No. 19-357

IN THE
Supreme Court of the United States

CITY OF CHICAGO,

Petitioner,

v.

ROBIN L. FULTON, GEORGE PEAKE AND TIMOTHY SHANNON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF BANKRUPTCY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are bankruptcy law professors affiliated with various institutions identified in Appendix A. *Amici* file this brief out of a concern that the rule urged by Petitioner, City of Chicago, would fundamentally impair the ability of debtors to reorganize under both Chapter 11 and Chapter 13.

This case arises in the context of a dispute involving Chapter 13 debtors whose vehicles were impounded by the City of Chicago before the respondent-debtors filed their bankruptcy cases. After the filings, the City then refused to turn over the vehicles, thereby exercising control over "property of the estate" and harming the debtors' ability to earn a living and effectuate their bankruptcy plans. This refusal to turn over the vehicles constitutes a violation of the bankruptcy automatic stay. 11 U.S.C. § 362(a)(3).

But this case is far more consequential than a case involving consumer debtors and their vehicles. The automatic stay and the associated "turnover" provision, 11 U.S.C. § 542(a), require any third party—including creditors—to surrender any property of the estate that is in their possession when a bankruptcy case is filed. This provision applies to all bankruptcy cases, not just disputes involving the municipal impoundment of consumer debtors'

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[1] Pursuant to Supreme Court Rule 37, counsel of record for petitioner and respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel contributed any money to fund its preparation or submission.

vehicles. The turnover obligation found in § 542 is the linchpin that permits rehabilitation and reorganization to function; if creditors can seize debtors' property on the eve of bankruptcy, and subsequently retain the property pending the judicial resolution of their demand for adequate protection, creditors would effectively be able to destroy all prospects of rehabilitation. Adopting the position urged by the City would result in serious adverse consequences for the Chapter 11 and 13 reorganization systems.

This Court's earlier ruling in *United States v. Whiting Pools Inc.*, 462 U.S. 198, 205 (1983) prohibits exactly this kind of outcome. In *Whiting Pools* the Court held that § 542(a) requires a secured creditor that has seized property of a debtor prior to the filing of a bankruptcy case to turn over the property to the bankruptcy estate prior to any adjudication of adequate protection. The key lesson articulated in *Whiting Pools* is that if a creditor could seize estate property pre-bankruptcy, and then not have to surrender it once the debtor filed for bankruptcy, there would be only a "small chance" for the debtor's reorganization to succeed. *Id.* at 203.

Unless the *Whiting Pools* rule is enforced through the automatic stay, as the decision below requires, the turnover will simply come too late for many debtors seeking to reorganize. Under the rule urged by the City, secured creditors can retain possession of the debtor's property until the bankruptcy court resolves their demands for adequate protection against depreciation to the property which they seized and are holding. This rule undermines a debtor's reorganization prospects and destroys value for other creditors. By the time the debtor recovers its property, the going concern value of its business will likely be destroyed, leaving only the option of liquidation. The City's statutory interpretation would often render Chapter 11 reorganizations unworkable. In order to preserve the viability of Chapter 11, the Court must reject the City's argument.

SUMMARY OF ARGUMENT

The question presented in this case is whether the City's refusal to turn over the debtors' vehicles which it had seized prior to the filing of the bankruptcy cases was a violation of the automatic stay under § 362(a)(3), on the grounds that this refusal constituted an act to exercise control over property of the bankruptcy estate. The answer must be yes. Any other rule would cause incalculable harm to the ability of debtors to reorganize under the Bankruptcy Code.

As the City notes, the issue is not whether there is ultimately a turnover obligation for a creditor in possession of estate property. Instead, the question is "only *when* turnover must occur: immediately upon the filing of the bankruptcy petition, or after resolution of any disputes and the provision of adequate protection in a turnover proceeding under § 542(a)." Pet. Br. 44.

The timing of turnover is critical because time is of the essence in a Chapter 11 reorganization. If a debtor is deprived of key assets needed for operations it cannot carry out its business. This means it cannot fulfill its existing contractual obligations, and it is unlikely to obtain future contracts. The debtor's business will cease to be viable, so the debtor will have to liquidate. Even a small delay in regaining control of key assets can be fatal.

Whiting Pools addressed this critical problem of ensuring that a debtor is able to function as an operating business immediately upon its filing for bankruptcy. This Court held that when a secured creditor has seized estate property before a bankruptcy filing, then upon the bankruptcy filing: (a) such property remains property of the bankruptcy estate; (b) the creditor no longer has the state-law *possessory right* that it might have had pre-bankruptcy; (c) the creditor must turn over the estate property to the debtor immediately and without pre-condition; and (d) the creditor may then invoke certain Code based protections in lieu of retaining possession. *Whiting Pools* is correctly rooted in the text of § 541 (describing property of the estate) and § 542(a) (requiring the turnover of property of the estate).

Whiting Pools balanced the obligation to return estate property by also holding that creditors may "seek protection of [their] interest according to congressionally established bankruptcy procedures, rather than by withholding property [of the estate]." 462 U.S. at 212. These congressionally established procedures are set forth in §§ 361 and 362. Adequate protection is not automatic, however. A creditor must pursue it by motion, and must bear the burden of proof that it has a valid lien and interest in the debtor's property. If not sought, adequate protection is waived.

Section 362(a)(3) implements the core rationale set forth in *Whiting Pools* by making it a violation of the automatic stay for a creditor to disregard the shift in possessory right by retaining property of the estate after the bankruptcy case has begun. This provision is unambiguous. The majority of the circuit courts have found that a creditor's refusal to deliver estate property as required by § 542 is a violation of the automatic stay. Whether the creditor's conduct is viewed as "active" or "passive" is immaterial. The refusal to deliver suffices.

The City's appeal disputes each of these long-standing, crucial understandings of bankruptcy history, law, and practice. First, the City argues that § 542 is supposedly not "self-executing." By this the City means that § 542 does not create a duty to turn over property of the estate unless and until a creditor has, at its discretion, obtained a full adjudication of its right to adequate protection—regardless of how long this might take.

The City's argument—that adequate protection must precede turnover—is in total derogation of the adequate protection regime, which: (1) plainly requires a creditor to seek adequate protection by filing a motion, and (2) does *not* limit the estate's right to possession of its property until the creditor decides to invoke whatever adequate protection rights it might have. Here, the City delayed by intentionally *never* invoking whatever right it might have had to adequate protection. As a result, turnover of the debtors' property was delayed for several months, thus demonstrating precisely the kind of harm that §§ 542 and 362(a)(3) seek to prevent.

The City's proposed rule will have grave consequences for how Chapter 11 functions in a business case. Creditors will almost certainly decide to seize collateral of a failing company days or weeks before a possible bankruptcy filing, and then refuse to surrender the debtor's property unless and until its demands for adequate protection are satisfied—whether such demands are fair or not. If deprived of its key business assets, a debtor will be unable to honor its contractual obligations and will find it difficult, if not impossible, to obtain new business. The City's proposed rule is an economic death sentence for businesses seeking to reorganize under Chapter 11.

The same is true in a Chapter 13 case. The City's refusal to turn over debtors' vehicles—especially to debtors who rely on their own vehicle for transportation to their jobs—deeply impairs debtors' primary hope of successfully reorganizing. Without their vehicles and primary mode of transportation, debtors will face a substantial risk of losing their job(s), and may then be prevented from performing their monetary obligations under a bankruptcy plan, and will thus lose the opportunity for a discharge as well.

Second, the City argues that if this Court were to sustain the long-standing majority rule by finding that § 542 is self-executing, this Court would effectuate a major change in pre-Code law. In fact, the exact opposite is true.

Since at least 1935, the courts and Congress have been well aware of the problem of creditors retaining seized collateral after a bankruptcy filing. As a result, they uniformly recognized that unless creditors were obligated to return estate property immediately, there would be a "small chance" of reorganization. Indeed, the proper historical view of the statutory history shows a steady progression by the Court and Congress to enlarge the protection of property of the estate, starting as early as 1935 with the Court's decision in *Continental Illinois National Bank & Trust Co. v. Chicago Rock Island & Pacific Railway Co.*, 294 U.S. 648 (1935), and building on *Reconstruction Finance Corp. v. Kaplan*, 185 F.2d 791 (1st Cir. 1950), and then *Whiting Pools* in 1983.

The statutory roots of turnover have evolved from § 257 of the Bankruptcy Act of 1898 to the modern § 542 of the Bankruptcy Code of 1978. Congress has steadily enlarged the turnover obligation. First, Congress created a right in a debtor to "immediate possession" of estate property in the hands of third persons, and then it enlarged that right in § 542 by requiring "delivery" of the property to the estate. The Court in *Whiting Pools* correctly reviewed this statutory development and ensured the proper functioning of bankruptcy by declaring that property of the estate includes the possessory interest in property held by a third party. The true "sea change" which the City bemoans would actually result from *its* own proposed outcome.

Third, the City attempts to avoid the plain meaning of § 362(a)(3) by arguing that there must be an "act" of "exercising control" beyond the City's mere refusal to turn over estate property. Yet, the cases from which the turnover obligation has developed (*Reconstruction Finance Corp. v. Kaplan*, *Whiting Pools*, and others) are *not* predicated on some additional form of conduct beyond the refusal to turn over estate property. It is the refusal to turn over estate property itself that harmfully interferes with reorganization and rehabilitation; more is not needed.

