



Office of Temporary  
and Disability Assistance

# **Bankruptcy and Child Support Debts**

NYPWA Summer Conference 2023

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July 25, 2023

# Model Bankruptcy Protocol

This Model Bankruptcy Protocol is a tool to provide social service districts general guidance for implementing office procedures and protocols for handling child support cases when the child support obligor has filed for bankruptcy protection. The Protocol is a general guide for establishing paternity and establishing, modifying, and enforcing child support after a bankruptcy petition has been filed.

# Model Bankruptcy Protocol

This Model Bankruptcy Protocol serves as a general guide only. Development of your district's specific procedures and treatment of individual cases should be undertaken in consultation with your attorney.

# Terminology

Pre-petition Arrears: Unpaid child support that became due before the date the bankruptcy petition was filed

Post-Petition Arrears: Unpaid child support that became due after the date the bankruptcy petition was filed

# Terminology

Claim: A creditor's assertion of a right to payment from the Debtor or the Debtor's property.

Proof of claim: A written statement and verifying documentation filed by a creditor that describes the reason the Debtor owes the creditor money. (There is an official form for this purpose.)

# Terminology

Bankruptcy Estate: A bankruptcy estate is created at the time the petition is filed. The property in the bankruptcy estate is administered under the provisions of bankruptcy law and is used to satisfy claims.

The estate property is subject to certain protections from creditors.

# Terminology

In general, it includes all legal or equitable interests of the debtor in property as of the commencement of the case, and in some cases, property transferred before the case commenced.

# Terminology

In chapters 12 and 13 it includes all property debtor acquires post-petition including post-petition earnings until case is closed, dismissed, or converted.



## Estate - Sklar v. Grassi, (B. Ct. D. N.J., 2020)

- The debtor/child support obligor was beneficiary of an inheritance.
- The state court ordered the administrator of the probate estate to hold all of debtor's disbursements from the inheritance in escrow and release them to Ms. Grassi for the unpaid support.
- The debtor filed a Chapter 7 bankruptcy petition.

## Estate - Sklar v. Grassi, (B. Ct. D. N.J., 2020)

- The inheritance (\$50,000) was listed in the schedules and not claimed as fully exempt.
- Without seeking leave of the Bankruptcy Court, the CP filed a motion in the state court seeking relief regarding the inheritance.
- The state court restrained the executor from releasing any funds to the debtor and ordered the executor to release the funds to the CP in satisfaction of unpaid spousal support.

## Estate - Sklar v. Grassi, (B. Ct. D. N.J., 2020)

- The executor transferred all the funds to the Probate department.
- The bankruptcy trustee argued that the funds were property of the bankruptcy estate and therefore the executor violated the automatic stay.
- He asked for sanctions and that the executor reimburse the bankruptcy estate.

## Estate - Sklar v. Grassi, (B. Ct. D. N.J., 2020)

- The bankruptcy court held that the funds were not property of the estate but belonged to a third entity: the probate estate.
- Under NJ law, the decedent's property is held by the probate estate until creditors and administrative expenses are paid.

## Estate - Sklar v. Grassi, (B. Ct. D. N.J., 2020)

- NJ law requires payment of all child and spousal support debts as part of the administration of the estate.
- The arrears were a lien on estate property, and no distribution could occur until they are paid.
- The debtor's contingent interest in the inheritance was subject to and diminished by this statutory lien.
- The inheritance was not vested at the time of the bankruptcy and was not property of the estate. The automatic stay did not apply

Domestic Support Obligation (DSO): Debts including past, present and future debts in the nature of alimony, maintenance and support (spousal and child), including interest on these obligations. The definition includes debts owed to governmental units for assistance provided. 11 U.S.C. § 101(14A)

# DSOs

- The term “domestic support obligation” means a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title

# DSOs

- owed to or recoverable by a spouse, former spouse, or child of the Debtor or such child's parent, legal guardian, or responsible relative or a governmental unit



# DSOs

- in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the Debtor or such child's parent, without regard to whether such debt is expressly so designated

# DSOs

established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of

- a separation agreement, divorce decree, or property settlement agreement
- an order of a court of record or a determination made in accordance with applicable nonbankruptcy law by a governmental unit.

# DSOs

- First Priority
- Unsecured
- Nondischargeable

# DSOs

In re Schall (N.D. Ga. B. Ct., 2019).

The custodial parent/creditor claimed that certain debts arising from the parties' divorce were non-dischargeable DSOs

- Payment of the child's college expenses
- Purchase of a car for the child
- Payment of a student loan, and a cash settlement.

# DSOs - In re Schall

- DSOs are exempt from discharge under Section 523(a)(5)
- Equitable distribution debts (incurred in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record) are non-dischargeable under Section 523(a)(15)

# DSOs - In re Schall

- Bankruptcy courts are not bound by the labels used by the parties or the state court
- The court must examine whether the obligation is actually in the nature of support.
- A debt is in the nature of support if at the time of its creation the parties intended the obligation to function as support or alimony.

# DSOs - In re Schall

Factors or characteristics of the debt considered to analyze of the nature of a debt:

- The language of the Settlement Agreement or judgment. The parties' labels may not be binding but they are relevant to the parties' intent;
- The parties' relative financial strength;
- The parties' treatment of the property division in the Settlement Agreement as it impacts parent or child's need for ongoing support;
- Whether an obligation ends upon marriage or death;

# DSOs - In re Schall

Factors or characteristics of the debt considered to analyze of the nature of a debt:

- The frequency and number of payments;
- Whether an agreement waives other support rights
- Whether the debts are subject to modification and enforcement in state court; and
- How the obligation is treated for tax purposes.



# DSOs - In re Schall

The court held:

- college expense payments and the car purchase were non-dischargeable DSOs.
- Cash payments to student loan debt were incurred in the course of a divorce order of a court of record, and not dischargeable under Section 523(a)(15).

## DSOs - In re Jardine (B. Ct. D. Idaho 2022).

- The CP submitted a claim for unpaid child support and medical expenses, as well as other debts arising from the parties' stipulation and divorce decree in the NCP's "no assets" Ch 7
- The debtor did not object to the claim.
- The debtor received a discharge and the case was closed after the trustee filed a notice of no distribution.

## DSOs - In re Jardine (B. Ct. D. Idaho 2022).

- The CP sought to recover these debts in state court
- The debtor moved to reopen the bankruptcy to contest the claim (to avoid a res judicata effect of the claims).
- The CP moved for relief from the stay to continue the state court proceeding.
- The Court held that the child support and medical expenses were DSOs.

## DSOs - In re Jardine (B. Ct. D. Idaho 2022).

- The overriding public policy of § 523(a)(5) is to safeguard the enforcement of familial obligations and protect minor children from potential neglect.
- The CP provided sufficient evidence that debtor owed \$9,459.79 in unpaid child support and \$1,974.49 in unpaid medical expenses.

## DSOs - In re Jardine (B. Ct. D. Idaho 2022).

- The court lifted the stay to the extent of allowing the state court to clarify certain issues and determine the value of other debts.
- The bankruptcy court reserved for itself the determination of what was dischargeable.

