Foreclosure Bankruptcy

Before commencing this outline, it is imperative that one understand the differences between the three chapters are likely to be encountered.

The three pertinent chapters are Chapter 7, Chapter 13, and Chapter 11.

Chapter 7 involves a liquidation of either a corporation's or person's debt in which a trustee, chosen by the local assistant U.S. Trustee's offices, acts as the fiduciary for the creditors and liquidates whatever is not permitted to be exempt under Florida law. In most individual cases, the trustee ordinarily ends his/her duty by filing a "no asset" report and after the completion of 90 days from the filing, or most particularly 60 days from the First Meeting of Creditors, the debtor is discharged and the debtor proceeds with no longer having any obligation to unsecured creditors.

In Chapter 13, the debtor must be an individual who delivers his or her or their wages to the trustee for a period of 36 to 60 months. This trustee is not a possessory trustee. Instead, the trustee receives the wages or other money from the debtor(s) and pays the creditors pursuant to a simple plan provided by the debtor(s). Most often, these plans are utilized to pay an arrearage on a mortgage or to pay extraordinary liabilities which would not be dischargeable in a Chapter 7, most particularly IRS debt.

The last bankruptcy is Chapter 11. Most often, this is filed by a corporation, but in extreme circumstances, an individual may file the same. In a Chapter 11, there is no pledging of assets to a trustee. Instead, the assets are held by the debtor as a "debtor-in-possession." That party prepares a sophisticated plan which is presented to the creditors in two parts: a disclosure statement and a plan of reorganization. The disclosure statement delivers to the creditors a form which describes the history leading up to the bankruptcy as well as what occurred after the bankruptcy and further describes how each creditor in each class is to be treated. After reviewing this, a creditor is supposedly able to make an "informed decision" and vote on the plan within a few months after the disclosure hearing. Most often, these plans involve large corporate restructuring and pay unsecured creditors, on the average, well less than 100% of the claims.

A) Seeking Relief from the Automatic Stay

1. Scope of the Automatic Stay– § 362 (a)(1)'s language[1]

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1 **Sec. 362.** - Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or

2. Procedure of Southern District of Florida
    a) Ex parte or "negative notice"[2]
    b) With hearing
3. Hearing of Automatic Stay
    a) Lack of Equity- not necessary for reorganization
    b) Burden of Proof- § 362(d) is on the movant [3]
    c) Burden of Proof for Cause – § 362(d)[4]
    d) Burden of Proof for Cause due to lack of adequate protection – § 362(d)
    e) Burden of Proof for parties seeking ex parte relief
    f) Burden of Proof on party opposing relief from stay– § 362(d)(2)[5]
    g) Burden of Proof on party opposing based upon lack of

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303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

2 SD Fla uses **Rule** 4001-1 for establishing procedure – MD Fla matches "negative notice" procedure under Rule 2002-4.

3 **362(d)**

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization; or

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

4 **362(d)(1)**, " for cause, including the lack of adequate protection of an interest in property of such party in interest. . ."

adequate protection- § 362(d)
h) Sneaky 30-day rule of 362(e)[67]

4. Relief from Automatic Stay Considerations

When seeking relief from the automatic stay, it is imperative to not only know what your collateral is, but whether the Chapter is one of reorganization (Chapters 11 or 13) as opposed to Chapter 7. In a Chapter 7 scenario, and it is a corporate filing, there are two alternatives.

- The trustee can abandon the asset and deliver it back to the debtor (subject to the secured creditor)[8]; or

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5 **362(d)(2)** with respect to a stay of an act against property under subsection (a) of this section, if -

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

6 **362(e)** Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, *such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section.* A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

7 This is addressed in **Rule 4001-1(H)** for the SD Fla. Where it provides that the 30-day requirement of 362(e) will be extended if the continuance is be request of the Movant. It also reverts to **Rule 5071-1** which handles the procedural aspects of continuances.

Rule 5007-1(g) for MD Fla. states continuance for stay relief motion will only be allowed if there is a waiver of 30-day rule.

8 **Sec. 554**. - Abandonment of property of the estate

(a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

- The trustee can attempt to sell the same asset and pay you from the proceeds.[9]

The payment by the trustee to the creditor can be best described as a two-edged sword. If the payment pays the creditor in full, and the creditor receives the trustee's benefits by preserving and protecting the asset prior to the sale, the trustee can request a "surcharge" against the creditor. § 506(c).[10]

But the best sword is one where there is money for everyone, including paying you interest and fees for handling the issues in bankruptcy.[11]

5. Valuation[12]

a) Procedure

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate

9 **Sec. 363.** - Use, sale, or lease of property
(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.

10 **Sec. 506(c)** The trustee may recover from property securing an allowed secured claim the reasonable, necessary costs and expenses of preserving, or disposing of, such property to the extent of any benefit to the holder of such claim.

11 **Sec 506(b)** To the extent that an allowed secured claim is secured by property the value of which, after any recovery under subsection (c) of this section, is greater than the amount of such claim, *there shall be allowed to the holder of such claim, interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.*

12 **Sec 506(a)** An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, *is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim*. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

b) Burden of Proof[13]
c) Elements of § 506(a) valuation
d) Standards
e) What is the best method?
    1) Replacement value – really an automobile concept[14]
    2) Fair market value [15]
    3) commercially reasonable [16]
    4) wholesale value[17]
    5) liquidation value [18]
    6) average of two values – probably defunct[19]

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13 Filing a proof of claim is prima facie evidence of the claim. The burden therefore shifts to the objector (probably the debtor) to disprove the validity of the claim. Courts hold that the burden is on the objector to sustain its objection and, thus, overcome the prima facie validity of the claim. In re Securities Groups, 116 Bankr. at 845; In re St. Augustine Gun Works, Inc., 75 Bankr. 495, 499 (Bankr. M.D.Fla. 1987). The presumption must be overcome with affirmative proof.

14 Chapter 7 redemption issue: use replacement value – Zell v. Chevy Chase Bank , 284 B.R. 569 (Bankr. Md. 2002). Automobiles usually utilize replacement value – First Merit N.A. v. Getz (In re Getz), 242 B.R. 916 (6th Cir 2000); First Associates v. Rash 520 U.S. 953; 117 S. Ct. 1879; 138 L. Ed. 2d 148; 1997 U.S. LEXIS 3688; 65 U.S.L.W. 4451 (1997) (The Court reversed and remanded the appellate court's judgment setting secured property's value under a foreclosure value standard, where debtors retained the property over creditor's objection. The Court held that property's value was its present replacement value, as the Bankruptcy Code required secured property to be valued from creditor's perspective. This standard reflected debtor's actual use of the property.)

