UPDATE ON CONSUMER BANKRUPTCY: *CITY OF CHICAGO V. FULTON*

JOHN M. HAUBER[*] [**]

INTRODUCTION

In early 2021, the U.S. Supreme Court issued a specific and narrow bankruptcy opinion holding that a secured creditor is not "exercising control" over property of the bankruptcy estate by retaining repossessed collateral prior to the filing of a debtor's bankruptcy.[1] Can attorneys now advise their clients to refuse to turn over property of the estate after a bankruptcy filing without facing any ramifications? The answer is likely "no," as the Court did not issue any opinions regarding other violations of the automatic stay[2] or other sections of the Bankruptcy Code ("the Code").[3] In order to determine whether the Supreme Court made the correct decision, or (more accurately) whether the decision makes any substantive changes to a creditor's procedures, it is imperative to understand how we got to this point.

I. THE HISTORY (HOW DID WE GET HERE?)

In 1983, the United States Supreme Court decided *United States v. Whiting Pools, Inc*.[4] and ruled that a reorganizing debtor could recapture property items from a creditor who was rightfully in possession.[5] The Internal Revenue Service (IRS) levied all of Whiting Pools tangible property in an attempt to satisfy a $92,000.00 tax liability.[6] The estimated liquidation value of that property was

---

* Chapter 13 Bankruptcy Standing Trustee (2015-Present); Adjunct Professor, Indiana University Robert H. McKinney School of Law (2019-Present); J.D., 1993, Indiana University Robert H. McKinney School of Law; A.B., 1990, Wabash College.

** This Article is adapted from remarks given by Mr. Hauber at the April 23, 2021, Neil Shook Bankruptcy Roundtable which raises funds for a scholarship awarded by the Indiana Bar Foundation. The Roundtable was chaired by the Hon. Jeffrey J. Graham, and the Honorable Robyn L. Moberly.

1. City of Chicago v. Fulton, 141 S. Ct 585, 589 (2021) (citing 11 U.S.C. § 362(a)(3)); The Bankruptcy Code states that it is a violation of the automatic stay for any creditor to take "any act to obtain possession of property of the estate or . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

2. For example, it is also a violation of the automatic stay for the creditor "to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6).

3. 11 U.S.C. § 542(a) states, *inter alia*, that an entity in possession, custody, or control of property that the trustee may use or that the debtor may exempt "shall deliver to the trustee, and account for, such property . . . , unless such property is of inconsequential value to the estate."

4. 462 U.S. 198 (1983).

5. *Id.* at 211-12.

6. *Id.* at 199-200.

approximately $35,000.00.[7]

Whiting Pools filed for a Chapter 11 reorganization, and the Bankruptcy Court determined that if the property was returned to Whiting Pools as part of its going concern, the property was worth $162,876.00.[8] The IRS planned on conducting its tax sale and filed for a declaratory judgment that the automatic stay did not apply to the IRS.[9] Whiting filed a counterclaim for an order demanding the IRS turnover the property pursuant to section 542(a), which reads:

> [A]n entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.[10]

The Bankruptcy Court refused to lift the automatic stay and ordered the IRS to turn over the property subject to payment of adequate protection.[11] The District Court reversed holding that a turnover order against the IRS was not authorized by the Code.[12] The Second Circuit Court of Appeals reversed the District Court ruling that section 542(a) was applicable to the IRS and that the matter should be remanded to the Bankruptcy Court for reconsideration of the adequate protection.[13] The Second Circuit opinion created a split with the Fourth Circuit[14], and the matter was heard by the United States Supreme Court.[15]

Even as a secured creditor with a statutory right of possession, *Whiting Pools* favors the view that § 542(a) requires a creditor to promptly turn over repossessed property in which the debtor retains an interest and which the trustee can use under § 363(b).[16] Returning collateral is required regardless of the fact that the creditor, rather than the debtor, had the right to possession when the case commenced.[17] In a unanimous opinion, the Court held that the basic purpose of

---

7. *Id.* at 200.

8. *Id.*

9. *Id.* at 200-01.

10. *Id.* at n.5 (citing 11 U.S.C. § 542(a)).

11. *Id.* at 201.

12. *Id.* at 202.

13. *Id.*

14. *See Cross Electric Co. v. United States*, 664 F.2d 1218 (1981). In *Cross*, the debtor owed about $40,000 in back taxes and was seeking a return of about $5,500 from a business account. *Id.* at 1219. The Circuit Court held that there was no "possible likelihood of any surplus arising out of the sale or liquidation of the account." *Id.* at 1221. In other words, a successful plan of reorganization was not likely, and a return of $5,500.00 would not change that outcome. *Id.*

15. *Whiting Pools*, 462 U.S. at 202.

16. *Id.* at 205. 11 U.S.C. § 363(b)(1) states, *inter alia*, "The trustee, after notice and hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate [except personally identifiable information]."

17. *Whiting Pools*, 462 U.S. at 205-06; *see also* 11 U.S.C. § 363.