## DSOs - In re: Morrissey (B. Ct. D. Ut., 2022)

- The NCP obtained a judgement against the custodial parent/debtor in small claims court for an overpayment of child support.
- The NCP brought a motion for summary judgment for a declaration that the debt was exempt from discharge.
- The debt was not a DSO that would be exempt under 11 USC 523(a)(5).

## DSOs - In re: Morrissey (B. Ct. D. Ut., 2022)

- It was exempt from discharge as a non-DSO marital debt under § 523(a)(15).
- The court held that the overpayment was incurred “in connection with” the support provisions of the judgment of divorce.

## DSOs - In re: Lopez (B. Ct. N.M., 2022)

- The CP was granted a divorce decree on default.
- The decree included a judgment for child support arrears, a judgment for reimbursement of the CP's property contributions to the marital home, attorney's fees and taxes.



## DSOs - In re: Lopez (B. Ct. N.M., 2022)

- The CP filed claims for these debts, characterizing them as DSOs entitled to priority.
- The debtor challenged the claims.
- The CP argued that the state court judgments precluded the debtor from challenging the amount and nature of the claims, including their priority and non-dischargeable status.

## DSOs - In re: Lopez (B. Ct. N.M., 2022)

- Under the Full Faith and Credit statute (28 U.S.C. § 1738), a federal court must give to a state-court judgment the same preclusive effect as would have been given that judgment under the law of the issuing State.
- The court applied New Mexico's law regarding issue and claim preclusion.

## DSOs - In re: Lopez (B. Ct. N.M., 2022)

- Under New Mexico law, issue preclusion required actual litigation of the issue. Not litigated in a default judgement.
- Under New Mexico law, claim preclusion required that the claim or issue be the same.
- The court held that the default judgment was not entitled to claim preclusive effect as to the nature of the claims but preclude challenge to the amount of the claims.

## DSOs - In re: Lopez (B. Ct. N.M., 2022)

- Claim preclusion didn't apply to determining dischargeability in bankruptcy because dischargeability can only be asserted in connection with a bankruptcy case.
- In determining the nature of a claim, the court looks beyond the labels given to the obligation by the state court to determine whether the obligation is “in the nature of ... support”

## DSOs - In re: Lopez (B. Ct. N.M., 2022)

- The court must conduct an inquiry into both the parties' intent and the substance of the obligation.
- Even though the child support arrears were calculated using the child support guidelines, the court had to make its own determination of the nature of the debt and could not rely on claim preclusion.

## DSOs - In re: Lopez (B. Ct. N.M., 2022)

Claim preclusion barred the bankruptcy court from looking behind a state court default judgment for unpaid alimony and support to determine the *amount* of the obligation.

## DSOs - In re: Dillon (B. Ct. S.D. Miss., 2020)

- As part of the divorce settlement, the CP was also awarded \$9000 of the equity in the home to be paid within ninety days of the decree and court costs and attorney's fees totaling \$1207.
- She testified in the bankruptcy hearing that the purpose of the \$9000 award was for her to establish a place to live for herself and the child, as the debtor was granted use of the marital home.

## DSOs - In re: Dillon (B. Ct. S.D. Miss., 2020)

- The court held that the \$9000 payment from the home's equity and the award of attorney's fees in the divorce were DSOs.
- Determining whether a payment is in the nature of support is a matter of federal bankruptcy law, not state law.



## DSOs - In re: Dillon (B. Ct. S.D. Miss., 2020)

- Regardless of how the obligation was labeled in the divorce court, the bankruptcy court determine the true nature and purpose of the award.
- The bankruptcy court must consider the factors relevant to characterizing the debt and determine the intent of the court in imposing the obligation.
- The wording of the Decree and other evidence established that the state court intended the \$9000 award as support.

## DSOs - In re: Dillon (B. Ct. S.D. Miss., 2020)

- Although the award was to come from the equity in the home, the Decree ordered the debtor to pay the CP “no less than” \$9000, implying that the award was not a property settlement.
- The mother’s testimony that the award was to help her get established supported this conclusion, as did the parties’ income disparity.

## DSOs - In re: Dillon (B. Ct. S.D. Miss., 2020)

Because the award of attorney's fees and costs also reflected a balancing of the parties' financial needs and the income disparity, it was in the nature of support.

# Notice of Bankruptcy

- The bankruptcy petition includes a matrix of creditors. This list is used to send out notices.
- The notice includes deadlines for filing a complaint objecting to discharge; and whether or not a proof of claim must be filed.
- The bankruptcy notice also advises the creditor of the automatic stay of certain collection and other actions against the Debtor and the Debtor's property.

# Notice of Bankruptcy

If the case record indicates that the arrears have been referred to the Department of Taxation and Finance (DTF) for enforcement, that another NYS CSEU has an open case, or the child support agency of another state has an open case, a copy of the notice should be sent to DTF, the other CSEU, and/or the other state's child support agency.

# Notice of Bankruptcy

In Re Dillon (B. Ct. S.D. Miss., 2020)

- The debtor used an incorrect address for the CP in the matrix.
- The CP's claim was filed after the claims bar date.

# Notice of Bankruptcy

- The mother had a reasonable time to file the Claim after she received notice of the case.
- Although she did not know of the bankruptcy until three months after the claims bar date, her then-attorney knew more than two months before the bar date, and his knowledge was imputed to her.

## Notice of Bankruptcy - In re: Clark (5th Cir. 2019)

- The debtor had children with 2 custodial parents, each receiving child support enforcement services from the State of Illinois.
- The NCP filed a Chapter 7 bankruptcy.
- The NCP did not list one CP in the matrix of creditors and gave an incorrect address for the other, so only the IV-D Agency received notice of the case.



## Notice of Bankruptcy - In re: Clark (5th Cir. 2019)

- The IV-D Agency didn't file proof of claims for the child support arrears (approx. \$300,000) owed to the CPs.
- The Chapter 7 Trustee marshalled the assets and sent the creditors notice of his proposed distribution of the \$71,000, including the IV-D Agency.
- The money was distributed to the five priority creditors who had filed timely proofs of claim.

## Notice of Bankruptcy - In re: Clark (5th Cir. 2019)

- When the CPs found out about the bankruptcy case, they contacted the IV-D Agency, which filed proofs of claim for the child support arrears.
- The CPs were not allowed to participate in the distribution of assets because they were filed after the claims bar date.
- They argued that their claims should have been treated as timely because the Chapter 7 Trustee failed to give them notice of the bankruptcy.

## Notice of Bankruptcy - In re: Clark (5th Cir. 2019)

- The bankruptcy court rejected this argument on grounds that the IV-D Agency, not the Trustee, had withheld notice of the bankruptcy filing from them.
- The Fifth Circuit held that the IV-D Agency was the creditor entitled to notice of the bankruptcy filing.
- The CPs authorized it to collect the arrears for them.

## Notice of Bankruptcy - In re: Clark (5th Cir. 2019)

- The proofs of claim were filed on behalf of the IV-D agency.
- The court held that the two custodial parents were not entitled to notice of the bankruptcy case, and that the Trustee's Final Report and Distribution was not deficient by not being sent to them.