15 In re Brinson 153 B.R. 502 (Bankr. M.D. Fla. 1991) citing In re Adams, 2 B.R. 313 (Bankr. M.D. Fal. 1980)

16 In re Turnbow, 121 B.R. 11 (Bankr. S.D. Tx. 1990) (Valuation – on unimproved real estate encumbered by secured creditor – should be based on the value realized by the most commercially reasonable disposition of the property under the circumstances, In re Raylin Development, 110 Bankr. 259 (Bankr. W.D. Tex. 1989) citing In re American Kitchen Foods, 2 Bankr. Ct. Dec. (CRR) 715 (Bankr. D. Me. 1976))

17 In re Byington, 197 B.R. 190 (Bankr. Ks. 1996) (The court confirmed the plan because the debtors' use of the wholesale standard of valuation in determining the value of a semi-tractor was appropriate)

18 After Rash (cited above) never again to be used. But, useful for parameter analysis: i.e. propose to court the creditors in liquidation would received this amount – the least amount imaginable – and contrast to commercially reasonable sale amount.

6. What should be included as debt[20]
    a) Accruing interest[21],[22]
    b) Accruing costs
    c) Accruing attorney's fees[23]

7. Unique Issues in Chapter 13
    a) Bad faith
        (i) filed within the 180-day probationary period[24]

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19 "The court disagrees. The Supreme Court reversed the Fifth Circuit in Rash after Anderson filed its brief, and held that collateral should be valued at its replacement cost under a Chapter 13 plan "cram down" when the debtor planned to retain and use the collateral under the plan. Associates Commercial Corp. v. Rash, 138 L. Ed. 2d 148, 117 S. Ct. 1879, 1997 WL 321231 (U.S. 1997). To argue that the Noteholders are not entitled to receive their fair portion of the increase in value between liquidation and going concern value is contrary to Rash and applicable principles of the Bankruptcy Code."

In re Treasure Bay Corp., 212 B.R. 520 (Bankr. S.D. Ms. 1997)

20 This applies to oversecured creditors only. The term oversecured has been defined to mean: An oversecured claim is one for which the collateral exceeds the debt. See In re Delta Resources, Inc., 54 F.3d 722, 724 n. 1 (11th Cir.1995)

21 In considering an oversecured creditor's claim for interest, the Supreme Court has stated that interest accrues under section 506(b) "as part of the allowed claim from the petition date until the confirmation or effective date of the plan." Rake v. Wade, 508 U.S. 464, 471, 113 S. Ct. 2187, 2191, 124 L. Ed. 2d 424 (1993).

22 11 U.S.C. § 506(b) (1999). Holders of oversecured claims are entitled, under this section, to any interest, fees, or costs provided for in the underlying debt instrument. Telfair v. First Union Mortgage Corp., 216 F.3rd 1333 (11th Cir. 2000)

23 Welzel v. Advocate Realty Invs., LLC (In re Welzel), 275 F.3d 1308 (11th Cir. 2001) where the court wrote:

> For the foregoing reasons, we conclude, as did the district court and the panel, that Congress intended for contractually set attorney's fees in the oversecured creditor context to be governed by § 506(b), even if otherwise vested and enforceable under state laws like O.C.G.A. § 13-1-11. We therefore rule that the contractually set attorney's fees owed to Advocate must be assessed for reasonableness under § 506(b).

24 Umali v. Dhanani (In re Umali), 345 F.3d 818 (9th Cir.2003) (Court of appeals agreed with the district court that a bankruptcy petition filed in violation of a court-imposed 180-day bar

(ii) enjoin serial filers from filing again [25]
(iii) cause for dismissal[26]

b) Failure to make payments to trustee[27]

c) When does property leave the estate?[28]

8. Is a Chapter 7 case a "reorganization" as defined under § 362(d)(2)(b)[29]?

9. Is a Chapter 11 liquidation a "reorganization" as used in § 362(d)(2)

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on such filings was properly excluded from the automatic stay provisions of the Bankruptcy Code.) Note: a debtor can always file within the probationary period, but two things will result: {1} no discharge § 727(c)(8) or {2}may likely be dismissed.

25 Casse v. Key Bank Nat'l Ass'n (In re Casse), 198 F.3d 327, (2nd Cir. 1999)(The order denying debtor's petition to set aside foreclosure and dismissing debtor's Chapter 13 filing with prejudice was affirmed, because the bankruptcy judge had the power to preclude future filings by debtor under the Bankruptcy Code.)

26 "Cause" for dismissal under § 349 has not been specifically defined by the Bankruptcy Code. For Chapter 13 cases, §§ 1307(c)(1) through (10) provide that the bankruptcy court may convert or dismiss, depending on the best interests of the creditors and the estate, for any of ten enumerated circumstances. Although not specifically listed, bad faith is a "cause" for dismissal under § 1307(c). Eisen, 14 F.3d at 470 ("A Chapter 13 petition filed in bad faith may be dismissed 'for cause' pursuant to 11 U.S.C. § 1307(c)."); In re Hopkins, 201 B.R. at 995 (holding that the debtors' filing of frivolous tax returns with no intention to pay taxes warranted dismissal of a Chapter 13 petition for bad faith). Therefore, it follows that a finding of bad faith based on egregious behavior can justify dismissal with prejudice. Tomlin, 105 F.3d at 937; In re Morimoto, 171 B.R. at 86; In re Huerta, 137 B.R. 356, 374 (Bankr. C.D.Cal. 1992). We hold that bad faith is "cause" for a dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307 (c).

Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999)

27 Failure to make ongoing mortgage payments outside of the plan, in many cases, will establish cause for relief from stay under 11 U.S.C. § 362(d)(1). See, e.g., In re Dupell, 235 B.R. 783, 788 (Bankr. E.D. Pa. 1999); In re Binder, 224 B.R. 483, 491 (Bankr. D. Colo. 1998). Failure to make plan payments to the Trustee is grounds for dismissal or conversion of the chapter 13 case. 11 U.S.C. § 1307(c); see, e.g., In re Nosker, 267 B.R. 555, 562 (Bankr. S.D. Ohio 2001). Other actions which are indicative of bad faith with respect to the execution of Debtor's chapter 13 plan are also grounds for dismissal or conversion of a chapter 13 case. See, e.g., Howard v. Lexington Investments, Inc., 284 F.3d 320, 323 (1st Cir. 2002); In re Cabral, 285 B.R. 563, 572 (B.A.P. 1st Cir. 2002).

In re Rouse, 301 B.R. 86, 89 (D.C. Co. 2003)

(b)[30]?

10. Is a single asset case different in
Chapter 7?[31]
Chapter 13 – principal residence rule?[32]
The exception to the mortgage on principal residence rule.[33]
Chapter 11?[34]

11. Is a Chapter 13 plan a "reorganization" as defined under § 362(d)(2)

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28 Courts have adopted one of three models: the estate termination approach, the estate preservation approach, and the estate transformation approach.