Chapter 11 was to allow a troubled enterprise to be restructured so it could operate successfully in the future, and reorganization "would have small chance of success . . . if property essential to running the business were excluded from the estate."[18]

As a result, "all the debtor's property must be included in the reorganization estate."[19] The Court made clear that this includes property in which a creditor has a secured interest:

> Although Congress might have safeguarded the interests of secured creditors outright by excluding from the estate any property subject to a secured interest, it chose instead to include such property in the estate and to provide secured creditors with "adequate protection" for their interests. At the secured creditor's insistence, the bankruptcy court must place such limits or conditions on the trustee's power to sell, use, or lease property as are necessary to protect the creditor. The creditor with a secured interest in property included in the estate *must look to [section 363(e)] for protection, rather than to the nonbankruptcy remedy of possession*.[20]

The Court continued its discussion holding that section 541(a)(1) (Property of the Estate) is purposely broad in scope.[21] The section could limit the estate to "all legal or equitable interests of the debtor in property as of the commencement of the case,"[22] but the Supreme Court held that the language intended to include in the estate any property made available by other provisions of the Code, several of which "bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced."[23]

Section 542(a) is another such provision which requires an entity holding property of the debtor that the trustee can use under § 363 to turn that property over to the trustee.[24] "While there are explicit limitations on the reach of § 542(a), *none requires that the debtor hold a possessory interest in the property at the commencement of the reorganization proceedings*."[25] Section 542(a), then, modifies the procedural rights available to creditors to protect and satisfy their liens:

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

---

18. *Whiting Pools*, 462 U.S. at 203.
19. *Id.*
20. *Id.* at 203-04 (citation omitted) (emphasis added).
21. *Id.* at 204-05.
22. 11 U.S.C.A. §541(a)(1).
23. *Whiting Pools*, 462 U.S. at 205.
24. 11 U.S.C. § 542(a).
25. *Whiting Pools*, 462 U.S. at 206 (emphasis added).

> protection, and these rights replace the protection afforded by possession.[26]

Based on this reasoning, the Court ultimately found "that the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization."[27]

The very next year, 1984, Congress amended section 362(a)(3) to extend the automatic stay from "any act to obtain possession of property of the estate or of property from the estate"[28] to "any act . . . to exercise control over property of the estate."[29] This extension of automatic stay violations introduced to the argument that by maintaining possession of estate property, creditors were violating either the turnover provisions of section 542(a) (which may or may not be self-executing) or violating the bankruptcy automatic stay.[30]

Even though there would still be a split of opinions among the Circuits following the 1984 amendment, the majority of Circuits held that simply maintaining possession of secured collateral was a violation of the automatic stay.[31]

A. Knaus v. Concordia Lumber Co. (In re Knaus)

In 1989, the Eighth Circuit decided the case, *Knaus v. Concordia Lumber Co. (In re Knaus)*.[32] In that case, John Knaus purchased products from Concordia Lumber Company on credit.[33] Knaus failed to pay, Concordia obtained a judgment and filed a writ of execution seizing grain and equipment.[34] Knaus filed for Chapter 11 bankruptcy and demanded a return of the property to which Concordia refused.[35] The Bankruptcy Court held twice (the second time on remand) that Concordia's failure to voluntarily turn over the property was a violation of the automatic stay which was also willful and malicious.[36] On a second appeal, the District Court reversed the Bankruptcy Court stating that a failure to voluntarily return property was not a violation.[37] The Eighth Circuit

---

26. *Id.* at 207.
27. *Id.* at 209.
28. 11 U.S.C. § 362(a)(3) (1982).
29. 11 U.S.C. § 362(a)(3) (2020).
30. *See* Knaus v. Concordia Lumber Co. (*In re* Knaus), 889 F.2d 773 (8th Cir. 1989).
31. *See, e.g.*, *id.*
32. *Id.*
33. *Id.* at 774.
34. *Id.*
35. *Id.* Additionally, Concordia's president tried to get Knaus excommunicated from the local church due to the bankruptcy filing. *Id.* This author has no opinion whether attempted excommunication is or is not a violation of the bankruptcy automatic stay. However, as the Eighth Circuit mentioned it in its opinion, it likely did not help Concordia Lumber.
36. *Id.*
37. *Id.*

reversed the District Court.[38] The Eighth Circuit recognized that "the automatic stay is fundamental to the reorganization process, and its scope is intended to be broad."[39] The primary purpose of reorganization is to maintain the going concern with their available assets.[40] Concordia argued that the property was seized prior to the automatic stay, but the Court did not agree that the timing of the seizure would make a difference regarding the purpose of reorganization.[41] In either situation, the Bankruptcy Code "clearly requires turnover. *See* 11 U.S.C. § 542(a). . . . The duty to turn over the property is not contingent upon any predicate violation of the stay, any order of the bankruptcy court, or any demand."[42]