The City further argues that "ample evidence" supposedly exists in the legislative history indicating that Congress intended only a "technical change" without intending to change the practice that supposedly existed before the amendments to § 362(a)(3). Cert. Pet. 23. This argument is based on a misreading of the 1980 and 1984 amendments. In the 1980 (proposed) amendments, where the key language first appeared, Congress made numerous substantive changes—as well as some "technical" changes—but in most cases it distinguished these two types of changes. For example, changes made to the stay provisions are undeniably substantive. They plainly provided an intent to protect property obtained pre-bankruptcy from being subject to creditor control after the bankruptcy case commenced. The 1984 amendments carried forward this very same language.

Accordingly, and with good reason, most courts—looking to the plain meaning of § 362(a)(3)—view the addition of the "exercise control" language not as an insignificant, "technical change," but as a substantive change enlarging the protection offered by the automatic stay to prevent exactly what occurred in this case.

The City's alternative reading, that Congress intended for the amendment to § 362(a)(3) to apply *only* to intangible property is extreme and readily dismissed; further, this alternative reading is deeply inconsistent with the City's argument that the changes were merely technical. The Code's definition of property of the estate, the relevant House Reports, and the relevant case law make it abundantly clear that intangible property has always been embraced within the definition of property of the estate and hence within the protections provided by the automatic stay.

The rule urged by the City would undermine the viability of the Chapter 13 process for debtors who depend on their vehicles to maintain their livelihoods, and likewise would prevent many businesses from being able to reorganize under Chapter 11. Pre-Code cases recognized that permitting the retention of seized collateral would likely bring a debtor's business to a "standstill" and that it was critical that secured creditors "get[] out of the driver's seat." *Kaplan*, 185 F.2d at 796–97. The Court in *Whiting Pools* repeatedly emphasized this potential harm to commercial reorganizations, noting that a contrary rule—one which permitted a creditor to retain seized collateral—would mean there would be "small chance" of any reorganization under Chapter 11. 462 U.S. at 203. The same is true here.

ARGUMENT

I. DELAYED TURNOVER OF PROPERTY OF THE ESTATE FRUSTRATES THE REHABILITATION GOALS OF THE BANKRUPTCY CODE FOR BOTH CHAPTER 13 AND CHAPTER 11 DEBTORS.

For many consumer debtors, a vehicle is an absolute necessity for earning a living.[2] Alternative transportation arrangements are often unavailable or infeasible, especially outside of major urban centers. In being deprived of the use of their vehicle, consumer debtors may consequently be deprived of their livelihoods. Failure of creditors to immediately turn over impounded vehicles undermines the ability of consumers to succeed in their Chapter 13 repayment plans.

However, this case is about far more than impounded vehicles. The rule urged by the City would apply to any creditor seeking to retain possession or control of any property of the bankruptcy estate. As such, the effects of the City's arguments are not

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[2] Vehicle ownership and/or access to a vehicle is often "crucial to employment." Job Opportunities Task Force, *The Criminalization of Poverty: How to Break the Cycle Through Policy Reform in Maryland*, Jan. 2018, at 15, https://jotf.org/wp-content/uploads/2018/08/cop-report-013018_final.pdf.

merely limited to Chapter 13 debtors; they also apply to Chapter 11 business debtors.

In Chapter 11 cases, the City's position would similarly frustrate the purposes of the Bankruptcy Code, namely the maximization of value through the facilitation of reorganization. Consider, for example, a debtor airline whose aircraft have been repossessed by a secured creditor, following a loan default, that refuses to turn over the aircraft to the debtor (airline) until its demands for adequate protection have been met.

The debtor airline would thus be precluded from using its aircraft, so it would not be able to honor the tickets it already sold. This predicament would simultaneously increase the total claims on the airline's bankruptcy estate while significantly curtailing the airline's ability to sell future tickets, as potential customers would likely be deterred from purchasing a ticket to fly on an airline without any airplanes. Without those future ticket sales, the debtor airline would not be able to pay its employees' salaries, its insurance premiums, its taxes, or for its fuel. Its vendors would demand cash payment on delivery, rather than accepting deferred payment, reducing the airline's already limited liquidity. The airline would have no choice but to liquidate, even if a reorganization would generate the most value for all creditors and be far preferable to liquidation.

Only the rule followed by the Seventh Circuit in the decision below—that the turnover obligation is immediate and backed up by the force of the automatic stay—ensures that debtors are not deprived of key property of the estate. Any other rule would seriously undermine the ability of many businesses to reorganize under Chapter 11.

Whiting Pools and pre-Code cases such as *Kaplan* recognized this reality. *See* 462 U.S. at 203. "Any other interpretation of § 542(a) would deprive the bankruptcy estate of the property essential to its rehabilitation effort and thereby would frustrate the congressional purpose behind the reorganization provisions." 462 U.S. at 208. The only way *Whiting Pools* retains its key function, however, is if the stay makes the turnover obligation automatic, and not merely an invitation to negotiate. Allowing creditors to delay turnover nullifies the rule announced by *Whiting Pools*.

II. THE CITY'S REFUSAL TO IMMEDIATELY TURN OVER THE DEBTORS' IMPOUNDED VEHICLES WAS IN DEROGATION OF ITS DUTY TO DELIVER ESTATE PROPERTY TO THE DEBTORS.

A. Under *Whiting Pools* the City no longer had a "possessory interest" in the impounded vehicles and was required to turn over the seized vehicles to the debtors.

Whiting Pools held that upon the bankruptcy filing, the possessory right in estate property reverts to the debtor: the creditor's state law possessory interest is "abrogate[ed]," 462 U.S. at 206 n.14, and the creditor must instead look to the congressionally created procedures if it wishes to seek adequate protection. 11 U.S.C. § 362(d)(1). Nothing in those procedures authorizes the creditor to retain possession of collateral while an adequate protection motion is pending. Thus, no legal basis exists for the creditor to retain possession after the bankruptcy filing.

Whiting Pools is a foundational case of modern bankruptcy law. Its ruling prevents a secured creditor from exercising a veto over the Chapter 11 or Chapter 13 process by holding key estate property hostage and insisting on favored treatment, as occurred here, and by refusing to permit a debtor—be it a company or an individual—to use its property to generate funds for the payment of creditors.

Whiting Pools ensured that the rehabilitative goals of bankruptcy could not be thwarted by creditors seizing a debtor's property on the eve of bankruptcy, and then refusing to permit the debtor to use it for productive purposes until the creditor's demands were satisfied. Although *Whiting Pools* does not directly address the issue of the automatic stay, the application of § 362(a)(3) to a creditor's continued post-petition possession of estate property is the ineluctable implication of that landmark case.

The threshold question in *Whiting Pools* was whether the seized collateral was property of the estate if it had not yet been sold at a foreclosure sale. The Court answered affirmatively that it was, and moreover, that the possessory right to the property was transferred from creditor to debtor upon the filing as a matter of law. 462 U.S. at 205–06. Accordingly, the obligation to return the property arises immediately; in essence, the obligation to turn over found in § 542 is "self-executing."

A creditor's duty to turn over property of the estate is absolute and not subject to any preconditions, as indicated by the "shall" requirement in § 542(a). *See In re Denby-Peterson*, 941 F.3d 115, 130–31 (3d Cir. 2019) (noting that "shall" is mandatory, but—in its view—requires an adversary proceeding). Further, this Court stated that § 542(a) "requires" a creditor "to *deliver* that property to the trustee." 462 U.S. at 201 n.5, 202–03 (emphasis added). *Whiting Pools* did not impose a condition precedent to the "requirement" that the property be "delivered." The language "shall," "requires," and "deliver" speaks to the immediacy of the transfer, and not to some deferral or condition precedent.

The Court in *Whiting Pools* also recognized that "[t]he reorganization effort would have small chance of success, however, if property essential to running the business were excluded from the estate." *Id.* at 203. Indeed, the Court favorably cited Judge Friendly's decision below in *Whiting Pools* for this point. *Id.* at 207 n.16 (citing *United States v. Whiting Pools, Inc.*, 674 F.2d 144, 151 (2d Cir. 1982) (turnover necessary if reorganizations were to have realistic possibility for success)). While *Whiting Pools* did not expressly address *when* turnover had to occur, there is nothing in the opinion indicating that it could be delayed, and the logic of the opinion brooks no delay because time is of the essence in bankruptcy.

Accordingly, it is with good reason that § 542 is viewed as self-executing by both the majority rule among the circuits and the leading bankruptcy treatise. "By its express terms, section 542(a) is self-executing, and does not require the trustee to take any action or commence a proceeding or obtain a court order to compel the turnover." 5 *Collier on Bankruptcy* ¶ 542.03 (16th ed. 2019).

B. The obligation of a creditor to turn over estate property under § 542, even prior to an adequate protection ruling, is entirely consistent with pre-Code practice and law.

The City argues that despite *Whiting Pools* and the plain, mandatory language found in the Code, § 542 is not self-executing. It argues that pre-Code law supposedly required an "order" of turnover, and that adequate protection precedes turnover. From this, it argues that unless—and until—there is an adjudication of adequate protection, whenever that may occur, a debtor is not entitled to turnover of the critically needed property of the estate.

