the posessory lien in impounded vehicles this way: "WHEREAS, in response to a growing practice of individuals attempting to escape financial liability for their immobilized or impounded vehicles, in November of 2016, the [City Council] amended the Municipal Code ... to clarify that the city has a possessory lien on those vehicles." Ordinance, transmitted to the City Council of Chicago by the Committee on Budget and Government Operations on June 28, 2017 and approved by the Corporation Counsel and Mayor Emanuel on July 7, 2017, Exhibit A to debtor's reply brief in *In re George Peake*, No. 18 B 16544, dkt. no. 23. Thus, the City acknowledged that the 2016 ordinance creating a possessory lien was enacted to stop individuals *attempting to escape financial liability*. The 2017 ordinance was then expressly enacted to eliminate a "loophole" for booted cars because the 2016 ordinance had the "unintended consequence that the owners of vehicles that are immobilized in place [also known as "booted"] but not impounded, continue to avail themselves of a loophole and thereby *avoid paying monies due to the City* ... ." *Id.* (emphasis added). By the City's own admission, the collection of fines and the impoundment process is all about money.

The City's conduct in this case reflects this purpose of collecting money. The City first filed an unsecured claim seeking payment of $3,160 for "parking tickets," based on a list of tickets issued to three license plates over 19 years. When Shannon demanded his car back

after confirmation, the City refused because it claimed Shannon owed it money, not because of any public safety issues. The City would not release the car unless Shannon amended the plan to pay the $5,600 amount asserted in the City's May 2 amended claim for "parking tickets." It was not until Shannon filed his motion seeking sanctions that the City raised the police power exception. It argued that it uses impoundment as part of its scheme of "general deterrence" to ensure compliance with traffic laws. Only later in the City's response to an *amicus* brief did it contend that Shannon's violations constitute matters related to public safety, include three speeding violations and driving on a suspended license. These allegations do not change the City's stated purpose and that impoundment is a collection mechanism for the City. The impoundment program raises hundreds of millions of dollar for the City, enough that the City Council was motivated to take action to stop debtors in bankruptcy from obtaining their cars back without paying the City in full.

The cases cited by the City to support its assertion that Chicago's vehicle-related laws, which generate the massive amount of fines the City collects, are about safety and welfare, not money, are not on point or persuasive. Two of the cases, *Valle v. Montgomery Co. (In re Valle)*, 456 B.R. 228 (Bankr. D. Md. 2011) and *In re Thomas*, 355 B.R. 166 (N.D. Calif. 2006), analyze parking regulations from other jurisdictions and are not persuasive. Another case considered the actions of a local government that obtained a TRO against the debtor for alleged building code violations at a horror theme park, not vehicle-related fines. *Spookyworld, Inc. v. Town of Berlin (In re Spookyworld, Inc.)*, 346 F.3d 1 (1st Cir. 2003). Most of the cases cited from the Northern District of Illinois involve due process chal-

lenges to the City's parking regulations or penalties, not the police power exception to the stay. *Robledo v. City of Chicago*, 778 F. Supp. 2d 887 (N.D. Ill. 2011); *Walter v. City of Chicago*, No. 91-6333, 1992 WL 88457 (N.D. Ill. April 27, 1992); *Grant v. City of Chicago*, 594 F. Supp. 1441 (N.D. Ill. 1984); *Pempek v. Edgar*, 603 F. Supp. 495 (N.D. Ill. 1984). One of the cases from this jurisdiction analyzes the dischargeability of a fine "for the benefit of a governmental unit" under 11 U.S.C. § 523(a)(7), also a differentstandard from the one that applies here. *City of Chicago v. Gallagher (In re Gallagher)*, 71 B.R. 138 (Bankr. N.D. Ill. 1987.) Its analysis is not persuasive.

As the City says in many ways in its briefs on this motion, it wants to keep Shannon's car to ensure that he pays the money. Its possessory lien, which exists solely to collect money, is not protected by the police power exception.

V. Conclusion

The City is bound by the terms of Shannon's confirmed plan. Its claim will be paid as unsecured in an amount to be determined in connection with Shannon's claim objection. The automatic stay requires the City to return Shannon's car immediately. The City is free to file a motion seeking adequate protection of its lien interest. A separate order requiring the City to immediately return Shannon's car to him will be issued.