B. Thompson v. General Motors Acceptance Corp.

In 2009, the Seventh Circuit followed suit in the case *Thompson v. General Motors Acceptance Corp.*[43] In that case, Theodore Thompson defaulted on his installment payments with GMAC, and GMAC repossessed the secured collateral, a 2003 Chevrolet Impala.[44] Thompson filed a Chapter 13 bankruptcy and demanded the return of his vehicle, and GMAC refused.[45] Thompson moved for sanctions for a willful violation of the automatic stay, specifically section 362(a)(3) (exercising control).[46] The Bankruptcy Court denied the motion and held that the creditor "need not return seized property to a debtor's estate absent adequate protection."[47] Thompson moved for and was granted direct appeal to the Seventh Circuit.[48] GMAC claimed that passively holding an asset without further action is not exercising control.[49] The Seventh Circuit disagreed, first observing that "[t]here is no debate that Thompson has an equitable interest in the Chevy, and, as such, it is property of his bankruptcy estate."[50] It looked to Webster's Dictionary definition of "control" as "to exercise restraining or directing influence over."[51]

The Court also looked to the automatic stay expansion and held:

> Congress's decision to amend section 362 evinces its intent to expand the prohibited conduct beyond mere possession . . . Although Congress did

---

38. *Id.*
39. *Id.* (quoting SBA v. Rinehart, 887 F.2d 165, 168 (8th Cir. 1989)).
40. *Id.*
41. *Id.* at 775.
42. *Id.*
43. 566 F.3d 699 (7th Cir. 2009).
44. *Id.* at 700-01.
45. *Id.* at 701.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 702.
50. *Id.* at 701.
51. *Id.* at 702 (quoting MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003)).

> not provide an explanation of that amendment . . . the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition.[52]

Regarding adequate protection, the Court ruled that there is no question that section 363(e) requires a debtor to provide adequate protection.[53] The question is whether a creditor may retain possession of the collateral until the court rules on adequate protection requests.[54] The answer is "no."[55] Section 542(a) "indicates that turnover of a seized asset is compulsory."[56] Additionally, if a creditor is allowed to retain the collateral, that creditor loses any incentive to seek protection or bargain in good faith when it knows that the asset is necessary for the debtor's reorganization.[57]

C. Weber v. SEFCU (In re Weber)

In 2013, the Second Circuit joined the majority opinion in the case, *Weber v. SEFCU (In re Weber*).[58] In August 2006, Christopher Weber purchased a pickup truck and entered into a security agreement with State Employees Federal Credit Union (SEFCU).[59] On January 10, 2010, SEFCU repossessed the truck after Weber defaulted.[60] Weber filed Chapter 13 bankruptcy on January 14, 2020, and demanded the return of the collateral.[61] A week later, SEFCU still had possession of the truck which Weber needed for his construction business.[62] Weber filed an adversary proceeding, and on March 1, while the vehicle still had not been returned, the Bankruptcy Court entered an order to SEFCU to show cause why it should not grant damages to Weber for a violation of section 362(a)(3).[63] SEFCU returned the vehicle, and Weber sought additional damages for his loss of employment.[64] The Bankruptcy Court denied any damages and granted summary judgment to SEFCU.[65] The District Court reversed holding that the section 362 violation was willful thus making it liable for damages and attorney fees.[66] The Second Circuit first observed that the UCC allows the debtor a right

---

52. *Id.*
53. *Id.* at 703.
54. *Id.*
55. *Id.* at 704.
56. *Id.*
57. *Id.*
58. 719 F.3d 72 (2d Cir. 2013).
59. *Id.* at 74.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 75.
66. *Id.*

of redemption, and in fact SEFCU sent a mandatory redemption letter to Weber.[67] Accordingly, he at least had equitable rights in the secured collateral.[68] Because Weber had an equitable right under state law, he was given a possessory right in bankruptcy under section 542.[69] While the debtor is not a corporation in Chapter 11, the "purpose of reorganization bankruptcy, *be it corporate or personal*, is to allow the debtor to regain his financial foothold and repay his creditors."[70] The Court finally found that section 542(a) is self-executing and does not require that the Trustee take any action to compel turnover.[71] SEFCU did exercise control over the secured collateral and thus violated the automatic stay by refusing to return the collateral promptly to the Chapter 13 "debtor-in-possession."[72]

D. United States v. Inslaw, Inc.

However, there was a split among the Circuits. Specifically, the D.C. Circuit ruled adversely in the case, *United States v. Inslaw, Inc.*[73] Inslaw's sole business was the creation and development of software called Prosecutor's Management Information System ("PROMIS").[74] At one time, PROMIS was a nonprofit organization that collected public funds and created software available in the public domain.[75] In January 1981, PROMIS became a for-profit entity, and it continued the development of the "enhanced PROMIS" software which was funded through private investors.[76] In March 1982, Inslaw entered into a contract with the Department of Justice ("DOJ") whereby the DOJ would pay $9.6 million for Inslaw to install its "old PROMIS" in twenty large and seventy-four small U.S. Attorney's Offices.[77] The DOJ had not yet purchased the hardware, so Inslaw agreed to temporarily provide links to its hardware for the 20 larger offices.[78] Because the DOJ was linking into the Inslaw hardware, the DOJ was able to use the enhanced PROMIS (not the older version).[79] In November 1982, DOJ requested a copy of all computer programs and supporting documents relating to their use of PROMIS.[80] Inslaw rebuked the request stating that the DOJ