# Claims

- Counsel for the CSEU may file a notice of appearance at no cost
- This will entitle the CSEU to notice of all future appearances, court actions, etc.
- The CSEU should file a proof of claim, unless directed not to do so in the Notice of Bankruptcy

# Claims

- The claim should be prepared by or reviewed and approved by the CSEU's legal office or by the CSEU following a procedure approved by CSEU counsel
- A claim is prima facia proof of the debt and the debtor must present sufficient evidence to rebut the prima facie validity of creditor's claim

## Claims - In re: Little (B.Ct. E.D. Ark, 2021).

- A proof of claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a).
- If an objection is filed, the court must determine the amount of such claim and must allow the claim unless one of nine exceptions found in Section 502(b) applies.

## Claims - In re: Little (B.Ct. E.D. Ark, 2021).

- A properly filed proof of claim is prima facie evidence of the validity and amount of the claim.
- The burden of proof shifts to the objector to prove one of the exceptions.
- Once the objector presents evidence supporting its objection to claim, the ultimate burden of persuasion shifts to the Claimant.



# Evaluating Chapter 12 and 13 plans

- Counsel should review the other debts and overall plan
- Review the plan to ensure that child support arrears are treated properly.
- Non-assigned (non-PA) arrears are entitled to first Priority status and must be paid in full under the Plan.

# Evaluating Chapter 12 and 13 plans

- Arrears assigned to a governmental entity (PA arrears) are also entitled to Priority status, right after non-assigned arrears.
- They must be paid in full under the plan **UNLESS** the Debtor is paying all of his or her “disposable income” into the plan for a 5-year period.

# Evaluating Chapter 12 and 13 plans

- If the full amount of assigned arrears is not paid during the plan, the balance is non-dischargeable.
- Current support is paid outside the plan.
- A plan should not be confirmed if the Debtor has not paid post-petition current child support when due.

# Evaluating Chapter 12 and 13 plans

The CSEU should file objections to the plan where appropriate, such as where the amount paid by the Debtor monthly is not sufficient to pay the arrears and interest in full.

## Evaluating plans - In re Hutchens (B. Ct. M.D. Fla., 2012).

- The debtor owed the CP unpaid alimony, child support, medical bills, college expenses for the child, interest/sanctions, and attorney's fees totally approximately \$140,000.
- The bankruptcy court held that these arrears were a DSO.

Evaluating plans - In re Hutchens (B. Ct. M.D. Fla., 2012).

Due to the debtor's financial circumstances, the CP agreed that he could pay a lower monthly amount without waiving the arrears and other amounts due.

The CP filed a claim for \$78,000 unpaid support (based on the lower payment amount).

Evaluating plans - In re Hutchens (B. Ct. M.D. Fla., 2012).

- She didn't file a claim for the full amount of arrears, the interest, or the attorney's fees.
- The debtor's confirmed plan allowed for full payment of the claim but not the remaining child support debt.

Evaluating plans - In re Hutchens (B. Ct. M.D. Fla., 2012).

- § 1322(a)(2) requires that the plan pay the DSO in full.
- On confirmation, a Chapter 13 plan is given res judicata effect even if the plan does not comply with the Code.



## Evaluating plans - In re Hutchens (B. Ct. M.D. Fla., 2012).

- Some case law suggests that the holder of a priority claim must expressly agree to have her claim treated differently from what the Code requires in order for the plan to be confirmed.
- This court held the confirmed plan binds the creditor, regardless of whether that creditor has objected to, accepted, or rejected the plan.

## Evaluating plans - In re Hutchens (B. Ct. M.D. Fla., 2012).

- The CP was bound by the terms of the confirmed plan and was only entitled to payment of \$78,000 as an allowed unsecured first priority claim for the prepetition DSO.
- The debtor's personal liability for the balance of the DSO was not affected by a Chapter 13 discharge and couldn't be discharged in bankruptcy.

## Evaluating plans - In re Hutchens (B. Ct. M.D. Fla., 2012).

- The unpaid portion of the pre-petition arrears, like any other nondischargeable debt, could be collected as a personal liability of the debtor.
- Whatever discharge the debtor received would not absolve him of the duty to pay the balance of the DSO and the interest that accrued under the applicable New Hampshire law.

## Evaluating plans - In re Cooley (S.D. Ala. B, Ct., 2019)

After filing the Ch 13 petition, debtor missed four child support payments. The custodial parent moved to dismiss the bankruptcy petition.

## Evaluating plans - In re Cooley (S.D. Ala. B, Ct., 2019)

11 USC Section 1307(c)(11) states that a court may dismiss a debtor's case for “failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.”

## Evaluating plans - In re Cooley (S.D. Ala. B, Ct., 2019)

“The creation of this higher priority for domestic support obligations was ... designed to enhance the status of domestic support obligations in bankruptcy cases and to prevent what Congress believed to be abuses of the bankruptcy process with respect to domestic support obligations.”

Collier on Bankruptcy p. 507.02 (16th 2017).

## Evaluating plans - In re Cooley (S.D. Ala. B, Ct., 2019)

- The series of domestic support amendments mark a clear congressional intent that domestic support obligations be considered paramount in bankruptcy cases.
- The plain language of Sections 507(a)(1) and 1307(c)(11) gave the court authority to dismiss a debtor's case for failure to pay post-petition child support.

## Evaluating plans - In re Cooley (S.D. Ala. B, Ct., 2019)

In an effort to give the debtor a fresh start, the Court conditionally denied the motion to dismiss.



## Evaluating plans - In re Cooley (S.D. Ala. B, Ct., 2019)

- The debtor was ordered to catch up his outstanding child support payments by making two payments in the amount of \$ 1,466.00.
- If either payment was not timely made the custodial parent could alert the Court and the petition would be dismissed without a hearing or further delay.

# Transfer of child support services case

- If the case is transferred to another county's CSEU during the pendency of the bankruptcy case, the transferring CSEU must advise the receiving CSEU of the pending bankruptcy and cooperate with the new CSEU to ensure ongoing compliance with the automatic stay.
- The CSEU receiving the case must advise the bankruptcy court to add its name and address on the creditor's matrix (for notice purposes), and the CSEU attorney in the receiving district may file an appearance.

# Transfer of child support services case

## Interstate Cases

- If New York is the initiating state, a copy of the initial Notice must be sent to the receiving state.
- If New York is the receiving state, a copy of the initial Notice must be sent to the initiating state.

## Transfer of cases - In re Lockhart

- The CP and child moved to Ohio and began receiving child support services there.
- The West Virginia child support agency notified the Ohio child support agency of the status of and arrears due in the child support case.
- Ohio seized the debtor's stimulus check.

## Transfer of cases - In re Lockhart

- The CP and child moved to Ohio and began receiving child support services there.
- The West Virginia child support agency notified the Ohio child support agency of the status of and arrears due in the child support case.
- Ohio seized the debtor's stimulus check.

# Transfer of cases - In re Lockhart

The debtor filed a complaint alleging:

- a violation of the automatic stay and
- a violation of the court's confirmation order in his chapter 13 case.

