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NOTES

THE 1978 BANKRUPTCY REFORM ACT'S POLICE OR REGULATORY POWER EXEMPTION TO THE AUTOMATIC STAY: UNNECESSARY, UNFOUNDED, AND UNRESTRAINED

"[A] stay of creditors from collecting their claims against the debtor and his property from and after the filing of a petition under the Bankruptcy Act is indispensable to bankruptcy administration."¹ Today, the automatic stay continues to be "one of the fundamental debtor protections provided by the bankruptcy laws. It gives a debtor a breathing spell from his creditors . . . [and] also provides creditor protection."² Although historically the automatic stay was a common law doctrine, federal bankruptcy legislation has codified a broad automatic stay provision.³ Congress intended the stay to have wide application, but the Bankruptcy Reform Act of 1978 includes specific exemption provisions. Under these exemptions, certain claimants can continue to pursue their claims against the debtor unless the court specifically grants the debtor's motion for relief. Exemptions from the automatic stay include actions relating to governmental exercise of police or regulatory power and enforcement of judgments other than money judgments on behalf of governmental units.⁴ The exemptions are powerful tools in the

1. Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J.L. REF. 1, 3 (1978) (citing *Meuller v. Nugent*, 184 U.S. 1, 14 (1901)).

2. H.R. REP. No. 595, 95th Cong., 2d Sess. 340, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 6296-97 [hereinafter HOUSE REPORT].

3. 11 U.S.C. § 362 (1982 & Supp. III 1985).

4. The exemptions are codified as part of the automatic stay provision at 11 U.S.C. § 362(b)(1)-(10). Sections 362(a)(1)-(2) and (b)(4)-(5) provide:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), 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

hands of local and state governments, allowing them to pursue their enforcement actions against debtors and ignore bankruptcy proceedings.⁵ The exemptions fail to strike a balance between the traditional goal of protecting troubled debtors and the desire to prevent harm to the public by those debtors.

Although Congress intended the exemptions to the stay to have narrow application,⁶ all types of governmental units have litigated exemptions⁷ in a variety of contexts,⁸ seeking to have their claims satisfied prior to those of private creditors. Courts have been unable to develop a single rule for determining when governmental units qualify for the exemptions from the automatic stay. Various courts interpreting the same statute and legislative history have arrived at astonishingly divergent applications of the law.⁹

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 arises before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

....

(b) The filing of a petition under section 301, 302, or 303 of this title, . . . does not operate as a stay—

....

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

Id.

5. Although the government could obtain judicial relief from the stay imposed by common law, and the Bankruptcy Rules of Procedure permitted *ex parte* relief, *see infra* note 45 and accompanying text, Congress was concerned that the stay interfered with government attempts to stop pollution and fraud. *See infra* note 68 and accompanying text.

6. *See, e.g., infra* text accompanying note 69.

7. *See In re Fintel*, 10 Bankr. 50 (Bankr. D. Or. 1981) (state Builders Board); *In re Joe DeLisi Fruit Co.*, 11 Bankr. 694 (Bankr. D. Minn. 1981) (state Department of Agriculture); *Aherns Aircraft, Inc. v. NLRB*, 703 F.2d 23 (1st Cir. 1983) (National Labor Relations Board); *Civil Aeronautics Bd. v. Tour Travel Enterprises*, 440 F. Supp. 1265 (N.D. Ill. 1977) (Civil Aeronautics Board).

8. *See In re Cousins Restaurants, Inc.*, 11 Bankr. 521 (Bankr. W.D.N.Y. 1981) (zoning ordinance); *In re Arnage, Inc.*, 33 Bankr. 662 (Bankr. E.D. Mich. 1983) (liquor license).

9. Compare *NLRB v. Evans Plumbing Co.*, 639 F.2d 291 (5th Cir. 1981) (NLRB enforcement proceeding ordering a bankrupt employer to reinstate two employees with back pay fell within the statutory exemption to the automatic stay) with *In re Theobald Indus.*, 16

In an article published soon after the United States Congress passed the 1978 Act, Professor Kennedy,¹⁰ who generally supports governmental exemptions to the automatic stay,¹¹ warned that "it is entirely conceivable that enforcement during the interim before judicial relief can be obtained will be fatal to the hope of financial rehabilitation of a debtor."¹² Despite Professor Kennedy's warning, the governmental exemptions, intended to be applied in exceptional circumstances, have become common avenues for creditors to seek payment from financially troubled debtors.

This Note first analyzes some of the policies supporting the governmental exemptions to the automatic stay by examining the common law, early statutory provisions, and the Bankruptcy Rules of Procedure. The Note then examines the stay codified in the Bankruptcy Reform Act of 1978 and the section 362(b)(4) police power exemption. The Note concludes that the police power exemption codified in the 1978 Act has disrupted the courts' quest to provide debtors a breathing spell and assure creditors orderly and equitable proceedings.

EVOLUTION OF THE STAY: BROADENING SCOPE AND CREATING UNIFORMITY

The Common Law

Under the common law, protection of debtors and orderly resolution of creditors' claims were the primary concerns of bankruptcy administration. The automatic stay played a significant role in bankruptcy proceedings. Although the first comprehensive federal bankruptcy act in 1898¹³ did not contain an automatic stay provision, the courts continued to enforce adherence to the com-

Bankr. 537 (Bankr. D.N.J. 1981) (unfair labor practice proceeding before NLRB in which board sought monetary claims was subject to automatic stay).

10. Professor Kennedy served as staff director of the Commission on Bankruptcy Laws of the United States. See 124 CONG. REC. 33,990 (1978) (statement of Sen. DeConcini recognizing Professor Kennedy's service as staff director of the Commission on Bankruptcy Laws of the United States).

11. "The provision of the new legislation allowing governmental authorities to enforce laws of a police nature without constraint by the stay is . . . a reasonable resolution of the conflicting policies involved." Kennedy, *supra* note 1, at 64.

