

The Automatic Stay and Consignment Carriers

AUTHOR: LARRY A. PITTMAN, II

Anticipating post-filing conflict is one of the more important pre-filing jobs for bankruptcy attorneys. For example, did you know that in many instances, consignment carriers (e.g., trucking companies that deliver your products) can seek full payment from a debtor's customers when a debtor defaults on payment? While fully understanding of customer liability outside of bankruptcy requires a case-by-case deep dive into such things as bills of lading and how the bills are completed, filing a bankruptcy will stop carriers from harassing your clients for payment.

That is, as a result of the commencement of a bankruptcy case, and by operation of law pursuant to section 362 of the Bankruptcy Code, the "Automatic Stay" enjoins all persons from, among other things, taking any action to obtain possession of property of the estate or to exercise control over property of the estate. See 11 U.S.C. § 362(a)(3). The Automatic Stay constitutes a fundamental protection for debtors, which, in combination with other provisions of the Bankruptcy Code, provides debtors with a "breathing spell from its creditors" that is essential to the Debtors' ability to reorganize successfully." See *Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984, 989 (2d Cir. 1990) (internal citations omitted).

For debtors whose business operations require moving product nationally at any given time, the Automatic Stay affords breathing room to reorganize debts and address creditor issues without the fear your carriers will seek payment from your customers. After all, a customer sued for your debts probably is your customer no longer.

Unfortunately, many consignment carriers are not bankruptcy savvy. Such carriers may aggressively proceed to collect against customers as soon as a debtor's bankruptcy case is filed. So debtors must prepare proactively to enforce the Automatic Stay as soon as a bankruptcy case is filed. To that end, it is not uncommon for debtors to proactively seek orders restating and clarifying the rights afforded by the Automatic Stay. See, e.g., *Continental Cast Stone, Inc.*, Case no. 19-21752 (Bankr. D. Kan. September 24, 2019) (Berger, J.); *In re Republic Airways Holdings Inc., et al.*, Case No. 16-10429 (Bankr. S.D.N.Y. Feb. 29, 2016); *In re NII Holdings, Inc., et al.*, Case No. 14-12611 (Bankr. S.D.N.Y. Sept. 16, 2014); *In re Newland Int'l Props., Corp.*, Case No. 13-11396 (Bankr. S.D.N.Y. May 1, 2013); *In re TBS Shipping Servs. Inc.*, Case No. 12-22224 (Bankr. S.D.N.Y. Feb. 8, 2012); *In re Almatix B.V.*, Case No. 10-12308 (Bankr. S.D.N.Y. May 17, 2010); *In re Oldco M Corp. (f/k/a Metaldyne Corp.)*, Case No. 09-13412 (Bankr. S.D.N.Y. May 29, 2009); *In re Satelites Mexicanos S.A. de C.V.*, Case no. 06-11868 (Bankr. S.D.N.Y. Aug. 14, 2006).

Carriers who seek to collect from a debtor's customers after a debtor obtains an order restating and clarifying that such conduct violates the automatic stay likely will be liable for damages a debtor incurs that arise from such conduct, the debtor's attorneys' fees, and likely punitive damages.

Anticipating client need is the hallmark of good bankruptcy counsel. If you deliver product to customers, consider asking your bankruptcy counsel whether you should seek to proactively enforce the automatic stay.

If you need assistance with bankruptcy or insolvency-related matters, please contact Larry A. Pittman, II, at lpittman@sandbergphoenix.com or 816.210.9680 or Sharon Stolte at ssolte@sandbergphoenix.com or 816.627.5543.