## Transfer of cases - In re Lockhart

The debtor sought actual damages for monetary, incidental, and consequential damages and compensatory damages for emotional and mental distress, aggravation, anxiety, annoyance, and inconvenience as a result of not receiving the CARES Act stimulus payment

# Transfer of cases - In re Lockhart

- The automatic stay acts as a breathing spell and protects a debtor from any action that would interfere with the debtor's ability to effectively reorganize.
- A petition does not operate as a stay as to an action by a governmental unit to enforce the unit's police or regulatory power. 11 U.S.C. § 362(b)(4).



## Transfer of cases - In re Lockhart

- The court dismissed both claims.
- The police and regulatory power exception applies if the purpose of the action is to promote public safety and welfare or effectuate public policy.

## Transfer of cases - In re Lockhart

- The “public policy” test distinguishes between government actions that effectuate public policy and those that adjudicate private rights.
- West Virginia has a public policy interest in ensuring compliance with child support orders.

## Transfer of cases - In re Lockhart

- The court found that West Virginia's notification was excepted from the automatic stay under §362(b)(4).
- The Court held that the mere act of reporting the status of debtor's child support obligations to an interested party does not constitute "an act" prohibited by § 362 of the Bankruptcy Code

# Transfer of cases - In re Lockhart

- The action was best characterized as an action which promotes public policy regarding child support payments by ensuring that the support payments reach the intended destination.
- Both government agencies had an interest in effectuating the support of minor children within their respective states, and communication between the two agencies is necessary to carry out their mission.

## Transfer of cases - In re Lockhart

- The court denied the request for a declaration of contempt for violation of the confirmed plan.
- Contempt is a violation of the Confirmation Order which may be remedied by the Court pursuant to § 105 of the Bankruptcy Code.

# Transfer of cases - In re Lockhart

In order for the court to hold a defendant in contempt, the movant must show:

- (1) The existence of a valid decree of which the alleged contemnor had actual or constructive knowledge;
- (2) That the decree was in the movant's "favor";

## Transfer of cases - In re Lockhart

(3) That the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and

(4) That the movant suffered harm as a result.

## Transfer of cases - In re Lockhart

- The debtor failed to allege that any harm was directly caused by West Virginia.
- There were no actions which could be said to have violated the terms of the confirmed Chapter 13 plan.



# Automatic Stay

- The automatic stay goes into effect on the date that the bankruptcy petition is filed, although there are some exceptions for DSOs. The automatic stay means that a creditor, including a county, city, or CSEU, may not take or continue certain actions to enforce or establish debts.
- Actions which violate the automatic stay may result in a court order sanctioning the creditor and awarding damages, attorney's fees, punitive damages, and costs payable to the Debtor.

# Automatic Stay

- The CSEU (by its counsel) may seek to lift the automatic stay for a specific enforcement action if there is a question about whether it is exempt.
- The CSEU **MUST** move to lift the automatic stay if the action the CSEU wishes to take will violate the automatic stay. To do so, the CSEU counsel files a motion for relief from the automatic stay in the bankruptcy court.

# Automatic Stay

- There are exemptions to the automatic stay, allowing certain creditors to collect support from property of the estate.
- If an action is exempt from the automatic stay, the CSEU may commence or continue that action without violating the automatic stay or being subject to penalties.

# Automatic Stay

- The DSO exemptions from the automatic stay are the same for all bankruptcy chapters.
- The case record should be adjusted to prevent all non-exempt enforcement activities (See Appendix A).

# Automatic Stay

The following actions are exempt from the automatic stay:

- Collection of a domestic support obligation from property that is not property of the estate.
- Income Executions for payment of a domestic support obligation (both current support and arrears).
- Withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license.

# Automatic Stay

- Reporting of overdue support owed by a parent to any consumer reporting agency.
- Interception of a state or federal tax refund.
- Enforcement of a medical obligation, including medical executions.

# Automatic Stay

Lottery intercept and passport suspension –Not specifically listed as exempt.

- In a Chapter 7, neither the lottery prize nor the Debtor's passport are property of the bankruptcy estate
- In chapters 12 and 13, property acquired after filing the petition is property of the estate

# Automatic Stay

- Referral to DTF - not exempt.
- Property executions and restraining notices –not exempt.



# Automatic Stay

## Personal Injury Claims - not exempt.

- In a chapter 7 case, no new liens should be issued unless the Trustee abandons any interest in the personal injury claim or case.
- No efforts to create or enforce the lien against estate property without a court order lifting the stay.

# Automatic Stay

- Do you have to withdraw liens, restraining notices, and levies?

Automatic Stay - City of Chicago, Illinois v Fulton, (U.S. S. Ct.,2021).

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

## Automatic Stay - City of Chicago, Illinois v Fulton, (2021).

- The mere retention of estate property after the filing of a bankruptcy petition does not violate the automatic stay provision in §362(a)(3).
- Under that provision, the filing of a bankruptcy petition operates as a “stay” of “any act” to “exercise control” over the property of the estate.

Automatic Stay - City of Chicago, Illinois v Fulton, (2021).

Taken as a whole, §362(a)(3) only prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

Question – What about § § 362(a)(4), (6) and the turnover section?

## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

- The debtor made a motion to hold Oregon Division of Child Support (“DCS”) in contempt for violation of the automatic stay and for failure to comply with the terms of the court's order confirming the chapter 11 plan.
- The debtor alleged that DCS violated the stay and the plan when it intercepted a \$1,200 stimulus payment that was issued under the CARES Act, sent notices to debtor post-petition, and caused debtor's passport to be withheld.

## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

- DCS received notice of the bankruptcy in March 2020.
- After the notice, DCS sent the debtor 3 billing statements for unpaid child support
- DCS intercepted a stimulus payment to the debtor of \$1,200 in May 2020.
- Debtor's passport had been withheld by the State Department due to unpaid child support.

## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

- Debtor filed his reorganization plan 3 weeks later. The plan provided for full payment of current support and arrears.
- The filing of a bankruptcy case does not stay the collection of a DSO from property that is not property of the estate or the interception of a tax refund
- The stimulus payment at issue was appropriately be treated as a tax refund.



## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

- The record was insufficiently developed to provide a basis for the court to grant summary judgment establishing liability for violation of the automatic stay regarding the withholding of debtor's passport.
- Debtor's only evidence regarding the passport did not specify when DCS acted and exactly what actions it took.

## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

- If DCS only provided a pre-petition notice to the State Department that the debtor owed unpaid child support, and did not take any action post-petition, then DCS did not violate the automatic stay.
- Inaction that merely maintains the status quo does not violate the automatic stay.

## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

- DCS did not violate the automatic stay when it sent statements to debtor after he filed his petition and before he confirmed his plan.
- These statements did not violate the automatic stay because DCS was entitled at that time to collect child support from assets that were not property of the estate.

## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

- There was nothing in the statements to indicate they were directed toward collection from property of the estate.
- DCS also did not violate the terms of the order confirming the plan when it sent statements post-confirmation.