The City's view of pre-Code law and practice is decidedly incorrect. The genealogy of the turnover obligation—and its intimate relationship with protecting property of the estate—has been the focus of the courts and Congress since at least 1935. The unmistakable historical progression has consistently been toward protecting reorganization by ensuring that third parties turn over estate property promptly. Indeed, it is the City's view that would undo decades of foundational principles and cause untold harm to the bankruptcy system.

Prior to the adoption of the 1978 Code, § 257 of the (prior) Bankruptcy Act,[3] governed a debtor's right to immediate possession of property held by a mortgagee.[4] This section stated that upon the filing of a bankruptcy petition, "the trustee or debtor in possession shall also have the right to immediate possession of all property of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage." *Kaplan*, 185 F.2d at 795.

In *Kaplan*, the First Circuit examined § 257. Waltham, a manufacturer of watches, filed a petition for reorganization under Chapter X of the former Bankruptcy Act.[5] Waltham had granted Reconstruction Finance Corp. ("RFC") a lien on virtually all of its assets, including the parts necessary to construct and finish watches. After the debtor defaulted, RFC took possession of all of the debtor's plant, machinery, fixtures, equipment and inventory. 185 F.2d at 792. The district court entered an order permitting the trustee to take possession of

[3] Act of June 22, 1938, § 257, ch. 575, 52 Stat. 840, 902 (1938) (codified as amended at 11 U.S.C. § 657 (1976) (repealed 1978)).

[4] "Section 542 of the present Bankruptcy Code is derived in part from Section 257 of former Chapter X and from Section 507 of former Chapter XII, *but is much broader in scope*." *In re Riding*, 44 B.R. 846, 855 n.8 (Bankr. D. Utah 1984) (emphasis added).

[5] Chapter X provided for a corporate reorganization. Act of June 22, 1938, §§ 101–276, ch. 575, 52 Stat. 840, 883 (1938) (codified at 11 U.S.C. §§ 501–676 (1939) (repealed 1978)).

all of the property then held by RFC. *Id.* at 794. RFC appealed the decision and challenged the right of the district court to order the turnover. *Id.*

The First Circuit concluded that Congress had granted the reorganization court "exclusive jurisdiction of the debtor and its property, wherever located" based on then Section 111 of Chapter X. *Id.* It further held that this statutory grant was constitutional, looking to the Court's ruling in *Continental Illinois National Bank & Trust Co. v. Chicago Rock Island & Pacific Railway Co.*, 294 U.S. 648 (1935), which affirmed the power of a reorganization court to "control pledged collateral of the debtor and property subject to mortgage." *Id.* at 795.

Concluding that a reorganization court has jurisdiction over a secured lender's collateral, the First Circuit recognized that turnover by the secured creditor was critical to the entire notion of reorganization. Hence, the court held that it was essential that the secured creditor's right to possession be "postpone[d]" and that the creditor had to "get[] out of the driver's seat" in order for the reorganization to work.[6] 185 F.2d at 796.

Section 542, enacted as part of the 1978 Code, built upon the prior broadening of protection for property of the estate. Section 542 added the express duty of a creditor to turn over estate property by

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[6] As the Seventh Circuit points out, "*Kaplan* [did] not reach the adequate protection question." *Thompson v. Gen. Motors Acceptance Corp.*, 566 F.3d 699, 706 (7th Cir. 2009).

stating that the creditor "shall deliver" to the estate the property that it had under its control. This made more explicit that the debtor was entitled to immediate possession and the creditor had a substantive obligation to deliver the property. Thus, § 542 made significant changes in the text of the turnover provision.[7]

Judge Friendly, writing for the Second Circuit in *Whiting Pools*, stated that § 542 codified *Kaplan.*[8] The City argues that this must mean that § 542 is not self-executing. Pet. Br. 41. But the Second Circuit flatly rejected the City's argument in its more recent statement of the law. *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72,79 (2d Cir. 2013) ("Nor was [the debtor] obligated to initiate an additional proceeding. Section 542 requires that an entity in possession of property of the estate deliver it to the trustees, without condition or any further action: the provision is 'self-executing.'").

There is no fair implication from pre-Code law, nor from the text of § 542, that Congress intended to permit creditors to retain estate property until their adequate protection claims were resolved through extensive and costly litigation. "[I]t is unlikely that Congress, in creating the Bankruptcy Code, intended to affirm any pre-petition convention that might have

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[7] "Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning." *Bracewell v. Kelley (In re Bracewell)*, 454 F.3d 1234, 1242 (11th Cir. 2006).

[8] *Whiting Pools*, 674 F.2d at 155.

existed that allowed a creditor to retain possession of an asset . . . while awaiting an adequate protection determination." *Thompson*, 566 F.3d at 706.

III. THE CITY'S OBLIGATION TO TURN OVER THE IMPOUNDED VEHICLES TO THE DEBTORS WAS NOT SUBJECT TO A CONDITION PRECEDENT THAT THE DEBTORS FIRST OBTAIN A COURT DETERMINATION ON ADEQUATE PROTECTION.

A. A creditor is entitled to adequate protection *only if* it complies with the congressionally established procedures and properly initiates a request for such protection.

At the conclusion of *Whiting Pools,* the Court stated, "[s]ection 542(a) simply requires the Service to seek protection of its interest according to congressionally established bankruptcy procedures, *rather than* withholding the seized property from the debtor's efforts to reorganize." 462 U.S. at 212 (emphasis added). Significantly, the Court added, such protection only arises, if at all, on the "creditor's insistence"—that is upon the creditor's motion. *Id.* at 204.

This statement encapsulates much of this case; a creditor must look to the "congressionally established bankruptcy procedures" for adequate protection. It is the creditor that must seek such relief under the congressional scheme. *Id*. The Court's concluding statement ("rather than") indicates that a creditor is not permitted to "withhold[] seized property" and thereby damage the reorganization while it contemplates and pursues its "defenses."

The City, however, urges a decidedly different view of the congressional scheme. The City's argument mirrors the short-hand notion from its *amicus*, Professor Brubaker, who contends that "adequate protection precedes turnover." Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part I): Origins and Evolution of the Turnover Power,* 33 Bankr. L. Letter No. 8, at 6 (Aug. 2013). "A consequence of this structural protection for the rights of creditors is that a secured creditor's obligation to turn over estate property can become judicially enforceable only following a turnover proceeding." Cert. Pet. 25.

This notion that a judicial determination of adequate protection precedes turnover is wholly at odds with the well-developed statutory scheme that governs adequate protection. At the outset of a bankruptcy case, a debtor has a largely unfettered right to use all of the property of the estate in the ordinary course of its business or affairs (other than cash collateral) without any court order. 11 U.S.C. § 363(c). This includes property on which a creditor has a lien.

However, if a creditor contends that it is entitled to adequate protection, it is the creditor that must initiate a demand for adequate protection. Section 363(e) requires the creditor to seek such relief: "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 such use, sale or lease as is necessary to provide adequate protection of such interest." 11 U.S.C. § 363(e) (emphasis added). The creditor has the burden of proof on the issue of the validity of its lien and its "interest" in estate property. 11 U.S.C. § 363(p)(2).

The Seventh Circuit correctly held below that "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." Pet. App. 16a; *see also Thompson*, 566 F.3d at 703–04 (holding that a secured creditor in a bankruptcy proceeding bears the burden of requesting adequate protection).

Until an adequate protection motion is filed and granted, a creditor has no right to adequate protection. While some courts grant adequate protection motions retroactively to the petition date, others only extend it from the date of the motion. 3 *Collier on Bankruptcy* ¶ 361.02 (16th ed. 2018). Even when adequate protection is granted retroactively, it is still extended only upon motion; adequate protection is never automatic.

B. The City intentionally declined to seek adequate protection.

The City did not comply with any of the "congressionally established bankruptcy procedures" pertaining to adequate protection and almost certainly could not have met its burden of proof of a valid lien or a valid interest. *See* 11 U.S.C. § 363(p)(2). Instead, it held the debtors' vehicles in order to exert coercive leverage. Pet. App. 44a.

The undisputed factual findings established that: (a) the City never sought adequate protection in *any* of the cases; (b) in three of the cases the City did not have a secured claim (in two such cases the court found that the City did not even hold a legally valid lien); and, (c) the City was not at risk that its "collateral" would decline in value because its general policy was to crush vehicles that were not redeemed.

Ms. Fulton's case is illustrative. She filed a motion for sanctions and turnover so that she could afford alternative transportation, expressly relying on § 542. Pet. App. 4a–5a. The City declined to move for adequate protection. *Id.* at 5a ("At no point did the City initiate proceedings to protect its rights under § 363(e).").[9] Ms. Fulton was unable to make her plan

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[9] The City claimed that because Ms. Fulton sought turnover by motion and not an adversary proceeding, it did not need to assert any right to adequate protection. Yet, it is widely agreed that the failure to file an adversary proceeding instead of a motion is "harmless error." *See, e.g.*, *In re Canonsburg Envtl. Assocs. Ltd.*, 72 F.3d 1260, 1264 (6th Cir. 1996).

payments, her case was dismissed, and she was unable to obtain a discharge. J.A. 89.

The other cases followed a similar pattern. "[The City] did not attempt in any of these cases, however, to seek adequate protection of its interests through the methods available under the Bankruptcy Code . . . . 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." Pet. App. 15a. The same was true in Mr. Shannon's case[10] and in Mr. Peake's case.[11]

Separately, three of the four bankruptcy courts found that the City did not have a valid possessory lien and/or did not have a secured claim.[12] Accordingly, in those cases the City was not entitled to adequate protection because, as an unsecured creditor, it did not have an "interest" in the debtor's property.[13]

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[10] "The court noted the City was free to file a motion seeking adequate protection of its lien [but the City] did not file any such motion." *Id*. at 6a.