12. *Id.*

13. Act of July 1, 1898, 30 Stat. 544 (repealed 1978).

mon law automatic stay. In 1901 Chief Justice Fuller of the United States Supreme Court wrote: "It is as true of the present law as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an attachment and injunction . . ."¹⁴

Congress first codified automatic stays as part of farm debtor relief legislation passed during the Depression era. These first stay provisions were extremely narrow. The 1933 amendment¹⁵ to the Bankruptcy Act of 1898 included an automatic stay provision that, upon a farmer's filing of a petition of bankruptcy, stayed proceedings for recovery of debts, foreclosure of mortgages, tax sales, and similar actions unless a judge granted the creditor relief from the stay.¹⁶ Along with this relief provision, the first automatic stay provision also contained an exemption provision.¹⁷ The stay did not apply to tax collection or to any proceedings affecting property other than farm equipment or the household effects of the farmer's family. As originally codified, the statutory stay was a limited ac-

14. *Mueller v. Nugent*, 184 U.S. 1, 14 (1901) (citing *Bank v. Sherman*, 101 U.S. 403 (1879)).

15. Act of Mar. 3, 1933, § 75(o), 47 Stat. 1467, 1473. Section 75(o) provided:

Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, rescission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale;

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage.

Id.

16. *Id.*

17. "The prohibitions of subdivision (o) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family." *Id.* § 75(p), 47 Stat. at 1473.

tion intended only to protect the essentials of farm operation. Other common law stays continued to be applied, however.

In 1934, Congress amended the stay provision¹⁸ to permit a bankrupt farmer alternative options to retain possession of mortgaged property with or without the consent of the mortgagee. Under the first option, the debtor purchased his estate for an appraised value and made deferred payments over a period of five years. The balance of the appraised price was due the sixth year.¹⁹ If the mortgagee refused to assent, the bankruptcy court would "stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property."²⁰ The second arrangement was a five-year stay of all proceedings by a secured creditor against a farmer-debtor's property.²¹ In 1935, however, the Supreme Court in *Louisville Stock Land Bank v. Radford*²² held the amended stay provision unconstitutional under the fifth amendment.

In *Radford*, the defendant, in addition to requesting a judgment of bankruptcy, requested that his property be appraised and that he be granted the relief provided by the amended stay provision.²³ His mortgagee responded with a suit challenging the constitutionality of the automatic stay. Justice Brandeis, delivering the opinion of the Court, held that the stay provision authorized the uncompensated taking of specific property rights of substantial value and therefore violated the fifth amendment.²⁴ Justice Brandeis concluded:

If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the

18. Act of June 28, 1934, 48 Stat. 1289.

19. *Id.* at 1290.

20. *Id.* at 1291.

21. See Kennedy, *The Automatic Stay in Bankruptcy*, 11 U. MICH. J.L. REF. 175, 180 (1977).

22. 295 U.S. 555 (1935).

23. *Id.* at 575.

24. *Id.* at 601-02.

relief afforded in the public interest may be borne by the public.²⁵

Three months later,²⁶ Congress responded with an amendment to the Bankruptcy Act which included a new version of the automatic stay.²⁷ The amendment reduced the period of the stay from five to three years and permitted the court, in its discretion, to order the sale of certain property of the debtor and accelerate the debtor's payments.²⁸ The new provision withstood challenges on constitutional grounds in 1937²⁹ and in 1940.³⁰

Codifying a Broader Stay

In 1938 Congress enacted the Chandler Act,³¹ which "radically amended"³² the Bankruptcy Act of 1898. The Chandler Act codified three statutory stays in Chapters 10 and 12 of the Bankruptcy Act. Chapter 10, the corporate reorganizations chapter, contained a section that, upon a court order approving a reorganization petition automatically stayed a prior pending bankruptcy, mortgage foreclosure, equity receivership proceeding, or action to enforce a

25. *Id.* at 602.

26. Kennedy, *supra* note 21, at 180.

27. Act of Aug. 28, 1935, § 6, 49 Stat. 942, 943. The 1935 amendment also amended the exemption provision, § 75(p), to remove the previous exemptions and substantially broaden the scope of the stay. The amended exemption provision provided:

The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in section 75 of this Act.

Id. § 5, 49 Stat. at 943.

28. *Id.*, 49 Stat. at 944.

29. See *Wright v. Mountain Trust Bank*, 300 U.S. 440 (1937) (amended Act not unconstitutional as applied to a mortgage because possession of the property during the Stay of Foreclosure is in the debtor subject to the obligations imposed by the Act and under the supervision and control of the court, rather than in a receiver or trustee).

30. See *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (the Act was within the plenary power of Congress in respect of the subject of bankruptcy).

31. Act of June 22, 1938, 52 Stat. 840.

32. *In re Hillsdale Foundry Co.*, 2 Collier Bankr. Cas. (MB) 542, 547 (Bankr. W.D. Mich. 1974).

lien.³³ Chapter 12, which dealt with real property arrangements by natural persons, contained two stay sections. Section 428 stayed any action to enforce a lien on the real property or real chattel of the debtor,³⁴ and section 507 stayed a prior mortgage foreclosure, equity, or other proceeding in federal or state court in which a trustee or receiver had been appointed.³⁵ These three statutory stays "anticipated the stays of the Rules of Bankruptcy Procedure by more than 30 years."³⁶

Expansion and Unification: The Bankruptcy Rules of Procedure

In 1964 Congress authorized the Supreme Court to "prescribe by general rules . . . the practice and procedure under the Bankruptcy Act."³⁷ From 1973 to 1975 the Supreme Court adopted Bankruptcy Rules of Procedure that introduced automatic stay provisions throughout the Bankruptcy Code.³⁸ The Bankruptcy Rules of Pro-

33. Act of June 22, 1938, 52 Stat. 840, 888. Chapter 10, § 148 provides, "Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property."

34. *Id.*, 52 Stat. at 918. Chapter 10, § 428 states:

Unless and until otherwise ordered by the court, upon hearing and after notice to the debtor and all other parties in interest, the filing of a petition under this chapter shall operate as a stay of any act or proceeding to enforce any lien upon the real property or chattel real of a debtor.

35. *Id.*, 52 Stat. at 927. Chapter 12, §§ 506-507 provide:

A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States or of any State in which a receiver or trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made.

Such prior proceeding shall be stayed by the filing of a petition under this chapter. The trustee appointed under this chapter, upon his qualification, or, if a debtor is continued in possession, the debtor, shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the immediate possession thereof. The trustee or debtor in possession shall also have the right to immediate possession of all real property and chattels real of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage.

Id.