## Automatic Stay - In re Bronson (B. Ct. D. Or., 2022)

The statements DCS sent post-confirmation did not demand payment of more than the monthly child support that was expressly due and required to be paid under the plan.

The plan provided that the debtor would make normal monthly child support payments pursuant to the support order.

# Automatic Stay - Court Proceedings

Commencement or continuation of the following types of civil actions or proceedings is exempt from the automatic stay:

- Establishment of paternity.
- Establishment or modification of a DSO.
- Child custody or visitation proceedings.

# Automatic Stay - Court Proceedings

- Dissolution of a marriage, except to the extent that the proceeding seeks to determine the division of property that is property of the estate.
- Domestic violence proceedings.
- Court actions to withhold, suspend, or restrict a driver's license, a professional or occupational license, or a recreational license to enforce a DSO.

# Automatic Stay - Court Proceedings

- Criminal proceedings generally are not stayed, including criminal contempt



# Automatic Stay - Court Proceedings

- Family court violation petitions based on pre-petition arrears are stayed and the CSEU must withdraw or move to terminate any family court enforcement petition.
- Exception - The CSEU could proceed to collect or enforce the obligation against non-estate property or seek a remedy that is exempt from the automatic stay (i.e., court-based license suspension).

# Automatic Stay - Court Proceedings

Great care should be taken not to inadvertently violate the automatic stay in any proceeding, as a violation will lead to an award of damages and attorney's fees.

# Automatic Stay - Court Proceedings

- If the custodial parent files a violation petition that violates the automatic stay, the CSEU should alert the court and, if the CSEU is a party, move to dismiss without prejudice to re-file when permitted by the Bankruptcy Code.
- The CSEU should not take any action in support of a proceeding initiated or continuing in violation of the stay.

# Chapter 13 limitations

There are additional limitation after confirmation of the Ch 13 plan

- The provisions of a confirmed Chapter 12 or 13 plan bind the Debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not a creditor has objected to, has accepted, or has rejected the plan.

# Chapter 13 limitations

- An unappealed, confirmed plan is res judicata, and its terms are not subject to collateral attack.
- Once final, the plan represents a binding determination of the rights and liabilities of the parties as set out by the plan.
- The terms of a confirmed plan are binding, even if they conflict with other provisions of the Bankruptcy Code.

# Chapter 13 limitations

A violation of the terms of the plan by a creditor may be enforced as a contempt of court. The court may award damages, attorneys fees and costs.

# Chapter 13 limitations

Pre-petition arrears.

- If child support arrears are included in the Plan, they must be paid in full during the term of the Plan.
- The CSEU may not collect the arrears by other means, and the account must be adjusted to prevent automated enforcement. (See MBP Appendix A.)

# Chapter 13 limitations

The Debtor will make payments to the Chapter 13 trustee, who will forward them periodically. If payments are not being received, the CSEU should contact the Trustee to determine whether payments are being made.



- Post-petition child support arrears
- The Debtor is required to pay current support that becomes due after the filing of the petition in order for the plan to be confirmed. 11 U.S.C. § 1325(a)(8)
- If the Debtor fails to pay post-petition support, a creditor may ask the court for an order to convert the case to a chapter 7 or dismiss the case.

# Chapter 13 limitations

- Post-petition debts are generally not paid under the plan and so enforcement does not violate the terms of the plan.
- The automatic stay still applies and prohibits any act to create, perfect, or enforce any lien against property of the estate.
- The exceptions to the stay for DSOs allow some enforcement activities.

# Chapter 13 limitations

- Any enforcement should be clear that the only arrears being enforced are those that accrued post-petition.
- CSEU and its counsel should be careful at every stage of administrative enforcement or court proceedings to ensure that the actions do not go beyond the relief permitted by the Bankruptcy Code.

# Violations of the Plan or Stay

In re: Lockhart, 2021 WL 2632765 (B. Ct. N.D. West Virginia, 2021).

# Violations of the Plan or Stay

- The debtor filed a chapter 13 bankruptcy and his Ch 13 plan was confirmed
- West Virginia was enforcing the support order.
- The case transferred to Ohio. Ohio was never given notice of the bankruptcy.

# Violations of the Plan or Stay

- The debtor alleged that Ohio, with knowledge of the Chapter 13 plan and confirmation order, coordinated with the U.S. Department of the Treasury to intercept a \$2,400 economic stimulus payment.
- The debtor received a “Notice of Ohio Income Tax Refund Offset For Overdue Support” and argued that this notice constituted a separate violation of the stay.

# Violations of the Plan or Stay

The debtor filed a complaint seeking sanctions for violating the automatic stay and for contempt in violating the chapter 13 bankruptcy plan.

# Violations of the Plan or Stay

- The IRS and Ohio sought dismissal on various grounds, including sovereign immunity.
- The court rejected their sovereign immunity defense as having been eliminated by amendments to section 106 of the bankruptcy code.



# Violations of the Plan or Stay

- The court held that the stimulus was appropriately characterized as a refund.
- The CARES Act expressly provided that the economic impact payment could be offset for child support obligations.
- The stimulus payment could be garnished to pay past-due child support and garnishment was except from the automatic stay.

# Violations of the Plan or Stay

- Debtor argued that the Notice of the offset constituted a violation of the stay.
- A creditor which provides notice that has an informative purpose, rather than one amounting to an attempt to collect, does not violate the automatic stay.

# Violations of the Plan or Stay

- 42 U.S.C. § 666(a)(3)(A) provides that a state shall ensure notice of an offset is sent to the noncustodial parent to ensure they are given an ability to contest it.
- The facts here indicate an informative, rather than harassing purpose, and fail to amount to a violation of the stay.

# Violations of the Plan or Stay

- The court held that the record required further development for a ruling on contempt.
- The confirmed bankruptcy plan binds the debtor and each creditor to its terms, whether or not the creditor is provided for in the plan and regardless of whether the creditor has objected to, accepted, or rejected the plan.

# Violations of the Plan or Stay

In order for the court to hold a defendant in contempt, the movant must show by clear and convincing evidence:

- The existence of a valid decree of which the alleged contemnor had actual or constructive knowledge;
- That the decree was in the movant's "favor:"

# Violations of the Plan or Stay

- That the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and
- That the movant suffered harm as a result.

# Violations of the Plan or Stay

As there were factual matters in dispute the court denied defendants' motions for summary judgement and ordered further proceedings on the issue of contempt.

# Violations of the Plan or Stay

In re: Gonzalez, (11th Cir. 2016).

- The Florida Department of Revenue attempted to intercept the Chapter 13 debtor's work-related travel reimbursement check for the payment of a domestic support obligation (DSO).



# Violations of the Plan or Stay

- The debtor objected to the collection attempt based on the bankruptcy and Florida returned the funds and stopped all collection activities
- The debtor filed motion to hold the state in contempt for violating the bankruptcy court's confirmation order.

# Violations of the Plan or Stay

- The court held the state in contempt for violating the confirmation order and awarded debtor \$21,360.00 in attorney fees.
- Florida appealed and the district and Circuit courts affirmed.