Under the estate termination approach, all property of the estate becomes property of the debtor upon confirmation and ceases to be property of the estate. See In re Petruccelli, 113 B.R. 5, 15 (Bankr.S.D.Cal.1990). According to the estate preservation approach, all property of the estate remains property of the estate after confirmation until discharge, dismissal, or conversion. See In re Kolenda, 212 B.R. 851, 853 (W.D.Mich.1997). A compromise between these two extremes is struck by the estate transformation approach, which regards only that property necessary for the execution of the plan as remaining property of the estate after confirmation. See In re Heath 115 F.3d 521, 524 (7th Cir.1997); In re McKnight, 136 B.R. 891, 894 (Bankr.S.D.Ga.1992).

In the EleventhCIrcuit, only the payments to the trustee remain property of the estate. Telfair v. First Union, *supra*

29 **362(d)(2)(B)** On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay -

(2) with respect to a stay of an act against property under subsection (a) of this section, if -

(B) such property is not necessary to an effective *reorganization*; or

30 United Savings Association of Texas v. Timbers of Inwood Forest Associates, Inc., 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed. 2d 740 (1988) (Undersecured chapter 11 mortgage holder is neither entitled to adequate protection payments in exchange for its stayed right to foreclose nor a right to immediate foreclosure.)

31 Not an issue here. Stay relief should be granted unless the property is property of the estate.

(b)?[35]

12. Termination of Stay– § 362(c)[36]

13. Termination of Stay as to "property" of the estate– § 362(c)(1) and § 541.[37]
14. Annulment of the Automatic Stay[38]
15. Termination of Stay as to other acts– § 362(c)(2)
16. Termination of Stay when property no longer is of the estate– § 362

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32 Chapter 13 allows protections to secured creditors on the principal residences of the debtor:

If there is one penny of equity, the entire lien ordinarily must be honored as sec. 1322(b)(2) provides:

(b) Subject to subsections (a) and (c) of this section, the plan may -

(2) modify the rights of holders of secured claims, *other than a claim secured only by a security interest in real property that is the debtor's principal residence*, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims . . .

Leading case on this issue: Dewsnup v. Timm, 502 U.S. 410; 112 S. Ct. 773; 116 L. Ed. 2d 903 (1992).

33 **Sec. 1322(c)(2)** Notwithstanding subsection (b)(2) and applicable nonbankruptcy law-

. . . .

(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for payment of the claim as modified pursuant to section 1325(a)(5) of this title.

Which takes you to **Sec. 1325(a)(5)** which states:

(a) Except as provided in subsection (b), the court shall confirm a plan if -

(5) with respect to each allowed secured claim provided for by the plan -

(A) the holder of such claim has accepted the plan;

(B) (i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the

(d)(1) and § 541/522[39].

17. What happens after abandonment?[40]

18. What happens to lawsuits filed by debtor against the creditor, is there a stay in effect?[41]

19. What happens if collateral is an insurance policy?
    Simple recovery for small claim on insurance where policy is liquid.
    Mass tort claims

20. How does the automatic stay affect a lease?
    When is a lease terminated?

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allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder . . .

The Eleventh Circuit, when confronted with this issue, wrote:

> We note that the great weight of persuasive authority supports debtors' interpretation of § 1322(c)(2); In re Witt appears to be the only case interpreting the statute differently. See, e.g., In re Eubanks, 219 B.R. at 472; In re Sexton, 230 B.R. 346, 349 (Bankr. E.D. Tenn. 1999); In re Reeves, 221 B.R. 756, 759 (Bankr. C.D. Ill. 1998); In re Mattson, 210 B.R. at 160; *see also Collier on Bankruptcy* § 1322.16, at 1322-51 (Lawrence P. King et al. eds., rev. 15th ed. 2001). Indeed, we have noted in dicta that § 1322(c)(2) was intended "to except short-term and balloon mortgages from [§ 1322(b)(2)'s] reach, thereby overruling *Nobelman* insofar as it applied to [those] types of mortgages." In re Tanner, 217 F.3d 1357, 1358 n.5 (11th Cir. 2000). The plain language of § 1322(c)(2) compels us to agree with the consensus of those courts that have considered the provision; § 1322(c)(2) permits the modification of claims (through bifurcation and "cramdown") secured by those short-term home mortgages that mature prior to the completion of a debtor's Chapter 13 plan.

Am. Gen. Fin., Inc. v. Paschen (In re Paschen), 296 F.3d 1203 (11th Cir. 2002)

34 **362(d)(3)** with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) -

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor's interest in the real estate.

35 This issue is more for Chapter 11. In Chapter 13, the issue is payments which comply

When keys given?[42]
When order rejecting lease entered?[43]

21. Setoff
    a) Must take deliberate overt act to demonstrate right of setoff[44]
    b) Actions to setoff– § 553(a)(1)[45], § 553(a)(2)[46], §553(a)(3)[47], §553 (b)[48] [debts incurred within 90 days]
    c) Bank account freezing[49]
    d) Right of setoff as a secured claim
    e) Setoff[50] v. recoupment[51]

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and the interpretation of of the principal residence continuing to be property of the estate. If not property of the estate (which it is not in the Southern District of Florida), the confirmation order recites that the home is not in the estate and therefore look to sec. 362(c) for your guidance on what to do. A form chapter 13 confirmation order is attached to the end of the outline.

36 **§362** Except as provided in subsections (d), (e), and (f) of this section -

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the *earliest of* -

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

37 At the beginning property of the estate is almost everything imaginable:

Sec. 541. - Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is -

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

22. Elements of § 553(a) Setoff
-Requirement that both debts be mutual
-Requirement that both debts arose prepetition[52]

B) Adequate Protection[53]

1) Adequate protection of interest in cash collateral – discussed more thoroughly below.[54]
2) Personal guarantees as adequate protection
3) Personal guarantees as adequate protection of an interest in

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(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date -

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7)Any interest in property that the estate acquires after the commencement of the case.

38 A unique remedy – usually done when there are clerical or other errors. Seek as equitable remedy when creditor understandably violated automatic stay (e.g. when creditor received clerk's erroneous delivered order of dismissal – Wytch v. Young (In re Wytch), 2000 U.S. App. LEXIS 5227 (9th Cir. 2000))

39 When exempt property is not objected to as being exempt, the property becomes limited to the nonexempt property.

Sec 522(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (1) and the other debtor elect to exempt property listed in paragraph (2) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (1), where such election is permitted under the law of the jurisdiction where the case is filed. Such property is -

cash collateral

4) Statutory sections granting adequate protection
5) How adequate protection may be offered
6) Adequate protection under § 361(1)[55]
7) Adequate protection under § 361(2)[56]
8) Adequate protection under § 361(3)[57]
9) What interest is entitled to adequate protection?
10) Adequate protection for landlord
11) Finding of adequate protection is finding of fact

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(1) property that is specified under subsection (d) of this section, unless the State law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,

(2)(A)any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

THIS HAPPENS QUICKLY – objection must be raised within 30 days of the termintaion of the first meeting of creditors. Rule 4003(b), Fed. R.Bank.P.

40 The effect of abandonment is that property is viewed as having been continuously in the debtor's possession as if no bankruptcy had been filed. Mason v. C.I.R., 646 F.2d 1309(9th Cir. 1980).