Dated: September 7, 2018

ENTERED:

/s/ Carol A. Doyle

Carol A. Doyle
United States Bankruptcy Judge

APPENDIX F

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Bankr. No. 17-25141
Chapter 13
Judge Jacqueline Cox

IN RE JASON HOWARD SCOTT,

Debtor.

Filed April 16, 2018

Order Imposing Sanctions on Rule to Show Cause

As explained in this Court's Memorandum Opinion dated April 16, 2018, the City of Chicago is fined $50.00 a day for violating the automatic stay.

Dated: April 16, 2018 ENTERED:

/s/ Jacqueline P. Cox
Jacqueline P. Cox
United States Bankruptcy Judge

APPENDIX G

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 18 BK 02860
Chapter 13
Judge: Hon. Jack B. Schmetterer

IN RE: ROBBIN L. FULTON,

Debtor.

Filed May 25, 2018

ORDER ON (A) DEBTOR'S MOTION FOR SANCTIONS AGAINST CITY OF CHICAGO FOR VIOLATION OF AUTOMATIC STAY AND FOR TURNOVER [DKT NO. 23] AND (B) DEBTOR'S OBJECTION TO CLAIM #1 OF THE CITY OF CHICAGO [DKT. NO. 28]

For the reasons articulated in the Memorandum Opinion on Debtor's Motion for Sanctions against City of Chicago for Violation of Automatic Stay and for Turnover and Debtor's Objection to Claim #1 of the City of Chicago, entered concurrently herewith, IT IS HEREBY ORDERED AND ADJUDGED THAT:

1. Debtor's Motion for Sanctions and Turnover is **granted**.
2. The City of Chicago must turnover possession of Debtor's vehicle no later than 10 a.m. on Tuesday, May 29, 2018.

3. For each day or partial day thereafter that the City of Chicago refuses and fails to comply with this order by not releasing Debtor's vehicle, it must pay Debtor $100.00 so as to enable Debtor to obtain other transportation. Jurisdiction is reserved to enter judgment thereon.

4. Debtor's Objection to Claim #1 of the City of Chicago is **sustained** to the extent that the City asserted to be a secured creditor.

5. Debtor's Objection to Claim #1 of the City of Chicago is **overruled** to the extent that Debtor objects to the amount of the City's claim.

6. Status is set for 1:30 p.m. on Tuesday, May 29, 2018 in Courtroom 682.

ENTER:

/s/ Jack B. Schmetterer
Jack B. Schmetterer
United States Bankruptcy Judge

Dated this 25th day of May, 2018

APPENDIX H

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BK No.: 18-16544
Chapter 13
Honorable Deborah L. Thorne

IN RE: GEORGE PEAKE
Debtor(s).

Filed August 15, 2018

Order Granting Debtor's Motion for Turnover

For the reasons expressed in this court's accompanying Memorandum Opinion, it is hereby ORDERED, ADJUDGED, and DECREED that:

(1) The Debtor's Motion is GRANTED;
(2) The City shall release the Debtor's 2007 Lincoln MKZ to the Debtor by 5:00 PM on August 17, 2018.

Enter:

/s/ Deborah L. Thorne
Honorable Deborah L. Thorne
United States Bankruptcy Judge

Dated: 8/15/2018

Prepared by:

APPENDIX I

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 18 B 04116
Judge Carol A. Doyle
Chapter 13

IN RE TIMOTHY SHANNON,

Debtor.

Filed September 7, 2018

ORDER GRANTING MOTION FOR SANCTIONS FOR WILLFUL VIOLATION OF THE AUTOMATIC STAY

IT IS HEREBY ORDERED THAT:

For the reasons stated in the Memorandum Opinion entered September 7, 2018, Shannon's motion for sanctions for willful violation of the automatic stay is granted. The City of Chicago is ordered to release Shannon's vehicle to him immediately.

