

The Contra Costa Bar Association Presents

## **AUTOMATIC STAY CONSIDERATIONS IN RESIDENTIAL EVICTIONS AND NONJUDICIAL FORECLOSURES**

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Presented by

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### ***I. RESIDENTIAL REAL PROPERTY LEASES<sup>1</sup>***

Scenario: John D aka the Tenant, is behind on his rent by several months. His landlord files an unlawful detainer case (“UD”) in state court. If John files bankruptcy, what are his options? Timing matters.

#### **A. If Landlord Obtains a Judgment for Possession Before Tenant Files Bankruptcy**

If the landlord obtained a judgment for possession in the UD case before the tenant filed bankruptcy, the automatic stay does not stop the landlord from proceeding with eviction.

The tenant can get a 30 day reprieve under certain circumstances.

##### 1. No automatic stay: §362(b)(22)

- a. The filing of a bankruptcy petition does not stay the continuation of an eviction against a debtor involving residential property in which the debtor resides where the lessor obtained a judgment for possession before the bankruptcy petition is filed. 11 U.S.C. §362(b)(22).
- b. Landlord cannot enforce judgment for money damages.

##### 2. Exception: §362(l)(1)

- a. There is an exception to §362(b)(22) under §362(l)(1) of the Bankruptcy Code.
- b. The automatic stay will continue to apply for 30 days if the tenant files with his bankruptcy petition and serves on the landlord a certification under penalty of perjury:
  - i. That under applicable nonbankruptcy law there are circumstances under which the tenant would be permitted to cure the entire monetary default that gave rise to the judgment for possession after that judgment was entered<sup>2</sup>; and

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<sup>1</sup> For information on the current eviction moratorium see the California Courts website:  
<https://www.courts.ca.gov/44660.htm>

<sup>2</sup> Under CCP §1179, a tenant can make a motion for relief from forfeiture and a court can give tenant relief from eviction if all back rent paid or full performance of conditions or covenants.

- ii. That he has deposited with the bankruptcy court any rent that would become due during the 30–day period after the filing of the petition (not just his portion of the rent).
  - iii. The Tenant must then cure all the arrears before the 30 days elapses and file/serve a certification that he has done so.
  - iv. If the Tenant cures the default, §362(b)(22) does not apply and the automatic stay remains in place to prevent the eviction.
  - v. The landlord can contest the debtor’s representations and an expedited hearing will be held.
3. Official Forms for §362(l)(1)
- a. Official Form 101A (file with petition).
  - b. Official Form 101B (file within 30 days of petition date).
4. Other Considerations
- a. What if the UD is appealed?
    - i. “The Code does not define the phrase “judgment for possession” in § 362(b)(22). The few courts that have addressed this issue have interpreted the phrase to mean a final, non-appealable judgment. Thus, for the exception to the automatic stay to apply, the landlord must obtain a final, non-appealable judgment for possession prior to the debtor's bankruptcy filing . . . . The bankruptcy court here agreed that a landlord must obtain a final, non-appealable judgment for possession prior to the petition date in order for the stay exception under § 362(b)(22) to apply. We could not locate a case holding otherwise and the parties have cited none.” *In re Nicholson*, No. 2:17-BK-20744-TLM, 2019 WL 2524291, at \*3 (B.A.P. 9th Cir. June 18, 2019) (not for publication).
    - ii. Eviction is not automatically stayed upon appeal. Tenant would need to make a motion for stay pending appeal in the state court that would need to be granted prior to lock-out. CCP § 1176. Once lock-out happens, court loses jurisdiction.
    - iii. “Pursuant to *Code of Civil Procedure* § 415.46 (prejudgment claim of right to possession), no occupant of the premises retains any possessory interest of any kind following service of the writ of possession. See *Cal.Code Civ. Proc. § 715.020(d)* (explaining that “if the summons, complaint, and prejudgment claim of right to possession were served upon the occupants in accordance with Section 415.46, no occupant of the premises, whether or not the occupant is named in the judgment for possession, may object to the enforcement of the judgment ...”).” *In re Perl*, 811 F.3d 1120, 1129 (9th Cir. 2016).