41 NO STAY is in effect, as the Third District Court of Appeals wrote in Shop In the Grove v. Union Fed. Saving & Loan Assn, 425 So. 2d 1138 (Fla. 3DCA 1982):

> . . . it seems self-evident that an appeal, initiated and to be prosecuted by the debtor may be considered neither the "continuation... of a... proceeding against " it, cf. State ex rel. Merchants' Nat. Bank v. Hull, 37 Fla. 579, 20 So. 762 (1896); the "enforcement" of the judgments previously obtained; nor an "act to obtain possession" of its property. The manifest purpose of the automatic stay provision is to act as a debtor's shield from proceedings which may adversely affect its interest; that purpose will hardly be served by requiring an indefinite suspension of the appellant's attempts to be relieved of the judgments with the obvious effect of acting as the debtor's sword against the creditor's claims upon it.

42 Tendering of keys to Landlord prepetition was not enough and the lease rejected 60 days later required payment of 60 days of rent to the Landlord [over $170,000.00] In re CHS

-Appeal review requires "clearly erroneous standard"

12) Replacement lien as adequate protection – the shell game[58]
13) In Chapter 13, payments to trustee may constitute adequate protection[59]
14) Reaffirmation of debt[60]
    - Requirements[61]
    - Effective and enforceable reaffirmation agreement[62]
    - Duty to reaffirm[63]

Electronics, Inc. 265 B.R. 339 (Bankr. S.D. Fla. 2001) where the court wrote:

> Based upon a plain reading of § 365(d)(3), this Court agrees with and adopts the interpretation of a majority of courts which have held that nonresidential landlords are entitled to administrative expense priority for postpetition rent under an unexpired lease of nonresidential real property, without regard to § 503(b)(1). See In re Pacific-Atlantic Trading Co., 27 F.3d 401, 404-05 (9th Cir. 1994); In re Kirsch, 242 B.R. 77, 79 (Bankr. M.D. Fla. 1999); In re Florida Lifestyle Apparel, Inc., 221 B.R. 897, 901 (Bankr. M.D. Fla. 1997).

43 When a lease is rejected, the stay is still in effect. But, it is not black and white as to whether or not the stay is in effect as the trustee or debtor have a duty to tender the premises to the Lessor under Sec. 362(d)(4). In short, you cannot sue the debtor for prepetition rent or postpetition rent, but the landlord obtains the premises and can relet. This is as good as stay relief. Plus the landlord must file a proof of claim within 30 days of the rejection in the Southern District of Florida – Rule 6006-1(A)..

Sec. 362(d)(4) (4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and t*he trustee shall immediately surrender such nonresidential real property to the lessor.*

44 Citizens Bank of Maryland v. Strumpf 516 U.S. 16; 116 S. Ct. 286; 133 L. Ed. 2d 258*; 1995 U.S. LEXIS 7408* has authorized a freeze of the debtor's account WITHOUT stay relief.

The court wrote:

> A requirement of such an intent is implicit in the rule followed by a majority of jurisdictions addressing the question, that a setoff has not occurred until three steps have been taken: (i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff. See, e. g., Baker v. National City Bank of Cleveland, 511 F.2d 1016, 1018 (CA6 1975) (Ohio law);

17) Redemption[64]
    a) Procedure[65]
    b) Requirements[66]
    c) Lump sum payment[67]
    d) Practicalities for debtors against reaffirmation[68]
    e) Redemption after conversion from a Chapter 13[69] and post discharge redemption
18) Kill the codebtor[70]

Normand Josef Enterprises, Inc. v. Connecticut Nat. Bank, 230 Conn. 486, 504-505, 646 A.2d 1289, 1299 (1994). But even if state law were different,the question whether a setoff *under § 362(a)(7)* has occurred is a matter of federal law, and other provisions of the Bankruptcy Code would lead us to embrace the same requirement of an intent permanently to settle accounts.

45 **Sec 553(a)** Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that -

(1) the claim of such creditor against the debtor is disallowed;

46 **Sec 553(a)** Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that -

(2) such claim was transferred, by an entity other than the debtor, to such creditor -

(A) after the commencement of the case; or

(B) (i) after 90 days before the date of the filing of the petition; and

(ii) while the debtor was insolvent

47 **Sec 553(a)** Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case, except to the extent that -

(3) the debt owed to the debtor by such creditor was incurred by such creditor -

(A) after 90 days before the date of the filing of the petition;

(B) while the debtor was insolvent; and

C) Obtaining Secured Credit Requirements

1) Scope is § 552 with regard to postpetition security interest
2) General Rules § 552(a)[71]
3) Trustee's Rule § 552(b)(1)[72] as an exception to § 552(a)
   Is 552(b)(2) eally different?[73]
4) Burden of Proof under § 552(b)(1)
5) Places under § 552(b)(1) exception to general rule of § 552(a)
6) Exception to the § 552(b)(1) exception
7) Application of § 552(b)(1) proceeds

(C) for the purpose of obtaining a right of setoff against the debtor.

48 **Sec. 553(b)**

(1) Except with respect to a setoff of a kind described in section 362(b)(6), 362(b)(7), 362 (b)(14), [1] 365(h), 546(h), or 365(i)(2) of this title, if a creditor offsets a mutual debt owing to the debtor against a claim against the debtor on or within 90 days before the date of the filing of the petition, then the trustee may recover from such creditor the amount so offset to the extent that any insufficiency on the date of such setoff is less than the insufficiency on the later of -

(A) 90 days before the date of the filing of the petition; and

(B) the first date during the 90 days immediately preceding the date of the filing of the petition on which there is an insufficiency.

(2) In this subsection, "insufficiency" means amount, if any, by which a claim against the debtor exceeds a mutual debt owing to the debtor by the holder of such claim.

49 See reference to Strumpf above.

50 Setoff is a simple test which allows recovery of prepetition obligations – something which the automatic stay prohibits. In short, setoff is an exception to the automatic stay as to collection of prepetition debt. Judge Mark reviewed the method to interpret if setoff applied and characterized it with a three-part test.

> Bankruptcy Code § 553 allows for setoff of mutual pre-petition debts between the creditor and the debtor under certain circumstances. Code section 553(a) provides:
>
> Except as otherwise provided in this section and in sections 362 and 363 of this title, this title does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case . . .
>
> To maintain a right of setoff, the creditor must prove the following:
>
> (1) That a debt exists from the creditor to the debtor and that the debt arose prior to the commencement of the bankruptcy case;
>
> (2) That the creditor has a claim against the debtor which arose prior to the

8) Application of § 552(b) against encumbered real property

D) CASH COLLATERAL

1) What is cash collateral– in general?
   a) Rents from real estate[74]
   b) Accounts receivable under blanket lien[75] or cash collateral lien
   c) Prepetition contract as cash collateral[76]
   d) Deposit account as cash collateral[77]

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commencement of the bankruptcy case;

(3) That the debt and the claim are mutual obligations. Braniff Airways, Inc., v. Exxon Co., U.S.A., 814 F.2d 1030, 1035 (5th Cir. 1987); In the Matter of Nickerson & Nickerson, Inc., 62 Bankr. 83, 85 (Bankr. D.Neb. 1986).Section 553 only permits setoff of mutual pre-petition debts. It does not permit a creditor to collect a pre-petition debt by withholding payment of a post-petition debt owed to the debtor. In re Sluss, 107 Bankr. 599 (Bankr. E.D.Tenn. 1989).