---

67. *Id.* at 77.
68. *Id.*
69. *Id.*
70. *Id.* at 78 (quoting Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 706 (7th Cir. 2009)).
71. *Id.* at 79.
72. *Id.* at 81.
73. 932 F.2d 1467 (D.C. Cir. 1991).
74. *Id.* at 1469.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*

was not entitled to enhanced PROMIS without additional compensation.[81] By April 1983, Inslaw agreed to deliver the enhanced PROMIS to the DOJ so long as the DOJ agreed to "limit and restrict the dissemination of the said PROMIS computer software to the Executive Office for United States Attorneys, and to the 94 United States Attorneys' Offices covered by the Contract . . . pending resolution."[82] In 1983 and 1984, Inslaw delivered the source code to the DOJ and began to install the enhanced PROMIS in large offices with the understanding that the DOJ would bargain in good faith after it determined which enhancements it wanted to keep and what that price would be.[83] Inslaw filed for Chapter 11 bankruptcy in February 1985.[84] After the bankruptcy filing and until 1987, Inslaw installed enhanced PROMIS in 23 additional U.S. Attorney offices.[85] In June 1986, Inslaw filed a complaint with the Bankruptcy Court that the DOJ was willfully violating section 362(a) by continuing to use enhanced PROMIS without consent.[86] The Bankruptcy Court found a violation of the stay and ordered the DOJ to pay $6.8 million in compensatory damages for using enhanced PROMIS.[87] The District Court upheld the Bankruptcy Court order but reduced the damages by $655,200.00.[88]

The D.C. Circuit reversed the District Court.[89] It distinguished the facts of this case from *Whiting Pools* due to the fact that the DOJ held the tapes containing source code under a claim of ownership.[90] That is, the DOJ had an argument that it had actually purchased the property, and thus Inslaw would have no legal or equitable interest in that property.[91] Inslaw could not use the Bankruptcy Code to force the turnover of property that is the subject of a contract dispute.[92]

> Inslaw's view of § 362(a) would take it well beyond Congress's purpose. The object of the automatic stay provision is essentially to solve a collective action problem - to make sure that creditors do not destroy the bankrupt estate in their scramble for relief. See House Report at 340; Senate Report at 49, 54-55. Fulfillment of that purpose cannot require that every party who acts in resistance to the debtor's view of its rights violates § 362(a) if found in error by the bankruptcy court. Thus, someone defending a suit brought by the debtor does *not* risk violation

81. *Id.*
82. *Id.*
83. *Id.* at 1470.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 1470-71.
88. *Id.* at 1471.
89. *Id.*
90. *Id.* at 1472.
91. *Id.*
92. *Id.*

> of § 362(a)(3) by filing a motion to dismiss the suit, though his resistance may burden rights asserted by the bankrupt. *Martin-Trigona v. Champion Fed. Sav. Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989). Nor does the filing of a lis pendens violate the stay (at least where it does not create a lien), even though it alerts prospective buyers to a hazard and may thereby diminish the value of estate property. *In re Knightsbridge Development Co*., 884 F.2d 145, 148 (4th Cir. 1989). And the commencement and continuation of a cause of action against the debtor that arises post-petition, and so is not stayed by § 362(a)(1), does not violate § 362(a)(3). *In re Continental Air Lines, Inc*., 61 Bankr. 758, 775-80 (S.D. Tex. 1986). Since willful violations of the stay expose the offending party to liability for compensatory damages, costs, attorney's fees, and, in some circumstances, punitive damages, see 11 U.S.C. § 362(h) (1988), it is difficult to believe that Congress intended a violation whenever someone already in possession of property mistakenly refuses to capitulate to a bankrupt's assertion of rights in that property.[93]

The automatic stay, then, serves only to restrain a creditor's act to gain possession or control over property of the estate; not to retain property that the creditor owns.[94] The Bankruptcy Court exceeded its jurisdiction by determining the end result of the controversary (that the DOJ fraudulently obtained and converted proprietary intellectual property) and also by finding that there were violations of the automatic stay as a result thereof.[95] Although this opinion can be distinguished from a creditor repossessing the debtor's collateral, the D.C. Court did limit section 362(a) stating that maintaining possession of collateral is not exercising control over that collateral.[96]

E. In re Denby-Peterson

Most recently, the Third Circuit joined the minority in the case, *In re Denby-Peterson*.[97] The facts of this case are much simpler than the *Inslaw* case and similar to the majority opinion. Specifically, on July 21, 2016, Joy Denby-Peterson purchased a yellow, 2008 Chevrolet Corvette which was financed by Pine Valley Motors and assigned to NU2U Auto World.[98] The agreement specifically required Denby-Peterson to obtain the license plates and tags and to pay sales tax and registration fees before August 11, 2016.[99] NU2U repossessed the vehicle in March 2017 after Denby-Peterson failed to make a deferred down payment of $2,491.00, and she failed to ever register the car in her name.[100] She