- b. Does the codebtor stay matter?

§1301 states, in relevant part: “a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt . . .”

Arguably, a landlord obtaining possession of its own property is not an action to collect a debt, but the BAP considered the issue rather than simply stating that it doesn’t apply in *In re Wilson*, No. AP 14-01120-BTB, 2016 WL 3209533, at \*7 (B.A.P. 9th Cir. May 31, 2016) (not for publication).

5. §362(b)(22) and §362(l)(1) Apply in All Chapters

*In re Wilson*, No. AP 14-01120-BTB, 2016 WL 3209533, at \*7 (B.A.P. 9th Cir. May 31, 2016) (not for publication) (Chapter 13) (Debtor failed to comply with statute’s requirements).

**B. If Landlord Does Not Obtain Judgment for Possession Before Tenant Files Bankruptcy**

If John’s landlord has not obtained a judgment for possession and:

1. John files a Chapter 7 case:

- a. If John makes no payments, John’s landlord can file a motion for relief from stay (RFS) to evict him. Rent that was due at the time the bankruptcy was filed is discharged.
  - i. If John moves out, the landlord would not be able to collect post-petition rent. *In re Miller*, 282 F.3d 874, 876 (6th Cir. 2002).
  - ii. If John stays without paying, he may be liable for post-petition rent. *McLaughlin v. Walnut Properties, Inc.* (2004) 119 Cal.App.4th 293, 302
- b. If John makes post-petition payments, John may be able to work something out with his landlord so the landlord doesn’t pursue RFS. Note that the landlord can’t require John to pay pre-petition arrears.

2. John files a Chapter 11, 12 or 13 case:

- a. If John makes no payments, the landlord can file a motion for RFS.
- b. If the lease hasn’t already terminated, John can “stay” the eviction by curing the rent arrears through his plan, as long as he maintains current post-petition rent going forward.
- c. If the lease hasn’t already terminated, John can assume the lease. §§ 1107, 1203, 1303.

### **C. If the Lease Default is Based on Drugs/Property Damage**

If the lease default involves endangerment of property or use of illegal substances, §362(b)(23) and §362(m) provide a procedure for a landlord to obtain relief from stay without filing a motion.

The landlord has to file and serve a certification about the debtor's bad acts, which the debtor can contest. Then the court will hold a hearing. If the landlord prevails, he can proceed with eviction.

## **II. NONJUDICIAL FORECLOSURE**

### **A. Recent Modifications to Nonjudicial Foreclosure Procedures for Residential Properties with 1-4 Housing Units: SB 1079**

1. Previously under California law, the person or entity with the highest and last bid at the foreclosure sale was the new owner. Now, depending on who the last bidder is, there may be further bidding after the foreclosure sale is over.
2. Favored buyer is a natural person who wants to live in the property and is defined by statute as the Prospective Owner-Occupant.
  - a. If a Prospective Owner-Occupant is the high bidder, he is not the official owner until he gives the foreclosure trustee an affidavit saying:
    - i. He's going to move into the property within 60 days
    - ii. He'll live at the property for at least a year
    - iii. He's not the borrower or related to the borrower
    - iv. He's not acting as an agent for someone else
  - b. If the Prospective Owner-Occupant submits that affidavit, the trustee will issue the Trustee's Deed (aka TDUS) so it can be recorded. If the TDUS is recorded within 18 days of the foreclosure sale, the sale is deemed perfected as of 8 am the date of the foreclosure sale. CC § 2924h(c).
3. Disfavored buyer is an investor or corporate buyer aka "LLC Investor."
  - a. If an LLC Investor submits the high bid at the sale (or presumably if there are no bids and the lender ends up with the property), the LLC Investor can be outbid after the sale by certain select individuals or entities:
  - b. "Eligible Tenant Buyer" is the tenant, not former owner, of the property.
  - c. "Eligible Bidder" includes a natural person who intends to live in the property, plus non-profit housing organizations or governmental entities.
4. Within 15 days of the foreclosure sale, an Eligible Bidder can submit a "Notice of Intent" to place a (matching/higher) bid to the foreclosure trustee.