In re Ruiz, 146 B.R. 877, 879 (Bankr. S.D. Fla. 1992)

51 Recoupment is not subjected to the automatic stay in Judge Robert A. Mark's court as he previously wrote:

> This Court previously has ruled in an unpublished opinion that the United States' withholding of Medicare Part A reimbursement is within its statutory and common law right of recoupment, and is not subject to the automatic stay nor appropriately enjoined under 11 U.S.C. § 105. Mederi of Dade County v. Aetna Life Ins. Co. (In re Mederi of Dade County), Case No. 94-11437-BKC-RAM, Adv. No. 94-0370-BKC-RAM-A (Bankr. S.D.Fla., May 23, 1994).

Recoupment has been defined to be: ". . .the doctrine of recoupment simply requires the claims to arise from the same transaction, and that the amounts recouped not exceed the amount of the original sum owed. In the Matter of Holford, 896 F.2d 176 (5th Cir. 1990); B & L Oil Co., 782 F.2d at 155; 4 LAWRENCE P. KING, COLLIER ON BANKRUPTCY, para. 553.03 (15th Ed. 1984)."

In re Ruiz, 146 B.R. 877, 880 (Bankr. S.D. Fla. 1992)

In re St. Johns Home Health Agency, 173 B.R. 238, 241 (Bankr. S.D. Fla. 1994)

52 Often, the debt and mutuality are evidenced by "dragnet clauses" or "cross collateralization" clauses or other creftily drafted documents.

e) Insurance proceeds as cash collateral[78]

f) Crops – often "product" from liened real estate or "inventory" of farmer

2) Necessity of notice and hearing under Rule 4001(b)(2)[79].

3) Use of Cash Collateral– in general[80]

4) Burden of Proof

a) In regard to the use § 363(o)[81]

5) Equity cushion as adequate protection[82]

Do oversecured creditor get paid interest to preserve the "equity

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53 "Adequate protection" is not explicitly defined by the Bankruptcy Code. In determining whether a creditor's secured interests are so protected, there must be an individual determination of the *value* of that interest and whether a proposed use of cash collateral threatens that value. Matter of Karl A. Neise, Inc, 16 B.R. 600, 601 (Bkrtcy.S.D.Fla.1981); H.R.Rep. No. 95-595, 95th Cong. 1st Sess. 339 (1977), U.S. Code Cong. & Admin.News 1978, pp. 5787, 6295. ("Though the creditor might not receive [*1020] his bargain in kind, the purpose of the section is to insure that the secured creditor receives in value essentially what he bargained for."); 2 *Collier on Bankruptcy* § 361.03 (1983).

In re George Ruggiere Chrysler-Plymouth, Inc., 727 F.2d 1017, 1019-1020 (11th Cir. 1984)

54 A mortgagee with the appropriately recorded lien on rents has a "cash collateral" issue. If there is a cash collateral issue, you start with 11 U.S.C. § 363(c)(2), which provides that the Trustee may not use, sell or lease cash collateral unless each party who has an interest in the cash collateral consents, or the court, after notice and hearing, authorizes the use of such cash collateral. In a chapter 11, this is a hearing heard almost simultaneously with the clerk's receipt of the petition.

If there is a stipulation, the issue dies – unless a creditor or other party in interest manages to ruffle the deal.

If there is no concession or agreement, there is a battle.

Strange issues: are hotel payments "rents" which are liened in a mortgage instrument or are they personalty which requires a UCC-1 filing? United States v. P.S. Hotel Corp., 404 F.Supp. 1188 (E.D. Mo.), aff'd, 527 F.2d 500 (8th Cir. 1975); In re Vickers, Ltd., 111 Bankr. 332 (D. Colo. 1990); In re Greater Atlantic and Pacific Investment Group, Inc., 88 Bankr. 356 (Bankr. N.D. Okla. 1988).

Usually you need tohave an assignment of rents which the Florida statute provides guidance on with Sec. 697.07 which states:

697.07 Assignment of rents.--

cushion?"[83]

Do undersecured creditors receive interest payments?[84]

6) Use of Cash Collateral by Irresponsible Debtor[85]

7) Obligation to provide adequate information with regard to request to use cash collateral[86]

8) Improper use of cash collateral[87]

9) Creditor's obligation to protect interest in cash collateral

- hiding of adequate protection may be *res judicata* on other issues in the case. In re George Ruggiere Chrysler Plymouth, 727 F. 2d. 1017,

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(1) A mortgage *or separate instrument* may provide for an assignment of rents of real property or any interest therein as security for repayment of an indebtedness.

(2) If such an assignment is made, the mortgagee shall hold a lien on the rents, and the lien created by the assignment shall be perfected and effective against third parties upon recordation of the mortgage or separate instrument in the public records of the county in which the real property is located, according to law.

(3) Unless otherwise agreed to in writing by the mortgagee and mortgagor, the assignment of rents shall be enforceable upon the mortgagor's default and written demand for the rents made by the mortgagee to the mortgagor, whereupon the mortgagor shall turn over all rents in the possession or control of the mortgagor at the time of the written demand or collected thereafter (the "collected rents") to the mortgagee less payment of any expenses authorized by the mortgagee in writing.

(4) *Upon application by the mortgagee or mortgagor, in a foreclosure action, and notwithstanding any asserted defenses or counterclaims of the mortgagor, a court of competent jurisdiction, pending final adjudication of any action, may require the mortgagor to deposit the collected rents into the registry of the court*, or in such other depository as the court may designate. However, the court may authorize the use of the collected rents, before deposit into the registry of the court or other depository, to

. . .

(5) Nothing herein shall preclude the court from granting any other appropriate relief regarding the collected rents pending final adjudication of the action. The undisbursed collected rents remaining in the possession of the mortgagor or in the registry of the court, or in such other depository as ordered by the court, shall be disbursed at the conclusion of the action in accordance with the court's final judgment or decree.

(6) The court shall expedite the hearing on the application by the mortgagee or mortgagor to enforce the assignment of rents. The procedures authorized by this statute are in addition to any other rights or remedies of the mortgagee or mortgagor under the mortgage, separate assignment of rents instrument, promissory note, at law, or in equity.

(7) Nothing herein shall alter the lien priorities, rights, or interests among mortgagees or other lienholders or alter the rights of the mortgagee under the mortgage, separate assignment of rents instrument, at law or in equity, concerning rents collected before the written demand by the mortgagee. A mortgagee's enforcement of its assignment of rents under this statute shall not operate to transfer title to any rents not received by the mortgagee.