36. Kennedy, *supra* note 21, at 182.

37. Act of Oct. 3, 1964, 78 Stat. 1001 (codified as amended at 28 U.S.C. § 2075 (1982)).

38. On April 24, 1973, the Court adopted the Chapter 1 through 7 and Chapter 13 rules, which included rules 401, 601, and 13-401. 411 U.S. 989 (1973). Rule 401 provided that the filing of a petition operated as an automatic stay of certain actions on unsecured debts. *Id.*

cedure represented a significant change from the Bankruptcy Act's limited automatic stay provisions. The rules broadened the reach of the stay, made it effective upon the filing of the petition for relief, and shifted the burden to the creditor, who had to show cause to obtain relief from the stay.³⁹ Suddenly, the stay became an obstacle to government enforcement actions; it barred the federal government from collecting a debtor's past due federal income tax,⁴⁰ prevented a municipality from cutting off a debtor's water supply,⁴¹ stopped a municipal board from revoking a debtor's liquor license,⁴² and prevented automatic revocation of a hospital's license.⁴³

at 1048. Rule 601 instructed that the filing of a petition operated as an automatic stay against lien enforcement. *Id.* at 1062. Under rule 13-401 a petition filed under Chapter 13 operated as an automatic stay of actions against the debtor or lien enforcement. *Id.* at 1177.

The Court adopted Chapter 11 rules, including rule 11-44, on March 18, 1974. 415 U.S. 1003, 1033 (1974). Rule 11-44 provided that a petition filed under Chapter 11 operated as a general automatic stay against any actions against the debtor or proceedings to enforce any lien. *Id.* at 1033.

The Court adopted Chapter 10 and 12 rules on April 28, 1975. 421 U.S. 1019 (1975). Under rule 10-601, a petition filed under Chapter 10 operated as an automatic stay of actions against the debtor and lien enforcement. *Id.* at 1069. Similarly, rule 12-43 provided that petitions filed under Chapter 12 operated as a stay of proceedings against the debtor or any actions to enforce a lien against his property. *Id.* at 1116.

39. Norton's *Bankruptcy Law and Practice* describes the impact of Bankruptcy Rules 401, 601, 10-601, 11-44, 12-43, and 13-401:

The adoption of the Bankruptcy Rules of Procedure resulted in a significant policy change in the Bankruptcy Act's automatic stay provisions. The automatic stay formerly available only under Chapter 10 became a hallmark of all straight bankruptcy cases and all other chapter cases as well. The debtor in possession no longer needed to make application to restrain the commencement or continuation of any action or to enforce any lien against the debtor or its property. The stay became effective immediately upon the filing of the petition for relief. The burden was shifted to the creditor who sought to obtain relief from the stay to file a complaint in an adversary proceeding upon a showing of cause. If the trustee or debtor in possession sought continuation of the stay against lien enforcement, as distinguished from actions against or the enforcement of judgments against the debtor, the trustee or debtor in possession then had the burden of showing entitlement to the stay.

1 W. NORTON, *BANKRUPTCY LAW AND PRACTICE* § 20.02, at 4-5 (1986) (footnotes omitted).

40. *Verran v. United States (In re Verran)*, 13 Collier Bankr. Cas. (MB) 288 (Bankr. E.D. Mich. 1977), *vacated and remanded*, 4 Bankr. Ct. Dec. (CRR) 47 (E.D. Mich. 1978).

41. *Shenberg v. Carpentersville (In re Shenberg)*, 433 F. Supp. 677 (N.D. Ill., 1977).

42. *Katman v. New Jersey (In re Angelo Priest, Inc.)*, 13 Collier Bankr. Cas. (MB) 524 (Bankr. D.N.J. 1977).

43. *In re Saugus General Hosp.*, 4 Bankr. Ct. Dec. (CRR) 1160 (Bankr. D. Mass. 1979).

Relief from the Stay

Under each of the Bankruptcy Rules of Procedure imposing a stay, creditors could obtain relief from the stay through an adversary proceeding initiated by filing a complaint with the court.⁴⁴ The rules also included procedures for obtaining ex parte relief from the stay in situations in which "immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition."⁴⁵ Furthermore, each of the automatic stay rules contained a clause explaining that the rule did not preclude the issuance of other relief.⁴⁶ In sum, the stay provisions were automatic in that they became effective upon the debtor's filing of a petition. The automatic stay provisions reflected the common law concern for debtor protection. They were not, however, impermeable.

Although the rules contained provisions for relief, some courts relieved creditors of the stay by expanding the exemptions rather

44. See, e.g., rule 10-601(c), 421 U.S. at 1069.

On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, [ex parte relief provision] set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

Id. at 1069-70.

45. Rule 601(d)(1), 411 U.S. at 1063. Rules 8-501(d)(1), 10-601(d)(1), 11-44(e)(1), 12-43(e)(1), and 13-3401(e)(1) also authorized ex parte relief from the stay on a showing by sworn allegations that "immediate and irreparable injury, loss, or damage will result to the plaintiff" before a hearing could be held. See Kennedy, *supra* note 21, at 226 & n.250.

46. See, e.g., rule 10-601(3), 421 U.S. at 1070. "Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized." *Id.* The All Writs Act, 28 U.S.C. § 1651 (1982), and § 105 of the Bankruptcy Code, 11 U.S.C. § 105 (Supp. III 1985), which defines the power of the bankruptcy court, also provided procedures for courts to grant creditors relief from the stay.

According to the All Writs Act, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1982). See *E.E.O.C. v. Rath Packing Co.*, 787 F.2d 318, 325 (8th Cir. 1986). Section 105 of the Bankruptcy Code established that bankruptcy courts have the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [title 11, Bankruptcy]." 11 U.S.C. § 105(a). See *Rath*, 787 F.2d at 325.

than requiring parties to request relief.⁴⁷ For example, in *Colonial Tavern, Inc. v. Byrne*,⁴⁸ the United States district Court for the District of Massachusetts chose to create an exemption to the automatic stay rather than require the government to adhere to the prescribed procedures for obtaining relief. The court held that rule 11-44 did not operate to stay a license suspension proceeding in particular and any local regulatory law in general.⁴⁹ Citing general principles of bankruptcy law,⁵⁰ the court circumvented the immediate question of the proper procedure for contesting a stay under the rules and rendered a result-oriented decision. The court's choice to discard procedure not only removed the debtor's protection, but also showed disdain for the Bankruptcy Rules.