---

93. *Id.* at 1473.
94. *Id.* at 1474.
95. *Id.* at 1474-75.
96. *Id.* at 1474.
97. 941 F.3d 115 (3d Cir. 2019).
98. *Id.* at 119.
99. *Id.*
100. *Id.* (From the secured creditor's perspective there would be a colorable question regarding

filed an emergency bankruptcy on March 21, 2017, and demanded that the creditor return the vehicle.[101] The creditor refused to return the untitled vehicle to the debtor.[102] The Bankruptcy Court ordered the creditor to return the vehicle within seven days pursuant to section 542(a) but did not award any damages for retaining the vehicle in violation of the automatic stay.[103] The Court found the minority view persuasive to the extent that there was a legitimate question regarding the Debtor's interest in the vehicle at the time of filing.[104] The District Court affirmed that holding.[105]

Neither Pine Valley Motors nor NU2U Auto World participated in the appeal.[106] The Third Circuit affirmed the Bankruptcy and District courts and joined the minority position holding that "a post-petition affirmative act to exercise control over the Corvette is not present."[107] Accordingly, the stay applies only to an affirmative act to exercise control, not to passive control, and retaining possession does not violate the automatic stay.[108] Section 542(a) requires a creditor in "possession, custody, or control, during the case, of property that the [debtor] may use, sell, or lease under section 363 . . . or that the debtor may exempt under section 522" and that is not "of inconsequential value or benefit to the estate" to turn over the property.[109] The Court determined that the turnover provision is not self-executing, but that Bankruptcy Rule 7001(1) requires an adversary proceeding to enforce turnover, which is itself subject to several conditions and contingencies.[110] As such, the creditor is not required to turn over the property until the court determines the trustee or debtor meets section 542(a)'s conditions.[111] The facts of this case can be distinguished from the majority opinions and raises a legitimate question: can and should a creditor be punished for a willful violation of the automatic stay when the creditor had an arguable belief that the collateral was not property of the estate?

II. THE PRESENT DECISION (WHAT ABOUT *FULTON*?)

The Supreme Court finally decided to fix the split amongst the Circuit's when eight of nine Justices[112] heard the case, *City of Chicago v. Fulton*[113] and it was a

---

vehicle ownership (and liability) when the creditor's name was still on the vehicle title).

101. *Id.* at 119-20.

102. *Id.* at 120.

103. *Id.*

104. *Id.* at 120-21.

105. *Id.* at 121.

106. *Id.* at 122.

107. *Id.* at 126.

108. *Id.*

109. *Id.* at 128 (quoting 11. U.S.C. § 542(a)).

110. *Id.* at 128-29.

111. *Id.* at 128.

112. Justice Amy Coney Barrett did not participate in the decision as oral arguments were heard on October 13, 2020, and she did not assume her position on the bench until October 27, 2020.

unanimous decision (just as *Whiting Pools* had been almost 40 years earlier).[114] The Seventh Circuit and Supreme Court heard the consolidation of four bankruptcy cases (*In re Fulton; In re Shannon; In re Peake;* and *In re Howard*) all with similar facts.[115] Robbin Fulton's fact pattern is discussed here. In December 2017, the City of Chicago impounded Robbin Fulton's vehicle for failure to pay citations and driving on a suspended license.[116] Fulton filed Chapter 13 bankruptcy in January 2018 listing the City of Chicago as a general unsecured creditor.[117] The City of Chicago filed an unsecured claim for $9,391.20.[118] Fulton's plan was confirmed in March (thus binding both the debtor and the creditor to its terms), and she requested that the City return her vehicle.[119] The City amended its Proof of Claim increasing the claim to $11,831.20 and changed its status to a secured creditor.[120] It refused to return her vehicle.[121] In May, Fulton moved for sanctions against the City, and the City responded that she was required to file an adversary proceeding to obtain possession.[122] The City additionally argued that it was required to maintain possession of the collateral to perfect its security interest and acts to maintain perfection were exempt from the automatic stay.[123] In May 2018, the Bankruptcy Court ordered the City to return the vehicle, holding that it violated the automatic stay by exercising control over the collateral, and imposed sanctions of $100.00 per day for every day that the City failed to comply.[124] The Court additionally sustained Fulton's objection to the City's secured proof of claim.[125] Four similar cases (including Fulton's) were consolidated for a direct appeal to the Seventh Circuit.[126]

The Seventh Circuit outcome was foreshadowed, when the Court presented the issue to be determined as "whether the City of Chicago may ignore the Bankruptcy Code's automatic stay and continue to hold a debtor's vehicle until the debtor pays her outstanding parking tickets."[127] The Circuit Court continued its line of reasoning from the *Thompson* case decided in 2009:

Additionally, the appeal came from the Seventh Circuit where she was previously a Circuit Court Judge. 141 S. Ct. 585, 588 (2021).

113. 141 S. Ct. 585 (2021).
114. *See* United States v. Whiting Pools, Inc., 462 U.S. 198 (1983).
115. *See In re* Fulton, 926 F.3d 916, 920-22 (7th Cir. 2019).
116. *Id.* at 921.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at 921-22.
127. *Id.* at 920.