(8) Any moneys received by the mortgagee pursuant to this statute shall be applied by the mortgagee in accordance with the mortgage, separate assignment of rents instrument, or

(11th Cir. 1984), In re Garfinkle, 672 F. 2d. 1340, 1344 (11th Cir. 1992)

E) AVOID FRAUDULENT TRANSFERS

1. If it is a security interest, is it a nonpurchase money security interest?

A) The transformation rule[88]

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promissory note, and the mortgagee shall account to the mortgagor for such application.

55 In re Timbers of Inwood Forest Associates, Ltd., 808 F.2d 363 (9th Cir. 1987)

(Under 11 U.S.C.S. § 362(d)(2), a secured creditor could obtain relief from an automatic stay to foreclose on its collateral when the debtor had no equity in it and the collateral was not necessary to the reorganization. Furthermore, under 11 U.S.C.S. § 1112(b), the secured creditor could request that the proceeding be converted into a Chapter 7 liquidation proceeding based on a showing of unreasonable delay, continuing losses coupled with the unlikelihood of rehabilitation, or inability to effectuate a reorganization plan.)

56 **Sec 361(c)(2)**When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by -

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property

57 **Sec 362(c)(3)** granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property

58 The test is really a practical one: why would a creditor give up is lien on the debtor's cash when the appearance appears very bleak? As one court concluded:

> The standard of adequate protection to be afforded a creditor when its cash collateral is being used should be a high one. Replacement liens in "hard assets" such as land or other minimally depreciable assets would be in most instances sufficient. However, to me, a lien in a crop to be grown with all of the other risks attendant to that is not sufficient adequate protection except where a significant profit margin is very likely or a minimal guarantee of payment is proffered through crop insurance. To ask a creditor to release cash requires a strong likelihood of return. The uncertainties of the weather, crop prices, and all the other uncertainties inherent in farming increase the insecurity of a replacement lien solely in crops to be grown.

B) Rejection of the transformation rule[89]

2. Lien avoidance in Chapter 13 cases[90]

3. Contrast § 548[91] with Fla. Stat. 726

A) Actual fraud § 548(a)(1)(A)

B) Constructive fraud– § 548(a)(1)(B)[92]

C) State actual frauds– § 726.103[93]

D)State constructive fraud– §726.104

In re Behrens, 41 B.R. 524, 527 (Bankr.D. Minn. 1984)

59 Most jurisdictions have the payments to the mortgagee made outside of the plan. The Southern District of Florida does not follow this rule. It imposes the burden on the debtors to pay the arrearage AND the current payments to the trustee, who charges 10% for the cumulative payment. This may be costly, but it effectively is a form of adequate protection being provided by local rule and practice. Some courts, when the debtor's payments are questionable, require the arrearage and current payments be made through the trustee. Mendoza v. Temple-Inland Mortg. Corp. (In re Mendoza), 111 F.3d 1264 (5th Cir. 1997).

The Southern District of Florida has one more favor to the secured creditor. If there are delays in confirmation – which is a delay in the trustee making payment to the creditors – the creditor can agree not to have stay relief but request a "vesting order." Translated into English, the order provides that the debtor's payments are vested in favor of the creditor and any dismissal or conversion which may occur in the future will not entitle the money to be returned to the debtor, instead the funds are disbursed to the creditor.

60 The exception to the discharge provided in Code.

Sec 524(c)

An agreement between a holder of a claim and the debtor, the consideration for which, in whole or in part, is based on a debt that is dischargeable in a case under this title is enforceable only to any extent enforceable under applicable nonbankruptcy law, whether or not discharge of such debt is waived, only if -

(1) such agreement was made before the granting of the discharge under section 727, 1141, 1228, or 1328 of this title;

(2) (A) such agreement contains a clear and conspicuous statement which advises the debtor that the agreement may be rescinded at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim; and

(B) such agreement contains a clear and conspicuous statement which advises the debtor that such agreement is not required under this title, under nonbankruptcy law, or under any agreement not in accordance with the provisions of this subsection;

(3) such agreement has been filed with the court and, if applicable, accompanied by a declaration or an affidavit of the attorney that represented the debtor during the course of negotiating an agreement under this subsection, which states that -

4. Liability for preference, fraudulent transfer, or state fraudulent transfer described in §550(a)[94]

F) AVOID PREFERENTIAL TRANSFERS

1. Statutory elements
   a) to or for the benefit of the creditor
   b) for or on account of an antecedent debt owed by the debtor before such transfer is made
   c) Made while the debtor was insolvent
   d) Made on or within 90 days before the filing of the petition

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(A) such agreement represents a fully informed and voluntary agreement by the debtor;

(B) such agreement does not impose an undue hardship on the debtor or a dependent of the debtor; and

(C) the attorney fully advised the debtor of the legal effect and consequences of -

(i) an agreement of the kind specified in this subsection; and

(ii) any default under such an agreement;

(4) the debtor has not rescinded such agreement at any time prior to discharge or within sixty days after such agreement is filed with the court, whichever occurs later, by giving notice of rescission to the holder of such claim;

(5) the provisions of subsection (d) of this section have been complied with; and

. . .

(d) In a case concerning an individual, when the court has determined whether to grant or not to grant a discharge under section 727, 1141, 1228, or 1328 of this title, the court may hold a hearing at which the debtor shall appear in person. At any such hearing, the court shall inform the debtor that a discharge has been granted or the reason why a discharge has not been granted. If a discharge has been granted and if the debtor desires to make an agreement of the kind specified in subsection (c) of this section and was not represented by an attorney during the course of negotiating such agreement, then the court shall hold a hearing at which the debtor shall appear in person and at such hearing the court shall -

(1) inform the debtor -

(A) that such an agreement is not required under this title, under nonbankruptcy law, or under any agreement not made in accordance with the provisions of subsection (c) of this section; and

(B) of the legal effect and consequences of -

(i) an agreement of the kind specified in subsection (c) of this section; and

(ii) a default under such an agreement; and

(2) determine whether the agreement that the debtor desires to make complies with the requirements of subsection (c)(6) of this section, if the consideration for such agreement is based in whole or in part on a consumer debt that is not secured by real property of the debtor.

61 See attached form required by the Southern District of Florida.

e) Made on or between 90 days in one year before the date of the filing of the petition and to creditor at the time the transfer was an insider

f) That enables such creditor to receive more than such creditor would receive if–

1) the case were a case under Chapter 7

2) the transfer was not made, AND

3) such creditor received payment of such debt to the extent provided by the provisions of this title

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62 The stay is no longer in effect and the deficiency, should one arise, will not be discharged. In simple language, as to a reaffirmed debt, it is as if "there was no bankruptcy at all."