Some bankruptcy courts held their ground, however, and did not allow government agencies to circumvent the Bankruptcy Rules. For example, in *Hillsdale Foundry Co. v. Michigan*,⁵¹ the United States Bankruptcy Court for the Western District of Michigan upheld the rule 11-44 stay where the state sought summary judgment rather than relief from the stay. In *Hillsdale Foundry*, the debtor sought a temporary restraining order against the state restraining it from commencing or continuing a pollution enforcement action against the company. The state responded by filing a motion for summary judgment rather than applying for relief from the stay.⁵² The bankruptcy court held that the rule 11-44 stay was in effect and an additional restraining order was not necessary to enjoin the state's enforcement action.⁵³ Consequently, the state's choice to contest the application of the stay rather than apply for relief had a significant impact on the result.⁵⁴

47. See, e.g., *N.L.R.B. v. Jonas (In re Bel Air Chateau Hosp., Inc.)* 611 F.2d 1248 (9th Cir. 1979) (NLRB proceeding exempt from rule 11-44 stay).

48. (*In re Colonial Tavern*), 420 F. Supp. 44 (D. Mass. 1976).

49. *Id.* at 45.

50. *Id.* (citing *Bay Bridge Inn*, 94 F.2d 555, 557 (2d Cir. 1938) (A. Hand, J.)).

51. 2 Collier Bankr. Cas. (MB) 542 (Bankr. W.D. Mich. 1974). See *infra* notes 74-84 and accompanying text.

52. *Id.* at 543.

53. *Id.* at 551-52.

54. *Id.* at 550. "The Rules provide procedures by which relief from a stay may be granted. No such relief has been applied for by the defendants." *Id.*

ABANDONING THE COMMON LAW: THE AUTOMATIC STAY IN THE
BANKRUPTCY REFORM ACT OF 1978

The Stay: Scope, Relief Provisions, and Exemptions

In 1978 Congress enacted the Bankruptcy Reform Act. Section 362(a) of the Act imposes, upon the filing of a bankruptcy petition, an automatic stay on eight different types of proceedings against the debtor.⁵⁵ Among the automatic stay provisions are subsection (a)(1), which imposes a stay on the commencement or continuation of pre-petition proceedings—judicial or other proceedings against the debtor that were or could have been commenced prior to the filing of the bankruptcy petition—, and subsection (a)(2), which stays the enforcement of a pre-petition judgment against the debtor. Together, the eight subsections create a comprehensive stay that reflects the common law doctrine of debtor protection.

Under subsection 362(d), the general relief provision, a party may obtain relief from a stay either for cause⁵⁶ or if the debtor lacks equity in property unnecessary to an effective reorganization.⁵⁷ Subsection 362(f), the ex parte relief provision, authorizes the court to grant relief from the stay without a hearing whenever necessary to “prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing. . . .”⁵⁸ The relief provisions follow the protective spirit of the common law by placing the burden on the creditor, and the provisions serve to protect creditors who may be faced with exceptional circumstances.

55. 11 U.S.C. § 362(a)(1)-(8) (1982 & Supp. III 1985).

56. *Id.* § 362(d)(1). “Cause includes lack of adequate protection of an interest in property which may result from a diminution in value due to depreciation or to physical loss or damage.” 1 W. NORTON, *supra* note 39, § 20.26, at 45. See *California v. Farmers Markets, Inc.* (*In re Farmers Markets, Inc.*), 792 F.2d 1400, 1404 (9th Cir. 1986).

57. 11 U.S.C. § 362 (d)(2).

58. *Id.* § 362(f) (Supp. III 1985). Subsection 362(e) provides that a request for relief shall receive an expedited hearing. If the court does not rule within 30 days from the time a party in interest requests relief from the stay, the stay is automatically terminated as to the requesting party. *Id.* § 362(e) (1982 & Supp. III 1985). For any hearing under subsections (d) or (e), subsection (g) provides that the party requesting relief has the burden of proof on the issue of the debtor's equity in property, *id.* § 362(g)(1) (1982), and the debtor, or “party opposing such relief,” has the burden of proof on all other issues. *Id.* § 362(g)(2).

Although the relief provisions provide adequate protection for most creditors, the 1978 Act continues the trend of eroding debtor protection through enumerated exemptions to the stay. Section 362(b) specifies ten complete exemptions from the stay.⁵⁹ Among these exemptions are subsection (b)(4), which exempts "commencement or continuation" of governmental actions to enforce police or regulatory power,⁶⁰ and subsection (b)(5), which permits courts to enforce judgments, other than money judgments, on behalf of governmental units exercising police or regulatory power.⁶¹

Lacking a definition of "police or regulatory power," the language of subsection (b)(4) provides courts little more than a starting point for their analysis. Few courts that have considered cases involving attempts by governmental units to enforce police or regulatory powers against parties seeking bankruptcy adjudication have been able to restrict their analysis to statutory language alone.⁶² When unable to determine the applicability of a statute, most courts look to the "intent of the legislature."⁶³ Thus, most bankruptcy courts seeking to divine legislative intent behind subsection 362(b)(4) have looked exclusively to the legislative history of the 1978 Act.⁶⁴

59. *Id.* § 362(b)(1)-(10) (1982 & Supp. III 1985).

60. *Id.* § 362(b)(4) (1982).

61. *Id.* § 362(b)(5).

62. In *N.L.R.B. v. Jonas (In re Bel Air Chateau Hosp., Inc.)*, 611 F.2d 1248 (9th Cir. 1979), a transition case decided under pre-existing bankruptcy law, the United States Court of Appeals for the Ninth Circuit held that an unfair labor practices action brought by the N.L.R.B. was exempt from the rule 11-44 stay. In dicta, the court considered the language of § 362(b)(4) and suggested that its holding was harmonious with the new law. "Section 362 thus makes explicit the principles of the old bankruptcy law: stays of regulatory proceedings should not be automatic but are appropriate when it is likely that the court proceedings will threaten the estate's assets." *Id.* at 1251. Although the Ninth Circuit discounted its conclusions by declining to "express any views on whether [N.L.R.B.] proceedings fall within the scope of § 362(b)(4)," *id.* at 1251 n.1, subsequent decisions have credited the court's dicta with undue authority. See *N.L.R.B. v. Evans Plumbing Co.*, 639 F.2d 291, 293 n.2 (5th Cir. 1981).

63. 2A C. SANDS, SUTHERLAND: STATUTORY CONSTRUCTION § 45.05 at 20-21 (4th ed. 1984). "An overwhelming majority of judicial opinions considering statutory issues are written in the context of legislative intent." *Id.*

64. In at least one case the court referred to *Black's Law Dictionary* as well as legislative history to determine the meaning of "police power" in subsection 362(b)(4). See *Herr v. Maine (In re Herr)*, 28 Bankr. 465, 467 (Bankr. D. Me. 1983).