> First, we observed in *Thompson* there was no debate the debtor has an equitable interest in his vehicle, and "as such, it is property of his bankruptcy estate." We then rejected the creditor's argument that passively holding the asset did not satisfy the Code's definition of exercising control: . . . Additionally, Congress amended § 362(a)(3) in 1984 to prohibit conduct that "exercise[d] control" over estate assets. . . . We therefore held that in retaining possession of the car, the creditor violated the automatic stay in § 362(a)(3).[128]

The Court continued to follow its earlier opinion ruling that the automatic stay in section 362(a)(3) becomes effective immediately following the filing of a bankruptcy petition and that a creditor has its own burden of requesting adequate protection pursuant to section 363(e).[129] Moreover, the section 542(a) turnover provision is self-executing and is compulsory.[130] Finally, the Court rejected the City's argument that it had an exception to the stay found in section 362(b)(3) (any act to perfect, or to maintain or continue the perfection of, an interest in property).[131] The exception is subject to the trustee's lien avoidance powers.[132] That is, if the creditor had a perfected (possessory) security interest in the vehicle on the date of filing, the trustee had no power to avoid that security interest.[133] If/when the creditor returns the collateral to the debtor, that act does not create any avoidance powers for the trustee.[134] Additionally, a possessory lien is not destroyed by an involuntary loss of possession due to forced compliance with the Bankruptcy Code.[135] The United States Supreme Court granted certiorari and heard argument on October 13, 2020.[136]

On January 14, 2021, the Court issued a unanimous opinion with Justice Sotomayor issuing a separate concurring opinion.[137] The Court vacated the Seventh Circuit opinion and remanded the case, holding that a creditor holding property after the filing of a bankruptcy case does not violate section 362(a)(3) by exercising control over that collateral.[138] The Court held that the "most natural reading" of section 362(a)(3)'s terms "stay," "act," and "exercise control" prohibits only "affirmative acts that would disturb the status quo".[139] Exercising

---

128. *Id.* at 923 (citing Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 703 (7th Cir. 2009) (internal citations omitted).

129. *Id.* at 924.

130. *Id.*

131. *Id.* at 927-28.

132. *Id.* at 928.

133. *Id.*

134. *Id.*

135. *Id.*

136. City of Chicago v. Fulton, 141 S. Ct. 585 (2021).

137. *Id.*

138. *Id.* at 587.

139. *Id.* at 590.

control is a different thing than simply "having" the power to control.[140]

If there were any questions regarding whether the automatic stay provision is ambiguous, those questions are resolved by looking to section 542(a). [141]Section 542(a) already requires a turnover of estate property with two exceptions (transfers of estate property in good faith without knowledge of the bankruptcy; and good faith transfers of life insurance obligations).[142] If section 362(a)(3) required a turnover of all property, then that would largely render section 542(a) superfluous.[143] "Under this alternative interpretation §362(a)(3), not §542, would be the chief provision governing turnover–even though §362(a)(3) says nothing expressly on that question. And §542 would be reduced to a footnote–even though it appears on its face to be the governing provision."[144] Most importantly, and as the author will discuss in Part III, the Court states, "§542(a) works within the bankruptcy process to draw far-flung estate property back into the hands of *the debtor or trustee*."[145]

The Court continued its reasoning pointing out that there are exceptions in section 542(a)'s turnover provision that would contradict section 362(a)(3) which does not contain the same exceptions.[146] Additionally, when Congress added "exercise control" language to section 362(a)(3) in 1984, one would expect that Congress would have cross-referenced section 542(a) if Congress meant to create a stay violation for failure to turn over property as required by section 542(a).[147] However, the ruling was extremely limited to a specific holding that "mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code."[148]

In Justice Sotomayor's concurring opinion, she agreed with the general principal that passive retention of property does not equate to exercising control over that property.[149] She wrote separately to emphasize that there are other provisions within section 362(a) which may still create automatic stay violations beyond passive retention.[150] Additionally, she wanted to emphasize that the Court has made no opinion regarding what procedures bankruptcy courts should take to enforce "creditors' separate obligation to 'deliver' estate property to *the trustee or debtor* under §542(a)."[151]

---

140. *Id.*

141. *Id.*

142. *Id.* at 590-91.

143. *Id.* at 591.

144. *Id.*

145. *Id.* (emphasis added). Even a cursory review of section 542(a) would have revealed that the turnover power is only available to a trustee (not to a debtor or trustee).

146. *Id.*

147. *Id.* at 591-92 (quoting 11 U.S.C. § 362(a)(3)).

148. *Id.* at 592.

149. *Id.* (Sotomayor, J., concurring).

150. *Id.*

151. *Id.* (quoting 11 U.S.C. § 542(a)) (emphasis added).