[11] "At no point did the City file a motion to protect its interest in [Mr. Peake's] vehicle." *Id*.

[12] *See id*. at 34a–39a (Howard); *id*. at 57a, 60a–62a, 152a (Fulton); *id*. at 108a (Shannon).

[13] General unsecured creditors are not entitled to adequate protection. *E.g. Franklin Fin. Corp. v. Baker (In re Baker)*, No. 14-71600-PMB, 2018 Bankr. LEXIS 3158, at *10 n.10 (Bankr. N.D. Ga. Oct. 12, 2018).

One of the bankruptcy courts noted that the City does not actually hold vehicles for re-sale if a debtor does not redeem the vehicle. Instead, the City destroys the vehicle by crushing it.[14] Accordingly, the vehicles had no true economic value to the City; thus, the statutory requirement that debtor's use of the property "results in a decrease in the value of such entity's interest in such property" cannot be shown. 11 U.S.C. § 361(1)–(2).[15]

The debtors entered bankruptcy in a state of demonstrable economic peril, which was only exacerbated by the fines and failure to release the vehicles.[16] Conversely, no real harm would have been incurred by the City had it complied with its

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[14] "[T]he vehicle, does not serve as a means of recouping debt . . . , but rather an attempt to coerce repayment of exorbitant parking debt as the City crushes rather than sells impounded vehicles." J.A. 226.

[15] *See United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 370 (1988) (holding that the "interest in property" to which adequate protection applies only arises if the property is depreciating in value because of the automatic stay).

[16] "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." 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).

obligation of immediate turnover. Indeed, the City's concern was not with preserving the value of the debtors' vehicles, but with preserving its leverage to extract payments from Chapter 13 debtors. As the Seventh Circuit found: "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." Pet. App. 14a.

IV. The City's refusal to turn over the debtors' impounded vehicles constituted a violation of the automatic stay.

A. The legislative history does not support the view that the amendments to § 362(a)(3) were merely "technical changes."

The City has acknowledged that § 362(a)(3) can be interpreted by its plain meaning. Pet. Br. 28. However, the City disputes that the plain meaning of exercising control embraces an intentional refusal to turn over estate property as required by § 542. Instead, the City argues that there is "ample evidence" in the legislative history that the 1984 amendments were intended to effect "only limited, technical changes," Cert. Pet. 23, or were "clarifying rather than substantive," Pet. Br. 28. Based on this, the City concludes that Congress must not have intended that the amendment effect any meaningful change in the law. These arguments are incorrect. The 1984 amendments were not merely "technical" but instead made important changes to the Code.

As a threshold matter, reliance on the legislative history is not required here, both because the parties agree that § 362(a)(3) may be interpreted in accordance with its plain meaning, Pet. Br. 17, and because courts have found the legislative history is "cursory," "undivinable" and "scarce." *See, e.g.*, *In re Denby-Peterson,* 941 F.3d at 126–27 (stating that § 362(a)(3) is unambiguous, so resorting to legislative history is unnecessary; and, that the "scarce legislative history" fails to shed light on Congress' intent).

The City's *amicus*, Professor Brubaker, was, at one time, certain that nothing was to be gained from the legislative history: "[T]here is absolutely no legislative history explaining Congress's objective in adding the intractably vague 'exercise control' language to § 362(a)(3)." Ralph Brubaker, *Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?*, 33 Bankr. L. Letter No. 9, at 3 (Sept. 2013).

Even though the legislative history is sparse—the 1984 amendments have substantial significance. At least three circuit courts have rejected the notion that the amendments were "limited technical changes." *See* Pet. App. 10a ("Congress amended § 362(a)(3) to prohibit conduct that 'exercised 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.'") (citing *In re Javens*, 107 F.3d 359, 368 (6th Cir. 1997) and *In re Del Mission Ltd.*, 98 F.3d 1147, 1151 (9th Cir. 1996), in which the Ninth Circuit held that the 1984 amendments "broaden[ed] the scope of § 362(a)(3) to proscribe the mere knowing retention of estate property"); *see also Thompson*, 566 F.3d at 702 ("Further, Congress's decision to amend section 362 evinces its intent to expand the prohibited conduct beyond mere possession.").

The City's assertion that the addition of new language to § 362(a)(3) should be disregarded as merely "technical" violates a key rule of statutory construction: "When Congress uses different language in a successor statute, the Court presumes that Congress has changed its intent." KENNETH KLEE & WHITMAN HOLT, BANKRUPTCY AND THE SUPREME COURT: 1801-2014*,* 17 (2015) (citing *Crawford v. Burke*, 195 U.S. 176, 190 (1904) ("Our own view, however, is that a change in phraseology creates a presumption of a change in intent, and that Congress would not have used such different language . . . without thereby intending a change of meaning.")). And, "Congress need not document its specific actions in elaborate fashion in order to direct this Court's attention to statutory policy and purpose." *Williams v. Austrian*, 331 U.S. 642, 661–62 (1947).

The City claims that there is "ample" evidence in support of its position that the 1984 amendments were merely technical; however, the only evidence that it actually provides is sourced solely from the 1980 House Report, which pertains to a bill that never passed. Pet. Br. 4, 28; *see* H.R. Rep. No. 96-1195 (1980), excerpts attached to this brief as Appendix B. The language of this House Report, however, is itself significant and reflects some important substantive changes that were eventually enacted in 1984. The introduction to this House Report shows that, while some changes were in fact technical, there were "several items of a substantive nature" that needed to be dealt with at the "earliest possible time." *See* H.R. Rep. No. 96-1195 at 1–2 (1980).

Changes that were stylistic or technical were often identified as such. For example, sections 17 through 23 of the House Report identify various changes as "conforming," "stylistic," or to "correct[] a typographical error." *Id.* at 10.

Conversely, section 25(a) of the House Report (*id.* at 10, 52) does not identify its changes as merely technical or stylistic, but rather contains numerous substantive revisions:

> This amendment *makes it clear* that the trustee's rights to accept or reject executory contracts and unexpired leases under section 365 are not affected by the automatic stay; that the effect of the automatic stay on judicial and administration proceedings runs also to such "actions"; and that the automatic stay against acts to obtain possession of property of or from the estate also encompasses acts to exercise control over such property without the need for actually obtaining such property.

Id. at 10 (emphasis added).

In codifying these numerous changes to § 362(a), Congress substantially expanded the scope of the automatic stay. Additionally, the House Report proposed many other substantive changes to the Code. *Id*. at 10–13.[17]

The City also incorrectly argues that to read the amendments to § 362(a)(3) as expanding the protection of the stay would somehow constitute a "sea change" from "long-settled bankruptcy practice." Pet. Br. 4. 27. But this misperceives precisely what was of most concern to the courts, well before 1984, in connection with creditor retention of assets, regardless of whether "passive" or not. The crucial problem of "passive retention" of seized collateral by creditors concerned the courts since at least 1935. In the two leading cases, *Whiting Pools* and *Kaplan*, no evidence existed that the creditors had undertaken any specific "active" steps other than refusing to turn over collateral. This refusal alone was precisely what made reorganization impossible, and thus defeated one of the central goals of bankruptcy practice. Congress added § 542 to deliberately broaden the turnover provision and avoid this harmful outcome. This is precisely why "exercising control" embraces fully the notion of a refusal to turn over property. Section 362(a)(3) did *not* add some additional

[17] As additional examples, these proposed amendments pertained to the relationship between the automatic stay and section 365 on executory contracts; *id*. at 51; the excepting from the stay of the setoff of mutual debts and claims of a commodity broker, *id*. at 52, alterations on the grounds for relief from the stay, *id,* at 53, and the definition of "new value" under the preference section, *id*. at 85.

requirement of an act beyond the refusal to comply with § 542.

B. The City's argument that the 1984 amendment was only intended to add "intangible property" is incorrect.

Having first argued that legislative intent is undivinable, the City contradicts itself by arguing that the 1984 amendments had an important (albeit mostly unexpressed) substantive purpose to make control of "intangible property" subject to the automatic stay. Pet. Br. 15, 30–31.

The City's *amicus* has a more extreme view. Despite having initially stated that the legislative history offered no evidence of any discernible intent, Professor Brubaker contends that five years later he "discovered" that the legislative history demonstrated that the amendments to § 362(a)(3) were meant only to apply to "intangible property."[18] Indeed, it is largely based on this 'discovery' that the City, and its *amici*, argue their highly limited view of § 362(a)(3). *See* Pet. Br. 15 (arguing the same).

The City and its *amici* are incorrect in arguing that the only, or primary purpose of Congress, in enacting the 1984 amendments was merely to extend the stay to include intangible property. There was no need for Congress to further belabor that point, as

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[18] Ralph Brubaker, *Turnover, Adequate Protection and the Automatic Stay: A Reply to Judge Wedoff*, 38 Bankr. L. Letter No. 11, at 2 (Nov. 2018); *see* Brief of *Amici Curiae* Professors Ralph Brubaker et al., at 28.

both the legislative history and judicial rulings, even pre-1984, fully reflected that the automatic stay already extended to intangible property.