5. If no notice is submitted by the 15th day, the Trustee will issue the Trustee's Deed to the LLC Investor. If recorded within 18 days of the foreclosure sale, the sale is deemed perfected as of 8 am the date of the foreclosure sale. If an Eligible Bidder(s) submits a "Notice of Intent" to place a bid to the foreclosure trustee within 15 days of the sale, the Trustee puts the sale on hold for 30 days to give the Eligible Bidder the chance to submit the bid, i.e., come up with the cash/cashier's check.
6. If the trustee receives the bid(s) by 5:00 pm on the 45th day after the sale, the Trustee will issue the Trustee's Deed to the Eligible Bidder with the highest bid.
7. If the trustee doesn't receive a bid by the 45th day after the sale, the Trustee will provide the Trustee's Deed to the LLC Investor.
8. The LLC Investor or Eligible Bidder who receive the TDUS must record it by the 48<sup>th</sup> day after the sale in order to receive the protection of CC §2924h(c).

### **B. The Interaction of the Automatic Stay with Foreclosure**

A nonjudicial foreclosure sale of real property is basically deemed final when the auctioneer accepts the final bid. CC § 2924h(c); *Millennium Rock Mortgage, Inc. v. T.D. Service Co.* (2009) 179 Cal.App.4th 804, 809. If the new owner records the Trustee's Deed within 18 or 48 (formerly 15) days of the foreclosure sale, the sale is deemed perfected as of 8 am the date of the foreclosure sale. The bankruptcy decisions we have are based on this concept.

*Scenario:* Jane D is in default on her home loan. Her Lender scheduled the foreclosure sale and Jane files bankruptcy to prevent/delay the sale.

1. If Jane's bankruptcy case is filed before the foreclosure sale occurs, the automatic stay "stays" the foreclosure sale. *In re Sanders*, 198 B.R. 326, 328-329 (Bankr. S.D. Cal. 1996), dismissed, 232 B.R. 822 (B.A.P. 9th Cir. 1997) "Violations of the automatic stay are void, not voidable." *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992). So if the foreclosure sale occurred at 10:00 am, but the bankruptcy case was filed at 9:59 am, the sale is void. The lender would need RFS to continue with foreclosure.
2. There may be circumstances that would warrant annulment of the stay which would validate the sale. *In re Sanders*, 198 B.R. 326, 330 (Bankr. S.D. Cal. 1996). (Further details below.)
3. If Jane's bankruptcy case is filed after the foreclosure sale occurred and the New Homeowner (or LLC Investor where no Notice of Intent to bid was submitted) records the trustee's deed within 18 days of the foreclosure sale, the sale is deemed perfected as of 8 am on the foreclosure sale date. Relief from stay is warranted based on *Civil Code* § 2924h(c). *In re Garner*, 208 B.R. 698, 701 (Bankr.N.D.Cal.1997). See also *In re Stork*,