Legislative History

The courts have focused on three distinct discussions of the automatic stay that pertain to Congress' intent in exacting the 362(b)(4) exemption to the stay. Although some courts have referred to these passages together, as if to suggest that they were harmonious,⁶⁵ the statements are internally conflicting. A court's choice of which of these legislative pronouncements apply and how to interpret it, bears significantly on the outcome of the court's analysis.

In its report on the bill, the House Judiciary Committee found that the stay provisions in the previous Bankruptcy Act were inadequate from the standpoint of both the debtor and the creditor.⁶⁶ The committee explained that under the law then in effect, the stay had been overused in the area of government regulation:

For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's anti-fraud consumer protection laws. The bill excepts these kinds of actions from the automatic stay. The States will be able to enforce their police and regulatory powers free from the automatic stay.⁶⁷

This statement is an essential part of the argument of debtors who claim that the legislature intended to limit the scope of the exemption to situations of pollution and fraud.⁶⁸

Similar to the committee's statements on pollution and fraud, floor statements by the committeemen in charge of the bill for

65. See *Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 775-76 (8th Cir. 1981).

66. HOUSE REPORT, *supra* note 2, at 174, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6135.

67. *Id.* at 174-75, 1978 U.S. CODE CONG. & ADMIN. NEWS at 6135-36. Although this passage in the legislative history may suggest rampant abuse of the stay by purveyors of fraud as well as polluters, very few such fraud cases are reported. For an example of a case decided under pre-1978 law in which the court held that a state regulatory proceeding enforcing a consumer fraud act was not subject to the rule 11-44 stay, see *Dixon v. Grand Spalding Dodge, Inc.* (*In re Grand Spaulding Dodge*), 5 Bankr. 481 (N.D. Ill. 1980).

68. See *infra* notes 90-100 and accompanying text.

both the Senate and the House of Representatives suggest a limited exemption:

This [governmental exemption] section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to protect a pecuniary interest in property of the debtor or property of the estate.⁶⁹

Additional commentary in the legislative history, however, suggests that the governmental exemptions were intended to reach beyond pollution and fraud situations. Both the Senate Judiciary Committee Report and the House Judiciary Committee Report accompanying the bill indicate that the police power exemption covers proceedings in which a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws.⁷⁰

THE 362(b)(4) EXEMPTION: UNNECESSARY, UNFOUNDED, AND UNRESTRAINED

An Unnecessary Exemption

Situations requiring exemptions as opposed to relief from the stay are rare. The relief provisions of the Bankruptcy Rules of Pro-

69. 124 CONG. REC. 32, 395 (1978) (statement of Rep. Edwards); *id.* at 33,995 (statement of Sen. DeConcini). Sands suggests that the statements of committeemen should be accorded equal weight with other forms of legislative history:

Courts have . . . excepted the statements of the members of the committee during the course of floor debate from the general rule excluding or restricting the use of statements by individual legislators about the meaning of the bill in debate. His [the committeeman in charge] remarks upon presenting the bill to the house . . . will be considered by the courts in construing provisions of the bill subsequently enacted into law. These statements are regarded as being like supplemental committee reports and are accorded the same weight as formal committee reports.

The courts have adopted the same attitude toward statements of the member of the conference committee who explains to the house the action his committee has taken in compromises made with the other house of the legislature. C. SANDS, *supra* note 63, § 48.14, at 334-35 (footnotes omitted). See *Commonwealth Oil Ref. Co. v. United States Envtl. Protection Agency*, 805 F.2d 1175, 1184 n.7 (5th Cir. 1986).

70. HOUSE REPORT, *supra* note 2, at 343, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6135; S. REP. NO. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 5838 [hereinafter SENATE REPORT].

cedure include even ex parte procedures that conceivably could be performed by a telephone call. Courts willing to exercise their discretionary power to stay proceedings or grant creditors relief from the stay should be able to handle cases within the policy constraints in almost every circumstance presented. Courts nevertheless have permitted the growth of unneeded exemptions. By failing to utilize the procedures available in the Bankruptcy Act, the courts have forced a loophole through which a governmental unit can drive a mere zoning ordinance.

A fire chief should not be required to petition the court for relief before ordering a debtor to remove dynamite from atop a furnace in the basement of a schoolhouse.⁷¹ On the other hand, a town government that has failed to enforce a zoning ordinance for twenty-five years should not be able to use section 362(b)(4) to enforce that ordinance against a protected debtor.⁷² A governmental unit should be exempt from the stay when emergency circumstances render relief procedures too cumbersome—when it appears that immediate and irreparable injury, loss, or damage will result if a police or regulatory action is stayed.⁷³ The common law and common sense application of the Bankruptcy Rules of Procedure provides a framework of relief and exemption provisions within which the law can achieve this goal. The governmental enforcement exemption in the 1978 Act, however, hits wide of the mark.

The Hillsdale Foundry Myth

Congress's primary motivation in creating the police power exemption seems to have been to prevent debtors from hiding behind the shield of the stay while polluting the environment or perpetrat-

71. *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 515 (1986) (Rehnquist, J., dissenting). See *infra* text accompanying notes 94-96.

72. See *Cournoyer v. Town of Lincoln*, 790 F.2d 971 (1st Cir. 1986). See also *infra* text accompanying notes 121-26.

73. Other commentators have discussed similar standards. See Loo, *Limits of Enforcing Governmental Powers During Bankruptcy Proceedings*, 19 HARV. B.J. 103, 111 (1985); Emerson, *Governmental Actions Under the Section 362(b)(4) Bankruptcy Exemption; Of Police Powers and Pecuniary Interests*, 90 COM. L.J. 101, 1985). The standard for this approach is an urgent threat to public health and welfare. Loo, *supra*. Loo, however, dispenses with the approach as having "limited utility." *Id.* at 112. Emerson discards this approach in selecting his preference, the "agency expertise" approach. Emerson, *supra*, at 99-100. For a brief description of the agency expertise approach, see *infra* note 126.

ing fraud. This interpretation is based on the House Judiciary Committee report, which cited an unreported pollution case in Maine and an equally obscure antifraud case in Montana.⁷⁴ Embedded in that bit of legislative history is a footnote noting that in at least one pollution case, *Hillsdale Foundry Co. v. Michigan*,⁷⁵ the court's decision to enforce the stay against state environmental authorities was appropriate.⁷⁶