The legislative history to § 541 expressly stated, well before 1984, that the phrase "property of the estate" was intended to include "intangible property" and thus enjoyed the protection of the automatic stay well before the 1984 amendments to § 362(a)(3). *See* H.R. Rep. No. 95-595, at 367–68 (1977); S. Rep. No. 95-989, at 82-83 (1978).[19]

Additionally, courts have regularly held—even prior to 1984—that the automatic stay applies to intangible property, and have even noted in some decisions that intangible property can be possessed.[20] *See, e.g.*, *R.S. Pinellas Motel P'Ship v. Ramada Inns, Inc. (In re R. S. Pinellas Motel P'ship)*, 2 B.R. 113, 118 (Bankr. M.D. Fla. 1979) (citation omitted):

> Intangible property rights, e. g. rights acquired under a license agreement are

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[19] "[Property of the estate] includes all interests, such as interests in real or personal property, tangible and intangible property, choses in action, causes of action, rights such as copyrights, trade-marks, patents, and processes . . . ." H.R. Rep. No. 95-595, at 175 (1977).

[20] *See also Schokbeton Indus., Inc. v. Schokbeton Prods. Corp. (In re Schokbeton Indus., Inc.)*, 466 F.2d 171, 177 (5th Cir. 1972) ("We do not doubt that in some circumstances intangible property rights are subject to 'possession' by the debtor and therefore fall within the equitable jurisdiction of the referee. *Katchen v. Landy*, 1966, 382 U.S. 323 . . . ; 2 Collier, Bankruptcy, ¶ 23.05.").

> properties of the estate and are capable of possession. Thus, an attempt to cancel such rights, after the commencement of the case may come within the protective provisions of the Code under subclause (a)(3) of Sec. 362; 11 U.S.C. § 362. This is so because the cancellation of the License Agreement may be deemed to be an attempt to obtain possession of "property" of the estate.[21]

Moreover, the City's argument contradicts the explicit legislative history of § 362(a)(3):

> This amendment *makes it clear that . . . the* automatic stay against acts to obtain possession of property of or from the estate also encompasses acts to exercise control over *such property* without the need for actually obtaining such property.

H.R. Rep. No. 96-1195 at 10 (1980) (emphasis added).

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[21] *See also Elec. Realty Assocs., Inc. v. ERA Cent. Reg'l Servs., Inc. (In re ERA Cent. Reg'l Servs., Inc.)*, 39 B.R. 738, 740 (Bankr. C.D. Ill. 1984) (holding that intangible contract rights could be "possesse[d]" and were subject to the automatic stay); *Varisco v. Oroweat Food Co. (In re Varisco)*, 16 B.R. 634, 637 (Bankr. M.D. Fla. 1981) ("It appears from the legislative history of this Section that the scope of the Section was intended to be broad and was designed to include all kinds of property tangible or intangible, chose of actions, and of course, contract rights and rights based on executory contracts.").

The reference to “such property” is key. “Such” is defined as meaning “having just been mentioned.” *Such,* BLACK’S LAW DICTIONARY (11th ed. 2019). What was “just mentioned” was property of the estate, which the aforementioned legislative history makes clear includes both tangible and intangible property. Congress was expanding the covered range of “acts” but was not expanding the range of “property types.”

Further, the Court should not adopt the notion that § 362(a)(3) uses the phrase “property of the estate” to have two different meanings, despite occurring in the same sentence, as the city argues. *Hall v. United States*, 566 U.S. 506, 519 (2012) (“At bottom, ‘identical words and phrases within the same statute should normally be given the same meaning.’”); *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998) (stating there is a “presumption that equivalent words have equivalent meaning when repeated in the same statute”).

CONCLUSION

For the foregoing reasons, we respectfully request that this Court affirm the decision of the Seventh Circuit.

Dated: March 10, 2020

Respectfully submitted,

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APPENDIX

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Appendix A

<u>List of *Amici Curiae* Law Professors</u>

Matthew Bruckner
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Howard University Law School

Margaret Howard
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Edward Janger
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Appendix B

H.R. REPORT NO. 96-1195 (1980) (Excerpted)

AN ACT TO CORRECT TECHNICAL ERRORS, CLARIFY AND MAKE MINOR SUBSTANTIVE CHANGES TO PUBLIC LAW 95-598

The Committee on the Judiciary, to whom was referred the bill (S. 658) to correct technical errors, clarify and make minor substantive changes to Public Law 95-598, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment to the text of the bill is a complete substitute therefor and appears in italic type in the reported bill.

INTRODUCTION

The Bankrupty Reform Act of 1978 has now been in effect less than one year. It is clear even at this early time in the life of this law that technical amendments are required. Errors in printing, spelling, punctuation, grammar, syntax, and numeration arose in the bill as enacted because of the last-minute process of change through which the bill went when considered at the closing sessions of the 95th Congress.

These same last-minute changes also resulted in the enactment of a bill that contains incongruent provisions; material that was removed from earlier versions remained as either cross-references or antecedents for provisions changed or inserted. And, material added often was not completely integrated into the total fabric of the bill as enacted.

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Such matters consitute the vast Majority of the subject of the Technical Amendments Act. In addition, however, there are several items of a substantive nature which are included because : (1) it was intended that the particular subject was to be dealt with at the earliest possible time after the enactment of the Bankruptcy Before Act in connection with whatever technical amendments would be considered; (2) further conforming changes were found to be necessary to complete the legislative work intended by the Bankruptcy Reform Act; (3) the treatment of a subject in the Bankruptcy Reform Act was found to be incomplete; or (4) there was overlooked some minor yet relevant matter. In each case the change proposed is consistent with policies adopted by Congress in its enactment of the Bankruptcy Reform Act.

Even with these substantive matters included and noting that they are consistent with the Bankruptcy Reform Act, nevertheless it is important to repeat that the Act as amended by this bill continues to represent a finely tuned and balanced treatment of the respective interests of debtors and creditors. Every effort has been made to abstain from reacting legislatively at every call for change and to maintain existing policy intact. At this .time, there are known areas of bankruptcy activity which give the Committee concern and which the Committee intends to monitor closely. However, it is also premature to change a statute that has been in effect for such a short period of time where it is not really known to what extent these concerns are other than transitory.

BANKRUPTCY JUDGE'S RETIREMENT

H.R. 8200, as reported by the Committee during the 95th Congress, contained provisions to reorganize bankruptcy courts and include them within the category of United States courts subject to the standards of Article II of the Constitution. S. 2266, the bill passed by the Senate during the 95th Congress, which eventually became Public Law 95-598 (the Bankruptcy Reform Act of 1978), did not contain such provisions. Numbered among the provisions contained in H.R. 8200 were those which would have provided for retirement of bankruptcy judges. When this general subject was resolved between the House and the Senate, the matter of bankruptcy judge's retirement was eliminated with the understanding that at the earliest possible time it would be dealt with.

There are two classes of United States judges: life tenure; and fixed term tenure. Notwithstanding, all United States judges, for retirement purposes, participate in what loosely may be called "judicial retirement." The essential characteristics of this retirement system are: (1) it is noncontributory; (2) eligibility for retirement at 100 percent of the salary a judge received at the time of retirement is based upon the reaching of seventy years of age with 10 or more years of service, or sixty-five years of age with 15 or more years of service; and, in the case 'of fixed term judges, (3) provision for 100 percent or less benefits in the event of failure of reappointment.

Bankruptcy judges presently are participants in the civil service retirement system. The essential characteristics of this system are: (1) it is contributory; (2) benefits accrue at the rate of approximately

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2 percent per year for each year of service; (3) benefits are available only after the participant has reached the age of sixty-two years; and (4) there is an 80 percent cap on the amount of benefits receivable. The civil service retirement system does not provide an equitable basis for retirement for bankruptcy judges vis-a-vis other United States judges.

The civil service system is predicated upon an individual's coming to work for the Federal government at an early age, usually in a person's early twenties. The average age of bankruptcy judges ascending to the bench is forty-five.

The overwhelming opinion on this subject, including that of the Judicial Conference of the United States, is that bankruptcy judges should participate in the judicial retirement system. Differences of opinion exist regarding the extent to which credit for service should be given for service as a bankruptcy judge during the transition period (that time between the enactment of the Bankruptcy Reform Act and the taking effect of the new bankruptcy court created under that Act) and for service as a referee in bankruptcy prior to the enactment of the Bankruptcy Reform Act. This' bill strikes a compromise between the position of giving such judges 100 percent credit for all such prior service and only allowing the participation in the judicial retirement system based upon service on the new court beginning April 1, 1984.

A complicated formula with a number of conditions and limitations has been Created. The objective of this scheme is to not only provide an equitable basis for bankruptcy judges' retirement, but also to act as an incentive to keep on the bench the experience and ability of bankruptcy judges presently sitting. It is also important to understand that the System by which bankruptcy judges will be chosen has been changed by the Bankruptcy Reform Act. This change will undoubtedly have an adverse effect upon the ability of bankruptcy courts to retain some of the most knowledgeable and experienced of the bankruptcy judges.

Under the law that was repealed by the Bankruptcy Reform Act, bankruptcy judges were selected by the judges of the United States district-court for the district wherein the bankruptcy judge would serve. Under the Bankruptcy Reform Act, bankruptcy judges will be nominated by the President. This change should not, in the best of all possible worlds, have the effect of displacing such experienced and knowledgeable judges. However, as this can be the case, enhancing bankruptcy judges' retirement will be an incentive for judges to seek presidential appointment and remain on the bench for a longer period of time.