# Violations of the Plan or Stay

Florida argued that § 362 initiates an automatic stay but permits the withholding of income that is property of the estate or property of the debtor for payment of a DSO.

# Violations of the Plan or Stay

- The Circuit court held that § 362(b)(2)(C) permits a DSO creditor to collect notwithstanding the automatic stay but does not create an exception to interfere with the binding effect a confirmed plan.
- Florida did not violate the automatic stay when it intercepted Gonzalez's reimbursement payment, but it did violate the confirmed plan.

# Violations of the Plan or Stay

- The binding effect of a confirmed plan encompasses all issues that could have been litigated, including whether Florida could intercept the reimbursement payment.
- Because the plan was silent on the issue of interception of the reimbursement payment, the Florida was prohibited from taking the action.

# Violations of the Plan or Stay

- In re LaCroix (B. Ct. M.D. Fl. 2021)

# Violations of the Plan or Stay

- The debtor filed a chapter 13 bankruptcy petition and listed the Florida Department of Revenue as a creditor.
- Florida was collecting child support arrears owed by the debtor.
- Texas was the initiating state (and therefore submitting arrears for tax refund offset) but was not listed on the creditor matrix.
- Florida never advised Texas of the bankruptcy and Texas did not participate in the proceedings.

# Violations of the Plan or Stay

- After the chapter 13 plan was confirmed, Florida sent various billing statements and garnished the debtor's wages three times.
- Debtor's counsel contacted Florida after each collection attempt or garnishment, and Florida promptly ceased the actions.
- In May 2020, Texas intercepted the debtor's \$1,200 stimulus check for the child support arrears.



# Violations of the Plan or Stay

- The debtor filed the Motion seeking sanctions against Florida and Texas for violating the automatic stay and requested an accounting.
- The Court entered an order which directed Texas to provide the debtor with a full accounting.
- At the hearing, debtor's counsel advised the Court that the debtor had received an accounting from Texas, which had returned the stimulus check.

# Violations of the Plan or Stay

- The debtor requested that the Court sanction Texas in the amount of his attorney fees and Florida for attorney fees and garnishment fees incurred by the debtor.
- Texas argued sanctions shouldn't be imposed because it didn't receive notice of the debtor's bankruptcy filing, and when given notice it returned the \$1,200.
- Florida argued that any sanction would be inappropriate since the DSO was exempt from the automatic stay and upon notice of the garnishments, it immediately took steps to cease the garnishments.

# Violations of the Plan or Stay

- The court didn't base its decision on violation of the automatic stay.
- The collection activities took place after confirmation of the plan.

# Violations of the Plan or Stay

- The confirmed plan was binding on the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.
- In this case, the confirmed Chapter 13 plan provided how the Claim would be paid. No plan provision allowed Florida or Texas to garnish wages or intercept stimulus checks.

# Violations of the Plan or Stay

A party seeking civil contempt sanctions for violation of a court order must establish by clear and convincing evidence:

- the allegedly violated order was valid and lawful;
- the order was clear, definite, and unambiguous and
- the alleged violator had the ability to comply with the order.

# Violations of the Plan or Stay

- The Court sanctioned Florida for civil contempt.
- Florida was a sophisticated creditor, represented by counsel and received proper notice of the proceedings in this case.
- The confirmation order was valid and lawful. It was also clear, definite, and unambiguous as to how the Claim would be paid.

# Violations of the Plan or Stay

- Although Florida quickly ceased the garnishment actions when notified, the court couldn't ignore that the garnishments occurred repeatedly over time.
- Texas was not sanctioned.
- It received no notice of the bankruptcy.

# Violations of the Plan or Stay

- The debtor has a duty to list the name and addresses of each creditor and to complete the bankruptcy schedules accurately to provide sufficient notice.
- Texas could not comply with a confirmation order when it had no knowledge of the case.
- After Texas received notice of the bankruptcy, it took actions to correct the issue.



# Violations of the Plan or Stay

In re Hamrick (B. Ct. S.D. S. C., 2021).

- The parties were divorced in North Carolina.

# Violations of the Plan or Stay

- The CP filed an action in Florida seeking child support and division of marital property.
- She also sought damages for failure to comply with the separation agreement, unjust enrichment, constructive fraud by breach of fiduciary duty, and conversion.

# Violations of the Plan or Stay

- The debtor filed a petition under chapter 13 of the Bankruptcy Code.
- The Bankruptcy Noticing Center served the CP and Florida court with the bankruptcy notice.
- The clerk of court closed the court file.

# Violations of the Plan or Stay

- The CP filed a motion to reopen, with a request for attorney's fees and other relief against the debtor.
- The case was reopened.
- After a number of proceedings in state court, the CP also filed a motion for relief from the automatic stay in bankruptcy court to proceed on all counts of her Florida complaint.

# Violations of the Plan or Stay

- The debtor sought damages for the custodial parent's willful violation of the automatic stay.
- The basis for the complaint was that she pursued the Florida court action after the debtor filed his bankruptcy case by filing of the motion to reopen the action for claims beyond child support and custody.

# Violations of the Plan or Stay

To recover damages for willful violation of the automatic stay, debtor must prove that (1) a bankruptcy petition was filed, (2) that the debtor is an “individual” protected under the automatic stay provision, (3) that the creditor received notice of the petition, (4) that the creditor’s actions were in willful violation of the automatic stay, and (5) that debtor suffered damages.

# Violations of the Plan or Stay

- Knowledge of the bankruptcy is the legal equivalent of knowledge of the stay.
- The Court found that the violation of the stay was willful because the state court motion was made with knowledge of the pending bankruptcy case.
- The CP's mistaken belief that the pending bankruptcy case did not affect the Florida action was immaterial to the question of whether a stay violation occurred, even if such belief was based on advice of counsel.

# Violations of the Plan or Stay

- The court awarded attorney's fees for the Florida action.
- An award of damages must be founded on concrete, non-speculative evidence and cannot be based merely on speculation, guess or conjecture.
- Debtor's counsel had to present affidavits specifying the attorney's fees and costs.



# Violations of the Plan or Stay

- The debtor claimed that he had take 12 days of paid time off (valued at \$2,900) and incurred travel expenses (transportation, lodging, and food) of approximately \$3,000 to attend hearings as a result of the stay violation.
- The Court was not persuaded that damages in the form of lost paid time off and travel expenses were appropriate.

# Violations of the Plan or Stay

- One of the Florida court conferences was held by Zoom and the other was on consent of the parties.
- The numerous bankruptcy court hearings were necessary to the administration of his bankruptcy case, regardless of any alleged stay violations.
- Debtor didn't present evidence to support the valuation of his travel expenses, such as flight, lodging, restaurant, or fuel receipts, or the valuation of his paid time off, such as his pay stubs.

# Violations of the Plan or Stay

- The debtor failed to meet his burden of proof to demonstrate damages that were the direct and proximate result of the stay violation in the form of lost paid time off and travel expenses.
- The debtor claimed damages for the emotional distress he experienced due to the willful violation of the stay.
- He testified that he needed monthly visits with the military chaplain to help him deal with his stress.