Dated: September 7, 2018

ENTERED:
/s/ Carol A. Doyle
Carol A. Doyle
United States Bankruptcy Judge

APPENDIX J

RELEVANT STATUTORY PROVISIONS

11 U.S.C. § 361

§ 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

11 U.S.C. § 362

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) 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 under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(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 or organization's police or regulatory power;

[(5) Repealed. Pub.L. 105-277, Div. I, Title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-886]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or oth-

er credit enhancement forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of 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;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of

trust, or other security interest in a fishing facility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subsequent case under this title, may move for relief from such order based upon changed circum-

stances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for

the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

(c) Except as provided in subsections (d), (e), (f), and (h) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as **required** by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property,

an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is an individual,

the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no long-

er be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case

commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

> (A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and
>
> (B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent

of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

> **(i)** subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and
>
> **(ii)** the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

> **(A)** subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be

required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

> **(i)** relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business

debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

11 U.S.C. § 363

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(i) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course

of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of prop-

erty by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—

(1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) such entity consents;

(3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

(g) Notwithstanding subsection (f) of this section, the trustee may sell property under subsection (b) or (c) of

this section free and clear of any vested or contingent right in the nature of dower or curtesy.

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the

debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

(k) At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

(l) Subject to the provisions of section 365, the trustee may use, sell, or lease property under subsection (b) or (c) of this section, or a plan under chapter 11, 12, or 13 of this title may provide for the use, sale, or lease of property, notwithstanding any provision in a contract, a lease, or applicable law that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title concerning the debtor, or on the appointment of or the taking possession by a trustee in a case under this title or a custodian, and that effects, or gives an option to effect, a forfeiture, modification, or termination of the debtor's interest in such property.

(m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

(n) The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

(o) Notwithstanding subsection (f), if a person purchases any interest in a consumer credit transaction that is subject to the Truth in Lending Act or any interest in a consumer credit contract (as defined in section 433.1 of title 16 of the Code of Federal Regulations (January 1, 2004), as amended from time to time), and if such interest is purchased through a sale under this section, then such person shall remain subject to all claims and defenses that are related to such consumer credit transaction or such consumer credit contract, to the same extent as such person would be subject to such claims and defenses of the consumer had such interest been purchased at a sale not under this section.

(p) In any hearing under this section—

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.

11 U.S.C. § 541

§ 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes

entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that—

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or

(B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this title;

(5) funds placed in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(e) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,825[1];

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with section 529(b)(1)(A) of the Internal Revenue Code of 1986 under a qualified State tuition program (as defined in section 529(b)(1) of such Code) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,825[1];

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;

(II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or

(III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2); or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5, any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where—

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b);

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made—

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor),

unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition; or

(10) funds placed in an account of a qualified ABLE program (as defined in section 529A(b) of the Internal Revenue Code of 1986) not later than 365 days before the date of the filing of the petition in a case under this title, but—

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds—

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $6,825[1].

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

(e) In determining whether any of the relationships specified in paragraph (5)(A) or (6)(A) of subsection (b) exists, a legally adopted child of an individual (and a child who is a member of an individual's household, if placed with such individual by an authorized placement agency for legal adoption by such individual), or a foster child of an individual (if such child has as the child's principal place of abode the home of the debtor and is a member of the debtor's household) shall be treated as a child of such individual by blood.

(f) Notwithstanding any other provision of this title, property that is held by a debtor that is a corporation described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code may be transferred to an entity that is not such a corporation, but only under the same conditions as would apply if the debtor had not filed a case under this title.

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[1] Dollar amount as adjusted by the Judicial Conference of the United States. See Adjustment of Dollar Amounts notes set out under this section and 11 U.S.C.A. § 104.

11 U.S.C. § 542

§ 542. Turnover of property to the estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to

pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee.

Federal Rule of Bankruptcy Procedure 7001

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under §554(b) or §725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, but not a proceeding under Rule 3012 or Rule 4003(d);

(3) a proceeding to obtain approval under §363(h) for the sale of both the interest of the estate and of a co-owner in property;

(4) a proceeding to object to or revoke a discharge, other than an objection to discharge under §§727(a)(8), 1 (a)(9), or 1328(f);

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan;

(6) a proceeding to determine the dischargeability of a debt;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for subordination;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing; or

(10) a proceeding to determine a claim or cause of action removed under 28 U.S.C. §1452.