In *Hillsdale Foundry*, the debtor had attempted various measures of control to comply with state air quality standards but with no success. At the time it filed for bankruptcy, the foundry was using a wet scrubber system that was unsatisfactory to the state. When the foundry filed for a reorganization under chapter 11 of the Bankruptcy Act, it also sought a temporary restraining order enjoining the attorney general from commencing or continuing action against the debtor for violation of state air quality standards.⁷⁷

Judge Nims, Bankruptcy Judge in the United State District Court for the Western District of Michigan, weighed the facts. On the government's side, he found that the debtor was polluting the air in violation of Michigan clean air laws. Several factors, however, weighed against allowing the state to shut down the foundry. The foundry had formulated a pollution control plan to resolve the pollution problem; under the guidance of a trustee and a new air pollution control specialist, the debtor was operating at a profit.⁷⁸ In the midst of a severe economic depression that had struck the state, the foundry employed approximately 80 people and had an average weekly payroll of \$15,000.00.⁷⁹ The foundry's primary customer, General Motors, would take its business elsewhere if the debtor were forced to cease operations, and the Hillsdale plant

74. See *supra* text accompanying note 67.

75. (*In re Hillsdale Foundry Co.*), 2 Collier Bankr. Cas. (MB) 542 (Bankr. W.D. Mich. 1974).

76. HOUSE REPORT, *supra* note 2, at 174-75 n.4, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS at 6135. The footnote reads: "But see *In re Hillsdale Foundry Company*. 1 Bankr. Ct. Dec. 195 (1974), in which the court fashioned a breathing-spell for the debtor but let it be know that a plan could not be confirmed absent compliance with anti-pollution laws."

77. *Hillsdale Foundry Co.*, 2 Collier Bankr. Cas. (MB) at 543-544.

78. *Id.* at 545-46.

79. *Id.* at 544.

probably would never reopen. The judge concluded that the facts favored the debtor and held that rule 11-44 stayed the state's enforcement actions.⁸⁰

Probably because the other two cases mentioned in the legislative history are not reported, courts and commentators cite *Hillsdale Foundry* as the pollution case that prompted the legislature to act. A closer look reveals that this interpretation is incorrect. Contrary to the popular sentiment, Congress approved the court's action in *Hillsdale Foundry*. That approval suggests that two popular myths are unfounded: first, that Congress intended the police power exemption to apply automatically to all pollution cases,⁸¹ and second, that Congress did not respect the judgment of local bankruptcy judges and intended the police power exemption to deprive them of their power to exercise judicial discretion.

Despite its absurdity, the *Hillsdale Foundry* myth prevails. For example, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*,⁸² Justice Powell, citing *Hillsdale Foundry*, reviewed the history of the section 362 automatic stay and stated: "Between 1973 and 1978, some courts had stretched the expanded automatic stay to foreclose States' efforts to enforce their antipollution laws, and Congress wanted to overrule these interpretations since its 1978 revision."⁸³ Also relying on *Hillsdale Foundry*, Professor Kennedy wrote: "Clearly, the purpose of [the governmental exemptions] is to overrule decisions applying the automatic stay to proceedings to enforce state environmental control laws."⁸⁴

80. *Id.* at 542. The judge also considered the fact that the state was attempting to bypass the Rules of Bankruptcy Procedure and had not actually sought relief from the automatic stay. *Id.* See *supra* note 54 and accompanying text for a discussion of relief from the stay.

81. Hazardous waste cleanup has provided commentators with an enthralling context for analysis of the Bankruptcy Code. See Note, *The Bankruptcy Code and Hazardous Waste Cleanup: An Examination of the Policy Conflict*, 27 WM. & MARY L. REV. 165 (1985).

82. 474 U.S. 494 (1986). See *infra* notes 89-100 and accompanying text.

83. *Id.* at 504 & n.6 (footnote omitted).

84. Kennedy, *supra* note 1, at 11 & n.36 (citing Kennedy, *supra* note 21, at 207 n.162 (describing *Hillsdale Foundry*)).

Unrestrained Scope of the Government Exemption

Not only is the governmental exemption unnecessary and based on myth, the scope of the exemption is also unrestrained in its application. This situation works to the advantage of the government and the disadvantage of debtors. Although commentators have made valiant efforts at grouping the cases to extract a common rationale and achieve some level of predictability, the general trend has favored a broadening of the governmental exemption to the stay to the detriment of debtors and contrary to the common law doctrine of debtor protection. Several cases illustrate the current confusion in the courts.

In *Commonwealth Oil Refining Co. v. United States Environmental Protection Agency*,⁸⁵ the company cited the pollution and fraud passage⁸⁶ to support its argument that Congress intended to limit the section 362(b)(4) exception to "cases where the government can show present ongoing pollution posing an imminent threat."⁸⁷ The United States Court of Appeals for the Fifth Circuit rejected this argument, holding that the police power was not limited to situations in which " 'imminent and identifiable harm' to the public health and safety or 'urgent public necessity' is shown" and that the automatic stay did not apply to Environmental Protection Agency actions to enforce compliance with environmental laws.⁸⁸ In support of their unsuccessful argument, the appellants cited the Supreme Court decision in *Midlantic National Bank*.⁸⁹

Midlantic National Bank v. New Jersey Department of Environmental Protection

In *Midlantic National Bank*, the Court considered a situation analogous to the problem of the police power exemption. The appellant bankruptcy trustee sought to abandon a waste oil facility

85. 805 F.2d 1175 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 3228 (1987).

86. See *supra* notes 66-67 and accompanying text.

87. 805 F.2d. at 1184 n.7.

88. *Id.* at 1184.

89. *Id.* at 1182 (citing *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494 (1986)).

under section 554(a) of the Bankruptcy Code,⁹⁰ which permits a 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."⁹¹ The property was a burden because the debtor had disposed of cancer-causing toxins at the site and was likely to be charged with liability for the cleanup. Justice Powell, writing for the majority in a five-to-four decision, determined that although the Code did not include such language, a trustee's abandonment power was limited by considerations of public health and safety.⁹² The Court rejected the argument that Congress's enactment to express exemptions to the automatic stay negated the existence of any implied restrictions on the scope of the abandonment power.⁹³

Justice Rehnquist, joined by Chief Justice Burger and Justices White and O'Connor, voiced a strong dissent. The dissent advocated strict construction of the statute, suggesting that "when Congress *was* so concerned it expressed itself clearly."⁹⁴ Justice Rehnquist admitted, however, that he would permit exceptions to the abandonment power, but "far narrower" than those announced by the majority, in situations in which "abandonment by the trustee itself might create a genuine emergency that the trustee would be uniquely able to guard against."⁹⁵ As an example, the dissent suggested that a trustee should not be permitted to abandon dynamite sitting on a furnace in the basement of a schoolhouse.⁹⁶

An exception that blends the *Midlantic National Bank* majority and minority approaches would apply well in the automatic stay situation. A judicial approach to police and regulatory power that protects debtors as well as innocent schoolchildren, for example, would render explicit exemptions, such as section 362(b)(4), entirely unnecessary.⁹⁷ Such was the analysis prior to the 1978 Act,

90. 11 U.S.C. § 554(a) (Supp. III 1985).