> [B]ankruptcy courts are not powerless to facilitate the return of debtors' vehicles to their owners. Most obviously, the Court leaves open the possibility of relief under §542(a). That section requires any "entity," subject to some exceptions, to turn over "property" belonging to the bankruptcy estate. 11 U.S.C. §542(a). The debtor, in turn, must be able to provide the creditor with "adequate protection" of its interest in the returned property, §363(e); for example, the debtor may need to demonstrate that [the] car is sufficiently insured.[152]

Finally, Justice Sotomayor stated that, while the section 542(a) turnover must be completed by adversary proceedings in some jurisdictions, that is not the only procedural requirement.[153] Instead, other courts have held that the turnover provision is automatic even absent a court order, and some other courts will permit debtors to seek turnover through a simple motion where the creditor has received adequate protection.[154] "Nothing in today's opinion forecloses these alternative solutions."[155]

III. THE FUTURE (WHERE DO WE GO FROM HERE?)

Did the entire Supreme Court get it wrong? Coming from the Seventh Circuit, would Justice Barrett have joined the unanimous decision?

While passively holding collateral in and of itself may not be an act "to exercise control over property of the estate,"[156] once the debtor demands a return (or travels to the creditor's location to retrieve the collateral) and the creditor refuses to relinquish, the creditor's act of refusal is exercising its control. As an analogy, one might presume that a federal penitentiary is not exercising its control over a prisoner (just passively incarcerating); however, the warden certainly would be exercising control once the prisoner strolled to the front gate and demanded to leave.

The Supreme Court's statement that the extension of section 362(a)(3) in 1984 makes section 542(a) superfluous[157] is also dissatisfying two reasons. First, turnover may be required by section 542(a), but damages are authorized in accordance with sections 362(a)(3) and 362(k).[158] It would not necessarily be superfluous to find a violation in one section and authorize damages in a second (section 542 does not award damages).[159] Secondly, if the 1984 amendment did not extend the automatic stay requirements to mean something more than collecting property, then *the entire amendment* was superfluous as related to the

---

152. *Id.* at 594.
153. *Id.*
154. *Id.*
155. *Id.* at 595.
156. 11 U.S.C. § 362(a)(3).
157. *Fulton*, 141 S. Ct. at 591.
158. *See* 11 U.S.C. § 542(a); *id.* § 362.
159. *See id.* § 542(a); *id.* § 362.

then existing section 362.[160] If the amendment was not superfluous verbiage, then it increased stay violations from obtaining collateral to obtaining collateral and continuing to exercise control over that collateral.[161] One way or the other, the 1984 amendment was superfluous to either section 542 or section 362. As the original section 362(a)(3) was not ambiguous, the most sensical reading is that Congress meant to expand stay violations.

Additionally, the Court failed to address the fact that a plain reading of section 542(a) indicates that it should not apply to Chapter 13 cases at all.[162] Specifically, in a Chapter 13 proceeding, section 1303, grants the Chapter 13 debtor "*exclusive of the trustee*, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l)"[163] (which is the ability to use, sell or lease property of the estate). These are the *only* trustee powers available to the debtor, and there is no specific provision within Chapter 13 that grants the Chapter 13 debtor the rights that a trustee would have under section 542.[164] Further, and conversely, nothing in the Bankruptcy Code provides a Chapter 13 trustee any right to share the debtor's exclusive right to use, sell, or lease estate property under section 363 (the Chapter 13 trustee cannot demand turnover or collect property of the estate).[165] Section 1306(b) further confirms this position stating that "the debtor shall remain in possession of all property of the estate" in a Chapter 13 case, except as provided in a confirmed plan.[166] While section 1107[167] grants a Chapter 11 debtor-in-possession all the rights and powers of a trustee to pursue a section 542 turnover, there is no such corresponding right in Chapter 13.[168]

Literal application of the turnover power in section 542 makes its use in a Chapter 13 case impossible. That is: delivery of property to the trustee will never be allowed because the Chapter 13 trustee is prohibited from using or possessing estate property;[169] and while the Chapter 13 debtor is exclusively empowered to use, sell, and lease estate property, the debtor is not granted the trustee's statutory right to bring a section 542(a) demand for turnover.[170] Simply put, section 542 is not applicable to Chapter 13 cases as it is currently written.[171] The most sensical reading of section 362(a)(3) and section 542(a) is that Congress wanted to give Chapter 13 debtors the same powers (and powers that they did not have under

160. *Compare id.* § 362(a)(3) (1982), *with id.* § 362(a)(3) (2018).
161. *See id.* § 362(a)(3).
162. *Id.* § 542(a).
163. *Id.* § 1303 (emphasis added).
164. *See id.* §§ 1301-30.
165. *Id.*
166. *Id.* § 1306(b).
167. *Id.*§ 1107.
168. *Compare id.* § 1107, *with id.* §§ 1301-30.
169. *Id.* §§ 1303, 1306.
170. *Id.* § 1303.
171. *See id.* § 542(a).

section 542) to demand a turnover of repossessed collateral.[172] Instead, the Supreme Court decided that the most sensible reading was to add words to section 542(a) giving Chapter 13 debtors the powers of a trustee.[173]