212 B.R. 970, 972 (Bankr.N.D.Cal.1997). The new owner will need RFS to take action regarding the property.

4. If Jane's bankruptcy case is filed after the foreclosure sale and the New Homeowner does not record the TDUS within 18 days of the sale:
  - a. Generally, bankruptcy courts would find that the sale removed Jane's equitable right of ownership and cause exists to lift the stay. *Davisson v. Engles (In re Engles)*, 193 B.R. 23, 26 (Bankr. S.D. Cal. 1996); *In re Cruz*, 516 B.R. 594, 598 (B.A.P. 9th Cir. 2014). *Cruz* recognizes that a purchaser at a prepetition foreclosure sale holds an interest in the purchased property even if the trustee's deed remains unrecorded postpetition for a significant period well beyond the 18 day period. *Id.*
  - b. *In re Zubenko*, 528 B.R. 784, 786–88 (Bankr. E.D. Cal. 2015) discusses trustee's strong-arm powers under § 544(a)(3). A recorded NOD or NOS provide constructive notice of a property's potential for transfer. See also *In re Grant*, 303 B.R. 205, 211 (Bankr.D.Nev.2003).
5. If Jane's bankruptcy case is filed after the foreclosure sale, the buyer does not record the TDUS within 18 days of the sale, then the buyer records the TDUS: the buyer should file a motion for relief from stay and to annul the stay.
6. If a significant amount of time has passed between the foreclosure sale and the recording of the TDUS, with an intervening bankruptcy case, see the following cases for different approaches: *Walker v. California Mortgage Service (In re Walker)*, 861 F.2d 597 (9th Cir.1988), and *In re Williams*, 124 B.R. 311 (Bankr.C.D.1991), for the proposition that a recorded notice of default and/or a notice of sale are not constructive notice charged to a bankruptcy trustee, but *In re Silva*, No. 9:10-BK-14135-PC, 2015 WL 1259774, at \*5 (Bankr. C.D. Cal. Mar. 17, 2015) indicated a different outcome where the TDUS was recorded five years after the foreclosure occurred and after a bankruptcy case was filed.
7. The buyer needs relief from stay to evict Jane because she retains a possessory interest.

### **III. POST FORECLOSURE EVICTIONS**

*Scenario:* the foreclosure sale has occurred, but no bankruptcy was filed that affected the transfer of title. The new owner finds that there is an occupant at the property, Jim D, who is not paying rent to the new owner. The new owner wants to take possession of the property, so he files an unlawful detainer case in state court. Jim files bankruptcy. The new owner files a motion RFS. It should be fairly straightforward to obtain RFS under these facts.

- A. In *In re Perl*, the 9th Circuit rendered a decision very similar to the reasoning in §362(b)(22). After the foreclosure, if the new owner obtains (1) a judgment for possession and (2) a writ of possession in an unlawful detainer ("UD") then the occupant files bankruptcy, the debtor/occupant has no legal or equitable interest remaining in the

property. *In re Perl*, 811 F.3d 1120, 1130 (9th Cir. 2016). “The unlawful detainer judgment and writ of possession entered pursuant to California Code Civil Procedure § 415.46 bestowed legal title and all rights of possession upon [new owner] . . . . Thus, at the time of the filing of the bankruptcy petition, Perl had been completely divested of all legal and equitable possessory rights that would otherwise be protected by the automatic stay.” *Id.*

- B. Sometimes the various occupants, real or imagined, file multiple bankruptcy cases to prevent the new owner from taking possession. If so, file an adversary proceeding to get injunctive relief in the form of *in rem* relief since only a secured creditor is entitled to *in rem* relief under §362(d)(4) which we’ll be discussing later. Apply for an OST and request a preliminary injunction for 6 months with the ability to extend it if necessary.

#### **IV. AUTOMATIC RELIEF FROM STAY BASED ON MULTIPLE BANKRUPTCY FILINGS BY AN INDIVIDUAL**

##### **A. First bankruptcy case**

When a debtor files bankruptcy (e.g., First Case), the automatic stay remains in place as to property essentially until the bankruptcy case is (1) closed, (2) dismissed, or (3) a discharge is granted (or denied) and the property is abandoned [§ 362(c)(2) ]. *In re D. Papagni Fruit Co.*, 132 B.R. 42, 45 (Bankr. E.D. Cal. 1991). The discharge terminates the stay as to the debtor, but not as to property of the estate.