The numerator for computing the amount of salary payable to a judge who is not reappointed at the end of his term is changed from sixteen years to 'fourteen years to conform to the term' of office of a bankruptcy judge appointed under the Bankruptcy Reform Act.

Incumbent bankruptcy judges are given full credit for all service prior to April 1, 1984, for the purpose of determining eligibility for benefits, but the rate of accrual of salary payable to a bankruptcy judge upon relinquishing office by resignation or upon failure of reappointment is substantially less for service prior to November 6, 1978, the date of enactment of the Bankruptcy Reform Act.

The formula for computing the rate of accrual of salary payable to a bankruptcy judge upon relinquishment of office, if he meets the age and length of service requirements for benefits, is 1/28 for service as a

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bankruptcy judge prior to November 6, 1978 and 1/14 for service as a bankruptcy judge on and after that date. The difference in the rate of accrual of benefits for service as a bankruptcy judge prior to November 6, 1978 and for such service thereafter is adopted in recognition, of the fact that the duties and responsibilities of the office of bankruptcy judge and the stature and jurisdiction of the bankruptcy court were greatly enhanced by the Bankruptcy Reform Act of 1978. The 1/14 formula will apply to all service as a bankruptcy judge prior to April 1, 1984 by a bankruptcy judge who is reappointed after that date if such a judge continues in service as a bankruptcy judge for a period of five years after the date of his reappointment or until he attains the age of seventy years.

Upon enactment of this bill an incumbent bankruptcy judge who is or may become eligible for benefits under section 373 of title 28 of the United

States, Code may elect coverage under that section, without regard to the date of such eligibility. To prevent so-called double-dipping, the election of benefits under section 373 voids the annuity rights of a bankruptcy judge under any other Federal employee pension plan.

An incumbent bankruptcy judge who has elected the benefits of section 373 of title 28 of the United States Code, but who has not attained the age of sixty five years prior to April 1, 1984, forfeits all rights to future payments under that section unless such judge has filed with the President, the President of the Senate, and the Director of the Administrative Office of the United States Courts before April 1, 1984, a written notice agreeing to accept appointment as a bankruptcy judge after such date and, if offered such appointment, accepts such appointment.

The right of incumbent bankruptcy ,judges who meet the length of service requirements of section 373 of title 28 of the United States Code, to resign and receive payments under that section prior to April 1, 1984, is restricted to two categories of judges—(1) those judges who have attained the age of seventy years, and (2) any judge who has attained the age of sixty-five years and provides the Director of the Administrative Office of the United States Courts a certificate of disability signed by the chief judge of the circuit. Otherwise, incumbent bankruptcy judges are precluded from receiving benefits under the section prior to April 1, 1984.

Upon enactment of this bill, incumbent bankruptcy judges will become judges of the United States, which would ordinarily make them ineligible for continued coverage under the Civil Service Retirement system. However, the right of a bankruptcy judge continued in office by section 404 (b) of the Bankruptcy Reform Act of 1978 to retain coverage under the Civil Service Retirement system served until such time as he elects coverage under section 373 of title 28 of the United States Code.

The term "bankruptcy judge" is defined to include a referee in bankruptcy to make it clear that all service as a referee in bankruptcy is includible for purposes of this section.

A definition of "reappointment" to include appointment to the new bankruptcy court which comes into existence on April 1, 1984 is included to make clear the fact that incumbent bankruptcy judges, whose terms expire at the end of the transition period, who are not

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appointed to the new court by the President immediately following the transition period are deemed to have failed of reappointment for the purposes of this section.

The word "retires" and "retirement" are used in this section in a broad generic sense and are intended to include voluntary resignation or involuntary resignation because of failure of reappointment.

An incumbent bankruptcy judge who, after continuing to serve throughout the transition period, fails of reappointment, and who at the time of relinquishing office has fourteen or more years of service as a bankruptcy judge, is eligible to receive benefits under this section before attaining the age of sixty-five years. However, the salary payable to such judge shall be reduced by one-sixth of one percent for each full month such judge is under sixty-five years of age at the time he relinquishes office.

MUNICIPAL FINANCING

In structuring the Bankruptcy Reform Act, one of the objectives, simplification, was achieved by consolidating into one chapter (11) a number of the previously separate provisions dealing with reorganizations. Now, there are only four distinct types of proceedings under title 11: liquidation, under chapter 7; adjustment of debts of a municipality, under chapter 9; reorganization, under chapter 11; and adjustment of debts of individuals with regular income, under chapter 13. This organizational arrangement, however, required that the general provisions contained in chapters 1, 3, and 5 either be made applicable or inapplicable, as was appropriate.

One such provision, contained in section 552, deals with the post-petition effect of a security interest. n arriving at the treatment of this subject as it did, the Bankruptcy Reform Act expressed the general policy that upon the filing of a petition in bankruptcy, except for proceeds, there would be no post-petition effect of a security interest. The central frame of reference for this decision was commercial transactions and the recognition and acceptance of after-acquired property clauses by the Uniform Commercial Code (adopted universally by the States, with the exception of Louisiana). This provision was made applicable to a proceeding under chapter 9.

After the enactment of the Bankruptcy Reform Act, attention was called to the fact of this applicability and that as a result certain municipal bondholders' interests in specific funds might be jeopardized in the event of the filing of a petition by the municipality under chapter 9. Revenue bonds issued by a municipality are in effect longer term secured obligations, the security for which is a specific fund(s). The bond indenture is the security agreement setting forth the security interest which, invariably, contains a provision for the repayment of the bond obligation from a specific fund(s) as such fund(s) is generated from time to time. Therefore, with section 552 applicable in a chapter 9 proceeding, upon the filing of a petition by a municipality, bondholders' rights to the specific fund(s) would be impaired.

S. 658 as enacted by the Senate contains a provision, a new section 928, designed to overcome the potential limiting effect section 552 would have on municipal revenue bonds in the event of the filing of

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a petition by a municipal issuer of such securities. Because this Senate-proposed section 928 deals only with traditional revenue bonds and not other forms of municipally issued securities secured by specified funds, concern was raised that the Senate's section 928 of S. 658 was not adequate. In seeking to eliminate section 552's limiting effect upon all municipal securities secured by specified funds, whether of the traditional revenue bond type, or some other type, the Committee sought a way to do this without placing itself in the position of making any express representation to States and municipalities regarding the character or quality of their securities under non-bankruptcy law. The Committee believes that it was not the intent of Congress in the enactment of the Bankruptcy Reform Act of 1978 to make any such representations. Therefore, it has chosen to deal with the limiting effect of section 552 by deleting the reference to it from section 901, removing from application in a chapter 9 proceeding the operation of that section.

Further, the Committee believes that it was not the intent of Congress in the enactment of 547(e)(3) to penalize holders of municipal securities which are secured by future receipts of the issuer. The deletion from section 901 of the reference to section 547(e)(3) would avoid allowing such payments to be classified as voidable preferences under section 547.

STOCKBROKER/COMMODITY BROKER LIQUIDATORS

Prior to the enactment of the Bankruptcy Reform Act special provisions existed in the bankruptcy laws for liquidations of stockbrokers. Much of this prior law served as the basis for what has become subchapter III of chapter 7 in the new Bankruptcy Code. The new subchapter IV, dealing with commodity broker liquidations, is new and not based upon any prior treatment under the repealed Bankruptcy Act. These subchapters were intended to provide comparable treatment for stockbroker and commodity broker liquidations. Moreover, it also was intended that in the event of a bankruptcy involving such an entity, the operations of the respective securities and commodities markets would be affected only minimally, i.e., that the financial failure of any one such entity would not have such an affect upon an entire marketplace so as to pose the potential for a massive disruption of the entire industry. However, quite soon after the enactment of the Bankruptcy Reform Act it was brought to the Committee's attention that the provisions in subchapters III and IV fell short of their intended mark. In short, the integrity of the securities and commodities markets was not adequately protected; and there was not comparability between the provisions, of subchapters III and IV.

There are a number of provisions in the bill which pertain to stockbrokers, securities clearing agencies, commodity brokers and forward contract merchants. These are intended to clarify the application to these entities of certain provisions contained in the Bankruptcy Reform Act. The Bankruptcy Reform Act provides a number of protections to commodity brokers and commodity clearing organizations, and several amendments have been made to clarity that these

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game protections are intended to apply to stockbrokers and securities clearing agencies. The overall purpose of these provisions is to preserve the financial integrity of the nation's commodity and securities markets.

Provision was also necessary to clarify that the automatic stay provision does not affect the setoff of mutual debts and claims which relate to commodity contracts, forward contracts, leverage transactions or securities contracts; nor does it prevent setoffs against customer property held by a commodity broker, forward contract merchant, stockbroker or securities clearing agency for claims which are margin or settlement payments.

Related amendments also preserve the contractual rights of stock-brokers, securities clearing agencies, commodity brokers and forward contract merchants to liquidate a debtor's account, notwithstanding the automatic stay of Section 362, or any other provision of Federal or State law or court order, unless the court order is authorized under the Securities Investor Protection Act of 1970 (15 U.S.C. 78aaa et seq.) or is required because of a threat to the national security.

In Subchapter III, Section 749 has been amended to give the Securities and Exchange Commission the power to approve specified transfers so approved may not be avoided by the trustee. This authority corresponds to the authority given to the Commodity Futures Trading Commission in Section 764(b).