# Violations of the Plan or Stay

- He did not present any testimony or other evidence of any physical ailments that required medical treatment or medication resulting from his stress.
- This testimony did not convince the Court that he experienced emotional distress proximately caused by the stay violation itself, as opposed to the general stress experienced by a person going through a difficult domestic dispute involving his children.

# Violations of the Plan or Stay

- The debtor also made a claim for punitive damages but did not present any testimony or argument in support of his claim.
- An award of punitive damages is within the discretion of the Bankruptcy Court and is a fact specific determination.
- The Court did not find the custodial parent's actions to be sufficiently egregious to justify an award of punitive damages.

# Violations of the Plan or Stay

In re Wohleber (B.A.P. 6th Cir. 2019)

- The parties' judgment of divorce required the debtor to pay a property settlement judgment to his ex-wife by a date certain.
- When he failed to pay on time, his ex-spouse filed a petition for civil contempt in the state court.
- The court found the debtor in contempt and scheduled a sentencing hearing.

# Violations of the Plan or Stay

- The debtor filed for bankruptcy protection and advised the court and the ex-wife.
- The state court judge researched whether going forward with the sentencing was a violation of the automatic stay under 11 U.S.C. § 362.
- The state court judge erroneously concluded that the hearing was not stayed.

# Violations of the Plan or Stay

- Prior to the sentencing, the judge invited the parties to submit any authority on the stay issue and gave the parties time to reach an agreement.
- The ex-spouse and her counsel declined to negotiate for fear of violating the automatic stay.
- The debtor was sentenced to 10 days in jail which he could purge by payment of the property settlement amount.



# Violations of the Plan or Stay

- The debtor filed an action seeking damages for violation of the stay against his ex-spouse, her attorney.
- The Sixth Circuit Bankruptcy Appellate Panel (BAP) found that proceeding with the sentencing hearing and confining the debtor were stay violations.
- While a state court has jurisdiction to determine if their own proceeding is stayed, if state courts proceed in error, their actions violating the stay are invalid.

# Violations of the Plan or Stay

- Although the creditor and her attorney relied on the state court ruling, “litigants proceeding in this way “proceed[ ] at [their] own risk” and sanctions may be assessed.
- Once the debtor filed his petition, the creditors should have sought relief from the stay in the bankruptcy court or sought a determination that the stay did not apply.

# Violations of the Plan or Stay

- The creditor and her attorney argued that because they did nothing to further the state court's sua sponte actions, they were not in violation of the stay.
- “a creditor cannot sit idly by, appear at a collection proceeding, and allow the debtor to be jailed because he did not pay the judgment creditor's dischargeable debt. The burden was on the creditor and her legal counsel to stop the collection proceeding once the bankruptcy was filed.”

# Violations of the Plan or Stay

- The CP and her attorney had an affirmative duty to prevent the sentencing hearing and the debtor's confinement.
- Because they did not have an opportunity to present evidence to the bankruptcy court, the matter was remitted to allow them to show they took affirmative action to prevent the sentencing hearing and debtor's incarceration from occurring.

# Post Petition Debts

- Sections 362(a)(3) and (4) stay acts to obtain possession of, exercise control over or create, perfect or enforce a lien against property of the estate.
- Sections 362(a)(3) and (4) protect the estate property and apply to pre – and post-petition claims.
- Section 1306 further defines property of the estate in Chapter 13 cases to include property defined in Section 541 and broadens the definition to include property acquired and earnings earned after the petition date but before the case is closed, dismissed or converted.

# Post Petition Debts

Read together Sections 362(a) and 1306 appear to prevent a creditor from collecting a post-confirmation debt because collection would be against estate property and would violate the automatic stay.

# Post Petition Debts

- Section 1327(b) vests all estate property in the debtor upon confirmation unless otherwise provided for in the plan or confirmation order. The term “vests” is not defined.
- If “vests” means ownership is returned to the debtor, unless the plan or confirmation order provides otherwise, a post-petition creditor could attempt post-confirmation collection without violating the automatic stay because all estate property vests in the debtor at confirmation.

# Post Petition Debts

The courts have reconciled these sections in 4 ways



# Post Petition Debts

## A. “The estate preservation approach”

- Property of the estate exists until the case is closed, dismissed or converted.
- Vesting in the debtor does not mean that the estate property is fully owned by the debtor post confirmation.
- No post-petition DSO enforcement unless action is exempt under another provision

# Post Petition Debts

- B. “The modified estate preservation approach”
- Existing estate property vests in the debtor at confirmation, and the estate post-confirmation includes post-confirmation income and assets.
  - Can enforce DSOs against assets obtained between the petition and confirmation.

# Post Petition Debts

## C. “The estate transformation approach”

- Only property (income) needed to fund the plan is estate property, all other property is under the debtor's control.
- Can collect DSOs from post-petition income and assets except amount needed to fund the plan.

# Post Petition Debts

## D. “The estate termination approach”

- All property vests in the debtor and estate property is terminated upon confirmation.
- Can collect DSOs from any property of the debtor after confirmation

# Post Petition Debts

- Remember – if the DSO arose post-petition, it can still be collected in any way exempt from the stay (IEX, Tax refund offset, etc.)

# Post Petition Debts

- Court proceedings to collect a post-petition DSO may proceed if the remedy sought is exempt from the stay or collection will be from non-estate property
  - whatever that means
- Seek an order lifting the stay if there is any doubt.

# Violations of the Plan or Stay

In re: Jordahl, (B. Ct. S.D. Ga. 2016)

- The debtor's ex-wife filed a contempt petition in state court to enforce a child support order.
- Shortly after, the debtor filed a Chapter 13 petition.

# Violations of the Plan or Stay

- The court found that debtor was in arrears on his child support and ordered his arrest and incarceration until he purged the contempt by full payment of the arrearage.
- In addition, the court awarded the ex-wife \$751.50 for attorney's fees and costs, to be paid directly to her attorney.
- The hearing was held after filing the petition but before confirmation of the plan.



# Violations of the Plan or Stay

- The attorney filed a claim for the fees and costs.
- The award of fees in connection with enforcement of support was a DSO.
- The debtor objected and the court sustained the objection and disallowed the claim.

# Violations of the Plan or Stay

- Actions taken in violation of the automatic stay are void and without effect. When an order is issued at a hearing that violates the stay, the order is void.
- The attorney argued that the debt was exempted from the stay as a collection from non-estate property.
- The attorney could not claim that the contempt was an attempt to collect from property that was not part of the bankruptcy estate

# Violations of the Plan or Stay

The estate under chapter 13 includes “all legal or equitable interests of the debtor in property as of the commencement of the case,” 11 U.S.C. § 541(a)(1); and “all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted,” as well as post-petition wages, 11 U.S.C. § 1306(a)(1)–(2).

# Violations of the Plan or Stay

- After a plan is confirmed, all property not necessary to the fulfillment of the plan reverts in the debtor. 11 U.S.C. § 1327(b).
- At that point collection of a DSO is possible from non-estate property, but prior to confirmation there is no property that is not property of the estate.