##### **B. Second Case pending within one year of First Case**

If an individual debtor files a second bankruptcy case (Second Case) and the First Case was pending within same year that the Second Case was filed, but was dismissed, other than a case refiled under a chapter other than Chapter 7 after dismissal under §707(b) (which involves dismissal based on the presumption of abuse), the automatic stay will terminate as to the debtor on the 30th day after the Second Case was filed unless the debtor files a motion to extend the stay and sets the hearing within the 30 day period and the motion is granted. §362(c)(3). The motion must demonstrate the Second Case was filed in good faith and the statute provides circumstances under which a case is presumptively filed in “not in good faith.”

The statute states that the stay will terminate as to the debtor and does not state that it terminates in its entirety (i.e., as to property of the estate). Caselaw goes both ways as to how to interpret this. *In re Reswick*, 446 B.R. 362, 373 (B.A.P. 9th Cir. 2011) (Chapter 13) held that the stay terminates as to the debtor and the estate, whereas *In re Thu Thi Dao*, 616 B.R. 103, 116-117 (Bankr. E.D. Cal. 2020) (Chapter 7) held that the stay only terminates as to the debtor.

##### **C. Third Case pending within one year of First Case**

If an individual debtor files a third bankruptcy case (Third Case) and the First and Second Cases were pending within same year, but were dismissed, other than a case refiled under a chapter other than Chapter 7 after dismissal under §707(b), the automatic stay will not go

into effect upon the filing of the Third Case. §362(c)(4)(A)(i). The debtor can file a motion to impose the stay which must establish the good faith of the third filing.

#### ***V. IN REM RELIEF FROM STAY (“against a thing”) § 362(d)(4)***

The Bankruptcy Code sections that terminate the stay by operation of law for the 2<sup>nd</sup> and 3<sup>rd</sup> Case are limited to cases that are filed by the same person(s) over and over. Sometimes a husband and wife or others will alternate bankruptcy filings to delay a creditor for a longer period of time, sometimes referred to as “tag team filing.” For creditors whose loans are secured by real property, the Bankruptcy Code allows relief from stay “in rem,” which means relief from stay as to the property itself, regardless of who files bankruptcy.

#### **A. Only Secured Creditors are Eligible for In Rem Relief, Not a Purchaser at a Foreclosure Sale.**

11 U.S.C § 362(d)(4) provides that the court shall grant *in rem* relief from stay to a creditor whose claim is secured by an interest in real property, “if the court finds that the filing of the petition was (1) part of a scheme (2) to delay, hinder, or defraud creditors (3) that involved either - (A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filings affecting such real property...” 11 U.S.C. §362(d)(4). To obtain relief under § 362(d)(4), the court must find all three elements to be present. *In re First Yorkshire Holdings, Inc.*, 470 B.R. 864, 870 (9th Cir. B.A.P. 2012); *In re Van Ness*, 399 B.R. 897, 902 (Bankr. E.D. Ca. 2009). The secured creditor has to prove this to the court’s satisfaction.

1. The Filing of the Petition was Part of a Scheme.  
In *In re Duncan & Forbes Development, Inc.*, 368 B.R. 27, 32 (Bankr. C.D. Ca. 2006), the court defined “scheme” as “an artful plot or plan,” noting the term refers to an “intentional construct” and not one that can happen inadvertently or due to negligence. (Id).
2. The Scheme was Intended to Delay, Hinder, or Defraud Creditors.  
For a scheme to fall under § 362(d)(4), it must be one intended by the debtor to delay, hinder, or defraud creditors. This element is satisfied if the scheme is designed to “postpone and to get in the way of” creditors. *In re Abdul Muhaimin*, 343 B.R. 159, 169 (Bankr. D. Md. 2006).
3. The Scheme Involved a Transfer of Ownership of the Property or Multiple Bankruptcy Filings Affecting the Property.
  - a. Transfer of ownership can involve fractional interests or hijacked cases. A hijacked case warrants in rem relief. *In re Dorsey*, 476 B.R. 261 (Bankr. C.D. Cal. 2012). If the debtor receives the property interest after the bankruptcy was already filed, one court rejected the argument that the automatic stay did not apply because the property is not property of the estate. The court said the property was property of the debtor and still subject to the automatic stay. *In re Cruz*, 516 B.R. 594, 603 (B.A.P. 9th Cir. 2014).
  - b. Multiple bankruptcy filings can mean as few as two.
4. The Order Must Be Recorded  
An order granting in rem relief, if recorded in the county records, will be binding in any other bankruptcy case under this title, purporting to affect the Property, filed within 2