91. *Id.*

92. *Midlantic Nat'l Bank*, 474 U.S. at 507. "This exception to the abandonment power vested in the trustee by § 554 is a narrow one. . . . The abandonment power is not to be fettered by laws or regulations not reasonably calculated to protect the public health or safety from imminent and identifiable harm." *Id.* at 507 n.9.

93. *Id.* at 506.

94. *Id.* at 509 (Rehnquist, J., dissenting).

95. *Id.* at 515.

96. *Id.*

97. See Loo, *supra* note 73.

when courts were not bound by the statutory exemptions to the stay.⁹⁸

The cases that follow the pollution rationale tend to fall into the trap of the *Hillsdale Foundry* myth.⁹⁹ The majority opinion in *Midlantic National Bank*, for example, quoted the legislative statement concerning the Texas and Montana cases to support the proposition that the exemption is a blanket order by which states may enforce all pollution laws against bankrupt parties.¹⁰⁰ As discussed earlier, the Court's interpretation of the pollution passage is erroneous. The committee's reference to *Hillsdale Foundry* in its report indicates that the legislators did not intend the exemption to apply in all pollution cases.

Missouri v. United States Bankruptcy Court

*Missouri v. United States Bankruptcy Court*¹⁰¹ is an example of the cases in which some courts apply the Edwards and DeConcini statements that the governmental exemption is "intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to protect a pecuniary interest."¹⁰² Governmental proceedings frequently are motivated by economic interests as well as health and safety concerns. In each case analyzing such proceedings, courts necessarily must determine whether the action brought by the government is predominantly for protection of a pecuniary interest or for furtherance of public health, safety, or welfare. Commentators refer to this approach as the pecuniary interest test.¹⁰³ The test generally consists of a two-part inquiry: whether a governmental

98. *E.g.*, *Hillsdale Foundry Co. v. Michigan (In re Hillsdale Foundry Co.)*, 2 Collier Bankr. Cas. (MB) 542 (Bankr. W.D. Mich. 1974).

99. *See supra* notes 74-84 and accompanying text.

100. *Midlantic Nat'l Bank*, 474 U.S. at 504 n.6.

101. 647 F.2d 768 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982).

102. 124 CONG. REC. 32, 395 (1978) (statement of Rep. Edwards); *id.* at 33,995 (Statement of Sen. DeConcini).

103. For discussions of the pecuniary interest approach, see Emerson, *supra* note 73; Loo, *supra* note 73; Case Note, *When Is a Governmental Unit's Action to Enforce Its Police or Regulatory Power Exempt from the Automatic Stay Provisions of Section 362?*, 9 FLA. ST. U.L. REV. 369 (1981).

unit is bringing the action and whether the action is an exercise of governmental police or regulatory powers.¹⁰⁴

In *Missouri v. United States Bankruptcy Court*, the state sought a writ of prohibition to prevent the United States Bankruptcy Court for the Eastern District of Arkansas from exercising jurisdiction over a debtor's grain located in Missouri. The United States Court of Appeals for the Eighth Circuit held that Missouri's liquidation proceedings did not constitute state police or regulatory powers.¹⁰⁵ The court of appeals examined both the House Report and the floor statements in the legislative history of the 1978 Act and chose to rely on the latter, concluding that "Missouri's grain laws, although regulatory in nature, primarily relate to the protection of the pecuniary interest in the debtors' property and not to matters of public safety and health."¹⁰⁶ Since the *Missouri* decision, a number of courts have chosen to follow the pecuniary interest rationale.

The United States District Court for the Eastern District of New York, for example, applied the pecuniary interest test in *United States v. Caro*.¹⁰⁷ In *Caro* the defendant, Raul Caro, was charged with possession of cocaine with intent to distribute it. Raul and his four brothers, who were sureties in the action, signed a \$100,000 appearance bond. The defendant subsequently disappeared and the government moved for an order entering judgment against the sureties and appointing a receiver to sell the house pledged by one of the sureties, Guillermo Caro. On December 20, 1984, the court granted a show cause order against the sureties. Guillermo, however, filed a petition for bankruptcy on January 8, 1985, and claimed that the automatic stay provision of section 362 prevented the government from taking any action against his property.¹⁰⁸

The district court, in addressing whether the government's action fell within the section 362(b)(4) exemption to the automatic stay, applied the pecuniary interest test of *Missouri v. United*

104. 647 F.2d at 774-76.

105. *Id.* at 775.

106. *Id.* at 776.

107. 47 Bankr. 995 (E.D.N.Y. 1985).

108. *Id.* at 995-96.

States Bankruptcy Court.¹⁰⁹ The government claimed that its action was exempt from the stay, arguing that its interest was in the public welfare rather than in the bail money itself.¹¹⁰ Although the court chose not to enter a final order and referred the matter to the bankruptcy judge, it indicated a willingness to accept the government's argument.¹¹¹ Instead, the court should have required the government to show that access to Guillermo Caro's property would protect the public welfare by preventing the escaped defendant, Raul, from distributing cocaine again. The absence of such evidence suggests that the pecuniary interest test was misapplied. The test should permit governmental units to combat existing threats to the public welfare, but it should not permit reactionary enforcement proceedings that are more punitive than corrective in nature.

EEOC v. Rath Packing Co.

The government exemption is at its broadest when courts follow the public policy test for determining whether a governmental action is an exercise of police or regulatory power that is exempt from the stay.¹¹² According to the public policy approach, "where the administrative agency is acting in a quasi-judicial capacity seeking to adjudicate private rights rather than effectuate public policy as defined by regulatory law the (b)(4) exception is inapplicable."¹¹³ The central focus of the public policy approach is on "whether the government seeks to effectuate a public policy interest or to adjudicate private rights."¹¹⁴

The United States Court of Appeals for the Eighth Circuit applied the public policy analysis in *EEOC v. Rath Packing Co.*¹¹⁵

109. "Whether the governmental action falls within [the 11 U.S.C. § 362(b)(4)-(5)] exemptions depends on whether the government is protecting its pecuniary interest in the property of the debtor, or its interest in the public health and safety." *Id.* at 996-97 (citing *Missouri v. United States Bankruptcy Court*, 647 F.2d at 776).