In Subchapter IV, the definition of "customer" has been amended to delete the reference to debtor and substitute in its place a broader reference. Under the previous definition, only an entity which was a debtor could have a customer. Such a result would have defeated the broad protections intended to be provided by the Act. Other clarifying amendments have been made to several of the definitions to be sure that if trading in commodity options is approved by the CFTC, such trading will be included within the scope of Subchapter IV provisions.

It is also made clear that the trustee may not avoid as a preference or fraudulent transfer, a margin payment, deposit or settlement payment made by or to a commodity broker, forward contract merchant, stockbroker or securities clearing agency, unless the payment is both made and received with intent to defraud.

Finally, Subchapter IV of chapter 7 has been amended to clarify that the proprietary accounts of commodity brokers are not entitled to share in any distribution from the customer property estate until such time as all other customer net equity claims have been paid in full.

TAX PROVISIONS

The Bankruptcy Reform Act's repeal of the former Bankruptcy Act removed from applicability the special provisions for treatment of tax consequences of transactions arising in a bankruptcy context. This was done with the view that soon after the enactment of the Bankruptcy Reform Act there would be considered bankruptcy tax legislation. However, to initiate the process whereby such tax legislation would be considered, there was included in section 346 a number of provisions designed to identify a basis upon which tax consequences could be determined.

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With the consideration of the Technical Amendments Act, this tax legislation has not yet been fully considered and the provisions of section 346, therefore, exist in a vacuum.

These section 346 provisions are being removed with the intention that (1) there should be a uniform treatment of tax consequences in bankruptcy under both State and federal law, (2) federal tax legislation should be considered at the earliest possible time, and (3) until such legislation is enacted it is most desirable that tax consequences of bankruptcy should be dealt with as they ,were under the former Bankruptcy Act.

Section-by-Section Analysis

Title I

Section 1(a). This amendment deletes a redundancy.

Subsection (b). This amendment corrects a typographical error.

Subsection (c). This amendment corrects the cross-references identifying the types of claims to be treated as pre-petition claims to include certain preconversion and co-debtor claims.

Subsection (d). This amendment corrects an omission by providing the connective to assure that "entity" is defined to include all of the types specified.

Subsection (e). This amendment corrects a typographical error.

Subsection (f). This amendment to the definition of "insolvent" with reference to a partnership clarifies that it is the general partner nonpartnership property that is the subject of valuation eliminating the ambiguity presented by the use of the term "separate" which allowed for the reference to noncommunity property in a community property stae; substitutes the indefinite article with reference to the types of property excluded from the valuation; and adds a cross-reference to include all property appropriately to be excluded from the valuation.

Subsection (g). This amendment redesignates paragraphs (35), (36), (37), (38), (39), and (40) to allow for the addition of two new definitions; and adds as one of the new paragraphs a definition for "securities clearing agency" to facilitate the treatment of stockbroker bankruptcies under subchapter III of chapter 7.

Subsection (h). This amendment clarifies that, the term “security” is applicable to the designated contract or interest if such is required to be the subject of a Securities Act registration statement whether or not it is so subject.

Subsection (i). This amendment corrects the name of a type of contract excluded froth the definition of “security”.

Subsection (j). This amendment makes a stylistic change in the cross-reference; and clarifies that the contract or certificate excluded from the definition of “security” is not required to be the subject of a Securities Act registration statement whether or not it is so subject.

Subsection (k). This amendment adds a new paragraph, which provides a definition for “State” primarily to assure that residents and domiciliaries of Puerto Rico can become debtors under title 11.

Subsection (l). This amendment makes a stylistic change.

Subsection (m). This amendment makes a change in punctuation to allow an additional paragraph to be added.

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Subsection (n). This amendment adds a new paragraph which provides a definition for “United States” to assure that title 11 is applicable wherever the judicial jurisdiction of the United States extends.

Section 2. This amendment corrects a typographical error.

Section 3(a). This amendment corrects a typographical error.

Subsection (b). This amendment deletes a cross-reference that does not exist.

Section 4(a). This amendment clarifies that time period alternatives are in a correlative not conjunctive relationship with each other.

Subsection (b). This amendment clarifies that statutes of limitations and court ordered deadlines tolled in this section as a result of the filing of a petition under title 11 do not include those contained in title 11.

Section 5(a). This amendment deletes a redundancy.

Subsection (b). This amendment makes a stylistic change.

Subsection (c). This amendment corrects a typographical error.

Section 6. This amendment makes it clear that an involuntary petition may be filed only against a person.

Section 7. This amendment corrects a typographical error.

Section 8. This amendment substitutes the definite article for the indefinite article so as to limit an examiner from being appointed as trustee in the case in which the person was appointed examiner.

Section 9. This amendment makes it clear that the amount of the bond the court is to determine is with reference to the bond the trustee is required to file.

Section 10(a). This amendment corrects an omission.

Subsection (b). This amendment makes a stylistic change in the organization of the provision establishing bases upon which the court may deny trustees' expenses; and makes a change to allow such a denial with providing for such a denial for only both.

Section 11. This amendment corrects an omission by providing that an examiner as well as trustee may employ professional persons to assist in the conduct of the examiner's responsibilities.

Section 12. This amendment makes a stylistic change.

Section 13(a). This amendment allows an attorney to request payment for prepetition services rendered either in contemplation of or in connection with the case as compared with services rendered only for both.

Section 14. This amendment deletes an unnecessary identification of notice recipients since the rule of construction in Section 102 is applicable; and makes a stylistic change in the standard for compensation of officers.

Section 15. This, amendment and the following amendment reverse the order of these sections to reflect the logic of providing first for notice and then for meetings rather than the reverse; and includes in the notice recipients persons whose claims might not be against the debtor but which nevertheless are to be satisfied out of property of the estate, i.e., persons having community claims, and who, therefore, might not otherwise receive notice.

Section 16(a). This is the second amendment mentioned in the above paragraph reversing the order of the notice and meeting sections. This

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amendment also makes it clear that a meeting of creditors in a chapter 13 ease is not mandatory.

Subsection (b). This amendment makes the necessary changes in the table of sections to conform to the inversion of sections made by this and the previous amendment.

Section 17. This amendment makes a conforming change in the cross-reference to reflect the inversion of the notice and meeting sections; and also corrects a typographical error.

Section 18. This amendment adds a new subsection to make it clear that those with whom money of the estate is deposited or invested are empowered to protect such moneys by deposit or investment.

Section 19(a). This amendment corrects a typographical error.

Subsection (b). This amendment deletes a cross-reference to reflect the deletion of the cross-referenced material.

Subsection (c). This amendment deletes provisions establishing the basis upon which state and local taxes are to be imposed as a result of bankruptcy proceedings because it is not in conformity with Federal tax law treatment of the same transactions and it is intended that there be this conformity. At the time of the enactment of this law Federal tax law treatment of these transactions has not finally been determined but when such has occurred conforming amendments will be made to this statute. It is also intended that until such conforming amendments are made Federal, State, and local tax law treatment of these transactions is best undertaken as though the former law under the Bankruptcy Act had not been repealed.

Section 20. This amendment makes a stylistic change.

Section 21. This amendment makes a stylistic change.

Section 22. This amendment makes conforming change's in cross-references to reflect organizational changes in the provisions dealing with exemptions under section 522.

Section 23. This amendment corrects a typographical error.

Section 24. This amendment makes it clear that adequate protection can be effected by one or more cash payments made to a secured creditor whose property the trustee uses, sells, or leases.

Section 25(a). This amendment makes it clear that the trustee's rights to accept or reject executory contracts and unexpired leases under section 365 are not affected by the automatic stay; that the effect of the automatic stay on judicial and administrative proceedings runs also to such "actions"; and that the automatic stay against acts to obtain possession of property of or from the estate also encompasses acts to exercise control over such property without the need for actually obtaining such property.

Subsection (b). This amendment makes it clear that the automatic stay does not operate to prevent a purchase money security interest from being perfected after the time of the filing of the petition if it is perfected as a purchase money security interest pursuant to the requirements for such under the Uniform Commercial Code with respect to which this amendment conforms; makes stylistic and conforming changes in the exception to the automatic stay concerning setoffs of certain securities and commodities transactions, and also excepts from the operation of the automatic stay certain securities and commodities margin transactions; makes a stylistic change in the

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reference to the Secretary of Housing and Urban Development; makes several changes to accommodate the addition of two new subsections; adds a new subsection excepting from the operation of the automatic stay a creditor's right to renew the effectiveness of an existing filing to protect the perfection of a security interest; and makes a conforming amendment to make it clear that the automatic stay is not intended to interfere with the rights of a holder of a negotiable instrument to obtain payment.

Subsection (c). This amendment clarifies that time period alternatives are in a correlative not conjunctive relationship with each other.

Subsection (d). This amendment makes it clear that the stay relief from which is available under this subsection is the stay provided for under subsection (a); and makes it clear that relief from the stay is available where the property with respect to which such relief is requested is not required to accomplish any objective of a plan under either chapter 11 or 13.

Subsection (e). This amendment makes it clear that relief from the automatic stay should follow from the interested party's initiative, not the court's sua sponte, and that such relief is available upon an ex parte basis if the facts and circumstances justfiy the invocation of the court's extraordinary powers in equity until such time as there is an opportunity for an adversary hearing.