63 Taylor v. AGE Fed. Credit Union (In re Taylor), 3 F.3d. 1512 (11th Cir. 1993)

64 **Sec. 722. - Redemption** An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

65 It is a one-shot deal. Pay the fair market value the day of the court's order, and the lien, even if greater than the fair market value, disappears.

66 Follow procedure established in Rule 6008, Fed. R. Bankr.P. Amazingly, there is no local rule on this issue in the Southern District of Florida.

67 Bank of Boston v. Burr (In re Burr), 160 F.3d 843 (1st Cir. 1998)

68 It all comes down to a short fuse. You have basically 60 days to obtain the reaffirmation from the date of the first meeting of creditors. The debtor has no reason to sign unless subjected to a motion. The reaffirmation merely provides that he or she will be liable under any event.

Is it worth the money to file a motion to compel debtor to sign reaffirmation agreement? Only your client can answer that question.

69 During a chapter 13, the debtor pays what appears to be principal and interest. When the case converts the debtor seeks to apply all of the payments to principal and credit the same for a 722 redemption. Cases for applying payments to the secured portion include:In re Tluscik, 122 B.R. 728 (Bankr. W.D. Mo. 1991) (debtor may redeem in Chapter 7 for balance of allowed secured claim from Chapter 13 proceeding); In re Bunn, 128 B.R. 281 (Bankr. D. Idaho 1991) (secured creditor would receive a windfall if allowed to demand redemption for current fair market value of collateral at time of conversion to Chapter 7, because amount paid toward "principal" of secured claim under Chapter 13 plan, when combined with current value of

g) transfer of property? See 11 U.S.C. § 101(54)

h) every mode, direct or indirect, absolute or conditional, voluntary or involuntary of disposing of or parting with property

ELEMENTS

A) to the benefit of the creditor?

Mechanics of the transfer

Who are the creditors?

B) Transfer of an antecedent debt– depletion of the estate

Includes delivery of security

C) Insolvency of the debtor. See 11 U.S.C. § 101(32)

D)Transfers within 90 days

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vehicle, would exceed the value of the collateral at the original Chapter 13 petition date); In re Estep, 96 B.R. 87 (Bankr. E.D. Ky. 1988) (debtors may redeem household goods from creditor's lien in Chapter 7 under § 722 without need of any additional payments because amount of secured claim was paid during Chapter 13 plan); In re Tunget, 96 B.R. 89 (Bankr. W.D. Ky. 1988) (under Chapter 13 plan, the creditor was paid full value of his secured claim; upon conversion to Chapter 7, these payments must be treated as a redemption pursuant to § 722).

Cases against include: In re Dennis, 31 B.R. 128 (Bankr. M.D. Ga. 1983) (even though creditor's secured claim paid in full under the Chapter 13 plan, these payments cannot be treated as redemption upon conversion to Chapter 7 because debtor could not be deemed to have redeemed property through the use of installment payments made under the Chapter 13 plan) and In re Burba, 1994 U.S. App. LEXIS 31290(6th Cir. 1994).

70 **Sec. 509. - Claims of codebtors**

(a) Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

(b) Such entity is not subrogated to the rights of such creditor to the extent that -

(1) a claim of such entity for reimbursement or contribution on account of such payment of such creditor's claim is -

(A) allowed under section 502 of this title;

(B) disallowed other than under section 502(e) of this title; or

(C) subordinated under section 510 of this title; or

(2) as between the debtor and such entity, such entity received the consideration for the claim held by such creditor.

(c) The court shall subordinate to the claim of a creditor and for the benefit of such creditor an allowed claim, by way of subrogation under this section, or for reimbursement or contribution, of an entity that is liable with the debtor on, or that has secured, such creditor's claim, until such creditor's claim is paid in full, either through payments under this title or otherwise

Date check clears not date on check
Date when received

2. Preferential effect
   a) A transfer which does not result in the transferee recovering a larger percentage of his debt that other creditors similarly situated is not the proper target of a law designed to equalize treatment among creditors
3. Exceptions to preferences– § 540(c)
   a) Contemporaneous exchange

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71 **Sec. 552. - Postpetition effect of security interest**

(a) Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case.

This kills the ordinary "after acquired" clause lienor by its language

72 **Sec 552(b)(1)** Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to proceeds, product, offspring, or profits of such property, then such security interest extends to such proceeds, product, offspring, or profits acquired by the estate after the commencement of the case to the extent provided by such security agreement and by applicable nonbankruptcy law, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise.

73 **552(b)(2)** Except as provided in sections 363, 506(c), 522, 544, 545, 547, and 548 of this title, and notwithstanding section 546(b) of this title, if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as rents of such property or the fees, charges, accounts, or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties, then such security interest extends to such rents and such fees, charges, accounts, or other payments acquired by the estate after the commencement of the case to the extent provided in such security agreement, except to any extent that the court, after notice and a hearing and based on the equities of the case, orders otherwise

Underlined portions are the difference between the sections.

74 **Use 552(b)(2)** . . . if the debtor and an entity entered into a security agreement before the commencement of the case and if the security interest created by such security agreement extends to property of the debtor acquired before the commencement of the case and to amounts paid as

b) Ordinary Course of Business– §547(c)(2)
c) Security interest from property [timelines – the magic of 20 days] [95], [96]
d) New value– § 547(c)(4)
e) Creates a perfected security interest– § 547(c)(5)
f) Fixing statutory lien– § 547(c)(6)[97]
-Is the landlord's lien a statutory lien?[98]
g) Bona fide payment or spousal obligation– § 547(c)(7)
h) Less than $600.00 Rule– § 547(c)(8)[99]

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rents of such property or . . . then such security interest extends to such **rents . . .**

75 An ambiguous document about what the property to be attached will be read against the lender. County State Bank v. Van Diest Supply Co., 303 F.3d 832 (7th Cir. 2001)

76 Concept is that prepetition contracts are liened prepetition and therefore postpetition payments for prepetition liened contracts are identifiable as prepetition accounts receivable and therefore not part of the avoidance language of 552(a). In re Patio & Porch Sys., 194 B.R. 569 (D.C. Md. 1996) (Order preventing debtor from using postpetition payments received under prepetition home improvement contracts that were performed postpetition was contingent on creditor with security interest in debtor's accounts receivable being able to establish in evidentiary hearing that postpetition "proceeds" were identifiable, notwithstanding that "equities of the case" might require that creditor's interest in proceeds be reduced.

77 Most loans define "cash collateral" to be, "cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest. . ." Not surprisingly, this definition mirrors, "'cash collateral' means cash, negotiable instruments, documents of title, securities, *deposit accounts*, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title." **Sec. 363(a)**

78 Insurance is property of the estate under 11 U.S.C. sec. 541. The issue becomes who has the greater rights – the debtor or creditor. Simple state law will answer the question. Most states agree that if the loss payee of the insurance is the lien holder, the insurance proceeds are "cash collateral" and are liened by the creditor. In addition, a normal UCC-a and personal property security agreement will state that the lien attaches to the identifiable property *or the insurance procceds attributable to such property*.