years of the date the order was entered. The debtor can move for relief from the order based on good cause.

## **VI. ANNULMENT OF THE AUTOMATIC STAY § 362(d)(4)**

### **A. The Court Must Balance the Equities**

Under 11 U.S.C. §362(d)(1) and (2), the court may annul the automatic stay nunc pro tunc so that actions taken in violation of the automatic stay and were thus void may become valid. The Bankruptcy Code provides that, "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, **annulling**, modifying or conditioning such stay." 11 U.S.C. § 362(d). (emphasis added). In appropriate circumstances, the court may annul the automatic stay retroactively to validate an act that was committed in violation of the stay and would otherwise be void. See *In re Siciliano*, 13 F.3d 748, 751 (3rd Cir. 1994); see also *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571, 573 (9th Cir. 1992) ("If a creditor obtains retroactive relief under section 362(d), there is no violation of the automatic stay.").

Generally, the bankruptcy court has wide latitude to determine whether annulment of the automatic stay is appropriate and makes a case-by-case determination by balancing the equities. *In re Fjeldsted*, 293 B.R. 12, 26 (9th Cir. B.A.P. 2003). In *Fjeldsted*, the BAP stated: "The general trend has been to focus on two factors in determining whether cause exists to annul the stay: (1) whether the creditor was aware of the bankruptcy petition; and (2) whether the debtor engaged in unreasonable or inequitable conduct, or prejudice would result to the creditor." However, the court further emphasized: "These two factors are not dispositive. In addition, courts may employ many other factors, which further examine the debtor's and creditor's good faith, the prejudice to the parties, and the judicial or practical efficacy of annulling the stay."

The *Fjeldsted* factors ("balancing of the equities")

- 1) Number of filings;
- 2) Whether, in a repeat filing case, the circumstances indicate an intention to delay and hinder creditors;
- 3) A weighing of the extent of prejudice to creditors or third parties if the stay relief is not made retroactive, including whether harm exists to a bona fide purchaser;
- 4) The Debtor's overall good faith (totality of circumstances test): cf. *Fid. & Cas. Co. of N.Y. v. Warren (In re Warren)*, 89 B.R. 87, 93 (9th Cir. BAP 1988)(chapter 13 good faith);
- 5) Whether creditors knew of stay but nonetheless took action, thus compounding the problem;
- 6) Whether the debtor has complied, and is otherwise complying, with the Bankruptcy Code and Rules;
- 7) The relative ease of restoring parties to the status quo ante;
- 8) The costs of annulment to debtors and creditors;
- 9) How quickly creditors moved for annulment, or how quickly debtors moved to set aside the sale or violative conduct;

- 10) Whether, after learning of the bankruptcy, creditors proceeded to take steps in continued violation of the stay, or whether they moved expeditiously to gain relief;
- 11) Whether annulment of the stay will cause irreparable injury to the debtor;
- 12) Whether stay relief will promote judicial economy or other efficiencies.

*In re Fjeldsted*, 293 B.R. 12, 25 (B.A.P. 9th Cir. 2003)

## **B. The Bankruptcy Court Retains Jurisdiction**

The bankruptcy court retains jurisdiction to annul the automatic stay after dismissal of the bankruptcy case. *Aheong v. Mellon Mortgage Co. (In re Aheong)*, 276 B.R. 233, 248 (B.A.P. 9th Cir. 2002).