Section 26(a). This amendment makes it clear that the limitations upon a trustee's ability to use, sell, or lease property and the greater protections afforded a secured creditor by virtue of the special provisions concerning "cash collateral" apply even though the property comes into existence after the filing of the petition and even though the property is a transmuted form of the property originally subject to the creditor's security interest.

Subsection (b). This amendment deletes the provision concerning burden of proof and transfers it to a separate subsection to emphasize its importance; and makes it clear that limitations upon the trustee's power to use, sell, or lease property, as provided for in other subsections, may be made with or without a hearing, depending upon the conditions and circumstances.

Subsection (c). This amendment makes it clear that one of the conditions upon which the trustee may sell property free and clear of liens is when the price realized upon such a sale is greater than the value of all of the encumbrances.

Subsection (d). This amendment makes it clear that when the trustee sells property in which the estate holds a joint interest, that joint interest shall have been severed when the property became property of the estate and the other (non-estate) joint-owner shall receive from the sale an aliquot portion of the proceeds, not an actuarially determined amount.

Subsection (e). This amendment corrects a typographical error.

Subsection (f). This amendment makes it clear that a secured creditor is entitled to bid in at the sale where the property subject to such creditor's lien is sold.

Subsection (g). This amendment corrects several typographical errors; and makes it clear that the trustee's right to use, sell, or lease

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property is not affected by, inter alia, the appointment of or the taking possession by a custodian as compared with the appointment and the taking of possession by such a custodian.

Subsection (h). This amendment makes several stylistic changes.

Subsection (i). This amendment isolates for purposes of emphasis the burdens of proof placed upon the trustee and others concerning adequate protection and the interest to be protected.

Section 27(a). This amendment makes it clear that ipso facto clauses are equally inoperative in instances where they are contained in contracts or leases entered into by an under of the debtor and are sought to be exercised because of the debtor's financial condition where such property may be of value to the debtor.

Section 27(b). This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal service nature of the contract.

Subsection (c). This amendment makes it clear that the time periods within which the trustee must decide to assume or reject an unexpired lease or executory contract are those contained in this subsection and not those applicable to prepetition matters.

Subsection (d). This amendment makes it clear that the prohibition against a trustee's power to assume an executory contract does not apply where it is the debtor that is in possession and the performance to be given or received under a personal service contract will be the same as if no petition had been filed because of the personal service nature of the contract.

Subsection (e). This amendment corrects an error in punctuation.

Subsection (f). This amendment makes a stylistic change.

Subsection (g). This amendment makes it clear that the damages which a lessee of the debtor may offset against rent owing to the estate are only those which arise out of the debtor's default on obligations under the lease.

Subsection (h). This amendment corrects an error in punctuation; and makes it clear that the damages which a purchaser of property from the debtor may offset against the price owing to the estate are only those which arise out of the debtor's default on obligations under the contract.

Subsection (i). This amendment makes it clear that the lien to which the purchaser of property from the debtor is entitled under this subsection arises whether the purchaser's down-payment has been paid to the debtor or to another for the benefit of the debtor.

Section 28. This amendment makes it clear that the anti-discrimination provision directed against a utility is triggered, inter alia, by the filing of a petition under title 11.

Section 29. This amendment adds to the cross-references of the types of postpetition claims which may be treated as prepetition claims.

Section 30(a). This amendment makes it clear that in a partnership bankruptcy only general partners may object to the allowance of a filed proof of claim.

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Subsection (b). This amendment adds to the cross-references of claims arising after the filing of a petition to make it clear that even though such claims do arise after the filing of the petition they are treated as arising before the petition is filed; establishes the currency basis upon which claims will be paid; eliminates a redundancy; excepts from the disallowance of unmatured interest original discount; deletes from treatment by disallowance claims offset since such treatment is more appropriate under the section dealing with setoffs; redesignates the paragraphs to conform to the deletion; inserts an erroneously eliminated word; inserts an erroneously eliminated word, corrects an error in punctuation, and conforms the cross-references; makes a stylistic change in the language dealing with landlords' claims; and makes it clear that employment contract claims are those of the employee whose contract is terminated, clarifies that time period alternatives are in a correlative not conjunctive relationship with each other, substitutes the proper pronoun, and corrects a punctuation error.

Subsection (c). This amendment makes several stylistic changes.

Subsection (d). This amendment deletes the section cross-references as redundant since the operative language of recoverability, avoidability, and liability is adequately descriptive.

Subsection (e). This amendment adds to the cross-references those to which this subsection otherwise would be subject in the treatment of allowed claims; corrects several punctuation errors; and makes a stylistic change in the description of the right of subrogation.

Subsection (f). This amendment makes it clear that claims which arise from the recovery of property in connection with the debtor's claim a exemptions can arise under more than one subsection of subsection 522.

Subsection (g). This amendment makes a stylistic change.

Subsection (h). This amendment makes it clear that both allowed and disallowed claims may be reconsidered and where such occurs any allowance and distribution with respect thereto does not require that creditors of the same class as the newly allowed creditor need disgorge their dividends but that the newly allowed creditor will receive a distribution, to the extent there is property in the estate, to bring such creditor into parity with the others of the same class before any further distribution to the class as a whole can occur.

Section 31. This amendment corrects several errors in punctuation; makes it clear that certain tax related claims to be given administrative expense treatment are those incurred by the estate; makes several punctuation changes to accommodate the addition of a new paragraph; and adds a new paragraph providing for administrative expense treatment of expenses incurred by individuals in connection with their official responsibilities as members of a creditors' committee.

Section 32. This amendment makes it clear that all questions regarding the estate's and the debetor's personal liability for taxes are determinable by the bankruptcy court and that the governmental unit levying such tax(es), may not claim sovereign immunity and is bound by such a determination; eliminates a redundancy in paragraph (1) which subject is dealt with in paragraph (2); makes it clear that the bankruptcy court's jurisdiction to determine tax liability is not un-

§ 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724 (a) of this title, or preserved under section 510(c) (2), 522**[**(i)**]**(*h*) (2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522**[**(i) (1)**]**(*h*) (*2*) 542, 550, or 553 of this title; and

(3) revests the property Of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

§ 350. Closing and reopening cases

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) **[**a**]** *A* case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

SUBCHAPTER IV ADMINISTRATIVE POWERS

§ 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.

362. Automatic stay

(a) Except as provided in subsection (b) of this section *and section 365 of this title*, a petition filed under section 301, 302, or 303 of this title 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 the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title 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) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect 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) of this title*;

(4) under subsection (a) (1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a) (2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in air action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) (7) of this section, of the setoff of any mutual debt and claim **[**that are**]** *regarding* commodity futures contracts, forward **[**commodity**]** contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities, *or, under subsection (a) of this section, of the setoff of any mutual debt and claim of a commodity broker, forward contract merchant, stockbroker, or securities clearing agency against the debtor for a margin payment, as defined in section 741 or 761*

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of this title, or settlement payment arising out of a commodity contract, as defined in section 761 of this title, forward contract, or securities contract, as defined in section 741 of this title, against cash, a security, or other property held by such commodity broker, forward contract merchant, stockbroker, or securities clearing agency to margin, guarantee, or secure such commodity contract, forward contracts or securities contract;

(7) 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 **[**said**]** *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; **[**or**]**

(8) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency**[.]**;

(9) under subsection (a) of this section, of the filing of any continuation statement or the refiling of any notice of a Federal tar lien required by nonbankruptcy law to maintain perfection of a security interest or the filing of such tow lien properly filed under such, law before the date of the filing of the petition; or

(10) 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.

(c) Except as provided in subsections (d), (e), and (f) 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; and

(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; **[**and**]** *or*

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

(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; or

(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 *in a case under chapter 11 of this title or is not necessary to an effective plan in a case under chapter 13 of this title, as the case may be.*

(e) 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

§ 546. Limitations on avoiding powers

(a) An action or proceeding under section 544, 545, 547, 548, or 553 of this title may not be commenced after the earlier of—

(1) two years after the appointment of a trustee under section 702, 1104, 1163, or 1302 of this title; **[**and**]** *or*

(2) the time the case is closed or dismissed.

(b) The rights and powers of **[**the trustee under section 544, 545, or**]** *a trustee under sections 544, 545, and* 549 of this title are subject to any generally applicable 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 such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

(c) The rights and powers of **[**the**]** *a* trustee under sections 544(a), 545, 547, and 549 of this title are subject to any statutory **[**right**]** or common-law right of a seller *of goods*, in the ordinary course of such seller's business, **[**of**]** *that has sold* goods to the debtor to reclaim such goods if the debtor has received such goods while insolvent, but—

(1) such a seller may not reclaim any such goods unless such seller demands in writing reclamation of such goods before ten days after receipt of such goods by the debtor; and

(2) the court may deny reclamation to a seller with such a right of reclamation that has made such a demand only if *the* court—

(A) grants the claim of such a seller priority as **[**an administrative expense**]** *a claim of a kind specified in section 503(b) of this title*; or

(B) secures such claim by a lien.

(*d*) *Notwithstanding sections 544, 545, 547, 54B(a) (2), and 548 (b) of this title, the trustee may not avoid a transfer that is a margin payment, as defined in section 741 or 761 of this title, deposit, or settlement payment, made by or to a commodity broker, forward contract merchant, stockbroker, or securities clearing agency, and that occurs before the commencement of the case, except under section 548 (a) (1) of this title.*

§547. Preferences

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, *including proceeds of such property*, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and