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79 **Rule 4001(b) Use of cash collateral.**

(1) Motion; service.

A motion for authorization to use cash collateral shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d) , and on such other entities as the court may direct.

(2) Hearing.

The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 15 day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice.

Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

80 If your lien includes the accounts receivable, then the trustee and debtor in possession are at your mercy. You must overcome the issue of liening after acquired property as described above. Many refer to the matter as a "replacement lien" where you let the debtor use our accounts receivable to keep the business afloat but in exchange receive a new lien against the accounts receivable which accrue *after* the bankruptcy filing. It is suggested that you prepare new financing statements, file the same and obtain stay relief for the filing of the same. Utilize stay relief language in the order which grants the replacement lien.

81 **Sec. 363(o)** In any hearing under this section -

(1) the trustee has the burden of proof on the issue of adequate protection; and

(2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest

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The term "trustee" means panel trustee or Debtor in Possession. Subpart (b) requires that the lienholder prove its lien. Know the rules of evidence before attempting to have this hearing.

82 One of the most overused phrases in bankruptcy is "equity cushion." Translated it can mean, "Judge, I do not need to pay the secured creditor until this Chapter 11 gets to its end a few years away because there is so much equity that if the case tanks and the matter ends in foreclosure, the creditor still has enough equity to pay him three years from now at the foreclosure." But, if the debtor makes such a comment, don't forget discussion of 506 above where the debtor has to pay your fees and costs for the roller coaster ride of the debtor's bankruptcy.

> 83 No. As the Eleventh Circuit stated in Orix Credit Alliance v. Delta Resources (In re Delta Resources), 54 F.3d 722, 730 (11th Cir. 1995):
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> . . . we conclude that 11 U.S.C. § 506(b), providing for postpetition interest on oversecured claims, read in pari materia with 11 U.S.C. § 362(d)(1), concerning conditioning the automatic stay on adequate protection, and 11 U.S.C. § 502, regarding the allowance of claims, requires that the payment of accrued postpetition interest to an oversecured creditor await the completion of reorganization or confirmation of the bankruptcy case. The *ratio decidendi* enunciated by the Supreme Court in *Timbers* that an undersecured creditor is not entitled to receive postpetition interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1) applies equally well to an oversecured creditor.

84 " The Supreme Court has recognized that an undersecured creditor may be entitled to adequate protection to ensure against the decline in the value of its collateral. However, an undersecured creditor is not entitled to receive postpetition 'interest on its collateral *during the stay* to assure adequate protection under 11 U.S.C. § 362(d)(1).'" Timbers, 484 U.S. at 382, 108 S. Ct. at 636, 98 L. Ed. 2d at 755 (emphasis added).

Orix Credit Alliance v. Delta Resources (In re Delta Resources), 54 F.3d 722, at 729 (11th Cir. 1995)

85 When they start bouncing checks, it is your duty to move for a trustee or move to convert or scream out "HOLD EVERYTHING."

86 Most orders require monthly (sometimes weekly) accounting to be delivered by the debtor to the lender. This is “adequate information” as often defined in the loan papers. When debtor fails to comply, the case may soon be converted or dismissed as one court stated, “The Debtor's inability or refusal to provide adequate information of its segregation and accounting for the use of cash collateral, violates not only of the terms of the adequate protection Order, but contravenes the clear requirement of Code § 363(c)(4).” In re O.P. Held, Inc., 74 B.R. 777 , 781 (Bankr. N.D.N.Y. 1987)

87 A serious concern of the court as the Eleventh Circuit has stated, “Opposed to the debtor's need for use of cash collateral is the valid concern that free use of secured "property" may result in the dissipation of the estate. Because security interests are "property rights" protected by the Fifth Amendment from public taking without just compensation, Wright v. Union Central Life Ins. Co., 311 U.S. 273, 61 S. Ct. 196, 85 L. Ed. 184 (1940), the Bankruptcy Court cannot allow the secured interest to be threatened by improper use of cash proceeds.”

In re George Ruggiere Chrysler Plymouth, 727 F. 2d. 1017,1019 (11th Cir. 1984)

88 Like any commingling issue, the Purchase Money Security Interest will fall on its face if the purchase money collateral is commingled with the non-purchase money assets.

89 In re Gibson, 16 B.R. 257 (Bankr. D.Ks. 1981)

90 Look at section about 506 recited above and how nonresidential liens are stripped to value and how residential liens are stripped if there is no equity and how other residential liens may be stripped to their value of the payments end within the plan’s payment period.

91

FEDERAL ACTUAL FRAUD:

548(a)

(1) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily -

(A) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was

made or such obligation was incurred, indebted;

STATE ACTUAL FRAUD

726.105 Transfers fraudulent as to present and future creditors.--

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or

(b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

(2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:

(a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

FEDERAL CONSTRUCTIVE FRAUD

548(a)(1)(B)

(i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii)

(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be

beyond the debtor's ability to pay as such debts matured.

STATE CONSTRUCTIVE FRAUD

726.106 Transfers fraudulent as to present creditors.--

(1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

(2) A transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the transfer was made to an insider for an antecedent debt, the debtor was insolvent at that time, and the insider had reasonable cause to believe that the debtor was insolvent.

92 Big note: Value is an issue for constructive fraud and is NOT an issue for actual fraud. Hence, value is not a defense to an actual fraud case but is to a constructive fraud case.

93 Unlike federal statute, it lists “badges of fraud” where you can prove “intent” by establishing some of the listed badges and maybe create some which are not listed in the statute.

94 Whether the trustee or debtor sues you under the state or the federal statute, you are liable under Sec. 550. A state fraudulent transfer action is under Sec. 544 while a federal is under

Sec. 548. Hence the liability clause of 550 applies as it states:

Sec. 550. - Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

95 **Sec. 547(c)** The trustee may not avoid under this section a transfer -

. . .

(3) that creates a security interest in property acquired by the debtor -

(A) to the extent such security interest secures new value that was -

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 20 days after the debtor receives possession of such property;

96 Perfection of purchase money interest must be made within 20 days or it will lose priority over other purchase money or secured interests.

679.324 Priority of purchase-money security interests.--

(1) Except as otherwise provided in subsection (7), a perfected purchase-money security interest in goods other than inventory or livestock has priority over a conflicting security interest in the

same goods, and, except as otherwise provided in s. 679.327 , a perfected security interest in its identifiable proceeds also has priority, if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter.

97 **Sec. 547(c)** The trustee may not avoid under this section a transfer -

. . .**(6)** that is the fixing of a statutory lien that is not avoidable under section 545 of this title;

98 In many cases it is. The question becomes, what is the lien after the landlord receives a judgment, but before it obtains possession? Is it a judgment lien?

99 **Sec. 547(c)** The trustee may not avoid under this section a transfer -

. . .

(8) if, in a case filed by an individual debtor whose debts *are primarily consumer debts*, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.