Annulment after multiple transfers and bankruptcy cases: *In re Cruz*, 516 B.R. 594, 598 (B.A.P. 9th Cir. 2014)

## **VII. MISCELLANEOUS**

### **A. BFP**

- a. § 549(c) does not create an exception which protects a bona fide purchaser for value (BFP) at a foreclosure sale which occurs after a bankruptcy case is filed. *40235 Washington St. Corp. v. Lusardi*, 329 F.3d 1076, 1081 (9th Cir. 2003). See *Value T Sales, Inc. v. Mitchell (In re Mitchell)*, 279 B.R. 839 (9th Cir. BAP 2002) (BFP status under § 549(c) is not an exception to the automatic stay.) A buyer's BFP status may factor into an analysis of the "equities" if annulment is requested.
- b. If the TDUS has been delivered (but not recorded), there is a conclusive presumption the sale is complete as to a bona fide purchaser. *Moeller v. Lien*, 25 Cal.App.4th 822, 831–32, 30 Cal.Rptr.2d 777 (1994).

### **B. Dismissal of case followed by reinstatement**

Debtors' case was reinstated and the automatic stay was reimposed as of the time the Reinstatement Order was docketed, not when it was signed. *In re Sewell*, 345 B.R. 174, 182 (B.A.P. 9th Cir. 2006). In *In re Sewell*, the Sewells' case was dismissed due to their failure to file required documents. They filed a motion to reinstate their case, which was granted, but the lender conducted a foreclosure sale before the order reinstating the case was entered on the docket. The reinstatement order in the *Sewell* case did not contain language that retroactively imposed the automatic stay. The *Sewell* court found that the reinstatement order was not effective until docketed and refused to re-impose the automatic stay retroactively:

[B]ut if reinstatement orders were to retroactively impose the automatic stay there would be no way to protect against the sale being rendered retroactively void at some future date. See *In re Lashley*, 825 F.2d 362, 364 (11th Cir.1987) ("While the Bankruptcy Code grants the bankruptcy court the power to retroactively grant relief from a stay, ... this court is unaware of any authority that grants the bankruptcy court power to retroactively impose a stay." (citations omitted, emphasis in original)); *In re Hill*, 305 B.R. 100, 106 (Bankr.M.D.Fla.2003) (discussing cases). But see *In re Diviney*, 225 B.R. 762, 770–71 (10th Cir. BAP 1998) (stating in dicta that the

“expected result” of vacating order should be to vacate all its effects and reinstatement was effective as of date when order was signed); *Hakim*, 244 B.R. at 822.

### **C. *Nunc Pro Tunc* Relief**

A recent U.S. Supreme Court case cast nunc pro tunc orders in a negative light: *Roman Cath. Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696, 206 L.Ed.2d 1 (2020). In that case the Supreme Court held that nunc pro tunc orders must reflect actions previously allowed or taken by a court. Such orders cannot create facts that did not already exist (the case was not remanded until 5 months after bankruptcy was dismissed so the trial court orders issued in the interim were void).

Since the Bankruptcy Code contains language allowing annulment, which presupposes the result will be nunc pro tunc, the 9th Circuit BAP found that nunc pro tunc relief is allowable regarding relief from the automatic stay. *In re Merriman*, 616 B.R. 381 (B.A.P. 9th Cir. 2020). (Creditors filed wrongful death action in state court without knowledge of Debtor’s chapter 13 filing and statute of limitations was implicated).

Fill in this information to identify your case:

Debtor 1 \_\_\_\_\_  
First Name Middle Name Last Name

Debtor 2 \_\_\_\_\_  
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_  
(State)

Case number \_\_\_\_\_  
(If known)

Official Form 101A

Initial Statement About an Eviction Judgment Against You

12/15

File this form with the court and serve a copy on your landlord when you first file bankruptcy only if:

- you rent your residence; and
- your landlord has obtained a judgment for possession in an eviction, unlawful detainer action, or similar proceeding (called *eviction judgment*) against you to possess your residence.