110. *Caro*, 47 Bankr. at 997.

111. *Id.*

112. *Herr v. Maine (In re Herr)*, 28 Bankr. 465, 468 (Bankr. D. Me. 1983).

113. *Volkswagen of Am., Inc. v. Dan Hixson Chevrolet Co. (In re Dan Hixson Chevrolet Co.)*, 12 Bankr. 917, 921 (Bankr. N.D. Tex. 1981).

114. *Emerson*, *supra* note 73, at 108 (citing *In re Dan Hixson Chevrolet Co.*, 12 Bankr. at 921).

115. 787 F.2d 318 (8th Cir.), *cert. denied*, 107 S. Ct. 307 (1986).

Rath was an Iowa corporation engaged in slaughtering hogs and processing hog meat products. In 1977 the Equal Employment Opportunity Commission (EEOC) brought an action against Rath based on a charge filed in 1975 by a woman who alleged that the company had denied her employment because of her sex. The district court held a trial on liability and referred the case to a special master, who recommended, in addition to other relief, a class back pay award of over \$1 million. Rath subsequently filed a petition in bankruptcy and the district court held that this petition did not automatically stay the Title VII proceedings.¹¹⁶ On appeal to the Eighth Circuit, Rath argued that the action brought by the EEOC was stayed because it was directed at making aggrieved persons financially whole—that it was enforcement of a money judgment, rather than a governmental attempt to protect the public safety and health.¹¹⁷

The court of appeals distinguished *Rath* from its prior decision, *Missouri v. United States Bankruptcy Court*,¹¹⁸ in which it had applied the pecuniary interest test, and affirmed the district court's ruling granting the EEOC an exemption to the automatic stay.¹¹⁹ The court examined the purposes underlying the laws that the governmental units in these two cases sought to enforce and determined that the purpose of the governmental action in *Rath* was to "vindicate the public interest in preventing employment discrimination."¹²⁰ The court recalled that in *Missouri v. United States Bankruptcy Court*, on the other hand, the law served to protect a pecuniary interest in the debtor's property and therefore was stayed. Had the court applied the same test to each situation, however, the results might have differed. One could suggest that the court chose to rely on the passage in the legislative history that supported the desired result in each case. In *Rath* the court of appeals was concerned with the outrage that a stay of an EEOC action would cause—a likely result if the pecuniary interest test had been applied.

116. *Id.* at 322-23.

117. *See* 11 U.S.C. § 362(b)(5) (1982).

118. 647 F.2d 768 (8th Cir. 1981).

119. *Rath*, 787 F.2d at 323-25.

120. *Id.* at 325.

An example of the government's broad exemption under the public policy approach is the decision by the United States Court of Appeals for the First Circuit in *Cournoyer v. Town of Lincoln*.¹²¹ Sometime between 1947 and 1952, Arthur Cournoyer and his father began operating a truck salvage business on about thirty-three acres of land in Lincoln, Rhode Island. In 1948, the town passed a zoning ordinance restricting the use of the Cournoyers' land to residential and farming. In 1962, a more restrictive zoning ordinance limited the use of the land to single family residences with lots of not less than 20,000 square feet. For the next twenty years the zoning board engaged the Cournoyers in a sporadic battle to enforce compliance with the ordinance. The Cournoyers, for the most part, continued their truck salvage operation.¹²²

In 1982, Arthur Cournoyer filed a chapter 11 bankruptcy petition and continued to operate the business as a debtor in possession. The town attempted to clear the Cournoyers' land pursuant to a Rhode Island Superior Court order. The Cournoyers then sought an injunction from the bankruptcy court to prevent the town from enforcing the zoning law against them.¹²³ The bankruptcy court held that the town was exempt from the automatic stay, and the district court affirmed this ruling.¹²⁴

On appeal, the First Circuit applied the public policy test and held that sections 362(b)(4) and (5) exempted the town's enforcement of its zoning ordinance from the automatic stay provision. The court considered the legislative history and pertinent case law and determined that the town's enforcement of the zoning ordinance was exempt from the automatic stay as a police or regulatory law.¹²⁵ The ironic result was that after twenty years of conducting business in violation of the zoning ordinance, the Cournoyers' bankruptcy, a safe harbor for debtors, made them

121. 790 F.2d 971 (1st Cir. 1986).

122. *Id.* at 972-73.

123. *Id.* at 972.

124. *Id.*

125. *Id.* at 977.

more susceptible to the town's discretionary enforcement than they had been prior to filing.¹²⁶

CONCLUSION

The Bankruptcy Rules of Procedure were the first genuine attempt to establish an automatic stay that could be applied in a cohesive and consistent manner. The rules generally were successful. Although they may have permitted occasional misapplication of an automatic stay, they contained generous relief provisions. When Congress enacted all-encompassing bankruptcy legislation in 1978, it should have codified the common law automatic stay as modified by the Bankruptcy Rules of Procedure. Instead, the Bankruptcy Act of 1978 included a specific exemption for governmental police or regulatory actions. The exemption is unnecessary, unfounded, and unrestrained; ultimately, it has eviscerated the rule.

Without a clear policy statement from the legislature, the hands of the courts are tied. The legislature must act to amend the statute either by removing the exemption and remanding the issue to the courts or by providing an absolute definition for "police or regulatory power." Governmental units and the courts must have a clear, workable, and effective standard for any exemption to the automatic stay.

Robert E. Korroch

126. Two additional approaches are pertinent to the analysis discussed in this Note. Under the agency expertise approach discussed by Emerson, the courts "in determining whether an agency action would inordinately threaten the assets of the estate would generally show great defe[rence] to the governmental unit and afford extended 363(b)(4) protection [to the governmental claim]." Emerson, *supra* note 73, at 107. The second mode of analysis would be a subject matter test. The case law indicates trends depending on subject matter, such as a zoning, pollution, licensing, fraud, labor disputes, and securities regulation. This second approach could be considered a corollary of the first, since most agencies specialize in particular areas of enforcement. See generally *id.* at 103-06.