# Violations of the Plan or Stay

## In re Hutchens (B. Ct. M.D. Fla., 2012)

- To the extent that the debtor had an ongoing post-petition DSOs, the confirmed plan would not, and could not affect that obligation.
- The ex-wife was free to petition the state court to enforce the obligation through garnishing debtor's income that was in excess of the monthly payments required by the plan or by other methods of collection.

# Violations of the Plan or Stay

## In re Bronson (B. Ct. D. Or., 2022)

- DCS did not violate the automatic stay when it sent billing statements to debtor after the plan was confirmed.
- Property of the estate, other than property required to perform obligations under the plan, reverted in the debtor upon confirmation of his plan, and the automatic stay no longer applied to that property.

# Violations of the Plan or Stay

## In re Bronson (B. Ct. D. Or., 2022)

- Viewing the evidence in the light most favorable to the non-moving party, DCS intended to collect the post settlement monthly amounts due only from this non-estate property after the plan was confirmed.
- There was nothing in the statements to indicate that DCS was directing them toward collection from any property remaining in the estate.

# Violations of the Plan or Stay

## In re: Ojiegbe (B. Ct. D Md., 2014)

- The debtor filed a chapter 13 petition in January 2011 and his plan was confirmed in August 2011.
- The debtor worked for an LLC and was the sole owner of the shares of the corporation. His ownership shares are part of the bankruptcy estate, but the LLC did not file for bankruptcy.



# Violations of the Plan or Stay

- In July 2011 the debtor and his wife cross-filed actions for divorce in state court.
- The judgment of divorce was signed in 2012 and awarded alimony and child support to the ex-wife.
- The creditor was the wife's attorney.
- The ex-wife was awarded \$13,000 in attorney's fees, payable to the creditor. The bankruptcy court held this debt was a DSO.

# Violations of the Plan or Stay

- When the fees were not paid, the creditor filed a motion in state court for entry of a judgment against the debtor for the attorney fee award, which was granted.
- The creditor requested that the court issue writs of garnishment against 3 bank accounts held by the debtor.

# Violations of the Plan or Stay

- At the creditor's request, the court issued a writ of execution directing the Sheriff to levy upon the property of the Judgment debtor to satisfy a money judgment at the offices of the LLC.
- The Sheriff went to the LLC and levied all the cash on hand.
- The debtor filed the motion seeking sanctions for stay violations against the creditor.

# Violations of the Plan or Stay

- A violation of the automatic stay occurs when a creditor takes any act to obtain possession or control of property of the estate or takes any act to create, perfect, or enforce any lien against property of the estate.
- A willful violation of the stay subjects the creditor to liability for damages.
- Willfulness does not require the specific intent to violate the automatic stay, only that the creditor knew of the stay and intentionally committed an act in violation of the stay.

# Violations of the Plan or Stay

- An action does not violate the automatic stay if it is not directed towards property of the bankruptcy estate.
- The bankruptcy estate encompasses “all legal or equitable interests of the debtor in property as of the commencement of the case.”

# Violations of the Plan or Stay

- Assets held by a separate legal entity are not property of a debtor's estate, even if the debtor owns all the stock or interest in the entity.
- The levy against the LLC did not violate the stay.

# Violations of the Plan or Stay

- Garnishment of bank accounts which are property of the estate, with knowledge of the bankruptcy, would be a violation of the stay unless the action was exempt from the stay.
- First, the creditor argued that the garnishment was exempt because the underlying debt was a DSO and the levy was a “garnishment” exempt from the stay.

# Violations of the Plan or Stay

- The court held that the income garnishment exception for DSOs did not apply to levying on bank accounts.
- Second, the creditor argued that the collection attempts were exempt because DSO's may be collected from property which is not property of the estate.
- The creditor argued that only post-petition income needed to fund the plan is property of the estate.



# Violations of the Plan or Stay

- The confirmed plan stated that title to the debtor's property would revert in the debtor when the debtor was granted a discharge.
- The order confirming the plan stated that the property of the estate would not vest in the debtor until the debtor was granted a discharge or the case was dismissed or otherwise terminated.
- Under the terms of the confirmed plan, all post-petition earnings and legal or equitable interests of the debtor in property remained property of the estate.

# Violations of the Plan or Stay

- One of the accounts was not listed in the debtor's schedule because it was opened post-petition.
- It did not contain exempt funds and was therefore entirely property of the estate.
- The creditor violated the stay by levying on the account and the court ordered a hearing on damages.

# Violations of the Plan or Stay

- The other 2 accounts contained exempt funds (i.e., exempt from creditors under state law) at the time the petition was filed.
- Exempt funds are not property of the estate.
- There was an issue of fact as to whether any funds in the accounts retained their exempt nature.

# Violations of the Plan or Stay

In re: Ojeigbe (B. Ct. D. Md., 2015)

- After the hearing the court concluded that 2 of the accounts were property of the estate and the creditor had violated the stay.
- The court also determined the damages for the violation of the automatic stay.

# Violations of the Plan or Stay

- After the creditor garnished debtor's bank accounts, his attorney asked that she unfreeze the accounts and cease all attempts to collect the post-petition debt, which she did.
- The debtor sought damages for bank fees, attorneys' fees, and for emotional and punitive damages.

# Violations of the Plan or Stay

- The Bankruptcy Code provides that an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.
- The award of actual damages is mandatory but must be proved by a preponderance of the evidence and must be founded on concrete, non-speculative evidence

# Violations of the Plan or Stay

- Actual damages include lost time damages, out-of-pocket expenses, and emotional damages.
- The court awarded bank fees of \$255 and costs, and attorney's fees in an amount to be determined (the debtor's counsel had to separate the hours worked between the arguments won and those lost).

# Violations of the Plan or Stay

- A debtor may recover emotional damages for significant harm if they demonstrate a causal connection between the harm and the violation of the automatic stay.
- Claims for fleeting or trivial emotional distress are not compensable.



# Violations of the Plan or Stay

To prove compensable damage for emotional distress the debtor must: (1) suffer significant harm; (2) clearly establish the significant harm; and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay.

# Violations of the Plan or Stay

- Unless the creditor's conduct is particularly egregious, where harm would be readily apparent, the claimant must establish emotional distress with corroborating evidence, such as expert testimony, medical testimony, or credible testimony from non-experts such as family members.
- In this case, there was insufficient evidence that the debtor experienced significant emotional harm to warrant an award of emotional distress damages.

# Violations of the Plan or Stay

- Much of the debtor's distress resulted from the writ of execution on the LLC, which did not violate the automatic stay.
- Section 362(k)(1) authorizes the court in its discretion to grant punitive damages in appropriate circumstances.

# Violations of the Plan or Stay

- Appropriate circumstances ordinarily means that the creditor has demonstrated egregious, vindictive, or intentional misconduct.
- Some courts use maliciousness or bad faith as the guide.
- Some court look for an arrogant defiance of federal law.

# Violations of the Plan or Stay

- In all cases punitive damages usually require more than mere willful violation of the automatic stay.
- In this case the court did not find that the creditor's actions warranted punitive damages.

# QUESTIONS