Landlord's name \_\_\_\_\_

Landlord's address \_\_\_\_\_  
Number Street

\_\_\_\_\_ City \_\_\_\_\_ State \_\_\_\_\_ ZIP Code \_\_\_\_\_

If you want to stay in your rented residence after you file your case for bankruptcy, also complete the certification below.

Certification About Applicable Law and Deposit of Rent

I certify under penalty of perjury that:

- Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.
- I have given the bankruptcy court clerk a deposit for the rent that would be due during the 30 days after I file the *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

**X** \_\_\_\_\_  
Signature of Debtor 1

**X** \_\_\_\_\_  
Signature of Debtor 2

Date \_\_\_\_\_  
MM / DD / YYYY

Date \_\_\_\_\_  
MM / DD / YYYY

- Stay of Eviction:** (a) **First 30 days after bankruptcy.** If you checked both boxes above, signed the form to certify that both apply, and served your landlord with a copy of this statement, the automatic stay under 11 U.S.C. § 362(a)(3) will apply to the continuation of the eviction against you for 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).
- (b) **Stay after the initial 30 days.** If you wish to stay in your residence after that 30-day period and continue to receive the protection of the automatic stay under 11 U.S.C. § 362(a)(3), you must pay the entire delinquent amount to your landlord as stated in the eviction judgment before the 30-day period ends. You must also fill out *Statement About Payment of an Eviction Judgment Against You* (Official Form 101B), file it with the bankruptcy court, and serve your landlord a copy of it before the 30-day period ends.

Check the Bankruptcy Rules ( <http://www.uscourts.gov/rules-policies/current-rules-practice-procedure>) and the local court's website (to find your court's website, go to <http://www.uscourts.gov/court-locator>) for any specific requirements that you might have to meet to serve this statement. 11 U.S.C. §§ 362(b)(22) and 362(l)

**Fill in this information to identify your case:**

Debtor 1 \_\_\_\_\_  
First Name Middle Name Last Name

Debtor 2 \_\_\_\_\_  
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: \_\_\_\_\_ District of \_\_\_\_\_

Case number \_\_\_\_\_  
(if known)

**Official Form 101B**

**Statement About Payment of an Eviction Judgment Against You**

12/15

Fill out this form only if:

- you filed *Initial Statement About an Eviction Judgment Against You* (Official Form 101A); and
- you served a copy of Form 101A on your landlord; and
- you want to stay in your rented residence for more than 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101).

File this form within 30 days after you file your *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101). Also serve a copy on your landlord within that same time period.

**Certification About Applicable Law and Payment of Eviction Judgment**

I certify under penalty of perjury that (Check all that apply):

- Under the state or other nonbankruptcy law that applies to the judgment for possession (*eviction judgment*), I have the right to stay in my residence by paying my landlord the entire delinquent amount.
- Within 30 days after I filed my *Voluntary Petition for Individuals Filing for Bankruptcy* (Official Form 101), I have paid my landlord the entire amount I owe as stated in the judgment for possession (*eviction judgment*).

**x** \_\_\_\_\_  
Signature of Debtor 1

**x** \_\_\_\_\_  
Signature of Debtor 2

Date \_\_\_\_\_  
MM / DD / YYYY

Date \_\_\_\_\_  
MM / DD / YYYY

**You must serve your landlord with a copy of this form.**

Check the Bankruptcy Rules ([www.uscourts.gov/rulesandpolicies/rules.aspx](http://www.uscourts.gov/rulesandpolicies/rules.aspx)) and the court's local website (go to [http://www.uscourts.gov/Court\\_Locator.aspx](http://www.uscourts.gov/Court_Locator.aspx) to find your court's website) for any specific requirements that you might have to meet to serve this statement.