While the Bankruptcy Code does not seem to consider that a Chapter 13 debtor (or trustee acting for a debtor) must be able to use the Section 542(a) turnover provision to recover exempt property necessary for a debtor's individual reorganization,[174] the *Fulton* holding appears to have expanded Chapter 13 debtors' section 1303 rights and powers to make a section 542(a) demand to turn over property to the trustee (or the debtor who has the section 363 powers of the trustee to use the property).[175] The Bankruptcy Code does not seem to consider that a Chapter 13 debtor (or trustee acting for a debtor) must be able to use the section 542(a) turnover provision to recover exempt property necessary for a debtor's individual reorganization. The Supreme Court decision appears to have expanded Chapter 13 debtors' section 1303 rights and powers to make a section 542(a) demand to turnover property to the trustee (or the debtor who has the section 363 powers of the trustee to use the property).[176] Following the *Fulton* decision, creditors should be warned that Chapter 13 debtors may now take advantage of that new power that is not to be found anywhere in the Bankruptcy Code.

The United States Supreme Court did not provide any prohibition or suggest any wrongdoing if any Bankruptcy Court allows the section 542(a) demand to be self-executing.[177] As the SCOTUS ruling did not modify the Seventh Circuit *Fulton* opinion in any manner except regarding section 362(a)(3), it appears that the Seventh Circuit dictate that secured creditors turn over property upon demand is still the relevant case law.[178] The Seventh Circuit stated, "Moreover, § 542(a) 'indicates that turnover of a seized asset is compulsory.'"[179] "Section 542(a) requires that a creditor in possession of property of the estate '*shall deliver* to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.'"[180] The Seventh Circuit holding was not reversed by the Supreme Court, and the return is still compulsory.[181]

The remaining question is, if the creditor refuses to turnover property, are damages still available under section 362(k)? While it appears that a debtor is no longer able to proceed under section 362(a)(3), there may still be a violation

---

172. *See id*. § 362(a); *id*. § 542(a).

173. City of Chicago v. Fulton, 141 S. Ct. 585, 592 (2021).

174. *See* 11 U.S.C. §§ 1301-30.

175. *Fulton*, 141 S. Ct. at 592.

176. *See id*.

177. *See id*. at 585.

178. *In re* Fulton, 926 F.3d 916, 920 (7th Cir. 2019).

179. *Id*. at 924 (quoting Thompson v. Gen. Motors Acceptance Corp., 566 F.3d 699, 704 (7th Cir. 2009)).

180. *Id*. (quoting 11 U.S.C. § 542(a)).

181. *See Fulton*, 141 S. Ct. at 585.

under section 362(a)(6).[182] The automatic stay prohibits "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."[183] If the secured creditor is prohibited from selling the collateral, and the debtor has provided proof of adequate protection (such as insurance and funds held by the Chapter 13 trustee), then there would only be one reason why the creditor would want to continue possession of the collateral: to collect additional money. Usually, an initial refusal to return collateral comes with a demand for something in exchange for a future return. Such a demand may be a violation of the automatic stay if it requires money or other consideration.[184] A creditor who simply refuses to return estate property in order to negotiate more money after a demand for turnover, may be trying to collect on its claim which would potentially violate the automatic stay.[185]

Post-script: On April 12, 2021, the Seventh Circuit issued an order on remand from the United States Supreme Court.[186] The Court of Appeals found that the Bankruptcy Court previously ruled that the City of Chicago's conduct violated automatic stay provisions other than those in section 362(a)(3).[187] The Seventh Circuit remanded the cases, *In re Fulton* and *In re Shannon*, for further orders.[188] In both bankruptcy cases, the matters were determined to be moot.[189] The *Fulton* case was dismissed in 2019, and the *Shannon* bankruptcy reorganization was completed in June 2021. The Honorable Judge Carol A. Doyle determined that the order granting Timothy Shannon's motion for the City of Chicago to return the vehicle would not be vacated.[190] While the City of Chicago was successful before the United States Supreme Court, that victory was limited and may not have provided much change (demand for turnover simply moves from section 362(a)(3) to section 542(a)).[191] Ultimately, the City of Chicago may have dodged a sanctions bullet due to the passage of time, but this ruling has also armed debtors with new ammunition, and successful debtors' counsel will now be able to rephrase the argument in conjunction with the Supreme Court's *Fulton* ruling.

---

182. *See* 11 U.S.C. § 362(a)(6).

183. *Id.*

184. *See id.*

185. *See* S.D. Ind. B-3015-1(c) (pre-confirmation adequate protection payments shall be presumed to be 1% of the allowed secured claims. If the Chapter 13 trustee is holding such funds available to the secured creditor, that creditor should have evidence available to rebut that presumption prior to demanding a higher payment).

186. *In re* Fulton, 843 F. App'x 799 (7th Cir. 2021).

187. *Id.* at 800.

188. *Id.*

189. *Id.*

190. *In re* Shannon, 590 B.R. 467 (Bankr. N.D. Ill. 2018).

191. *See* City of Chicago v. Fulton, 141 S. Ct. 585 (2021).