



Dennis LeVine & Associates
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**A SECURED CREDITOR MAY NOT
 HAVE TO RETURN A VEHICLE
 LEGALLY REPOSSESSED
 PRE-PETITION**

On many occasions, after a car is repossessed the customer will file bankruptcy (generally Chapter 13) and demand that the creditor return the car. Creditors, of course, are loathe to return a car to the debtor after repossession. Does the creditor's continued possession of the car, without more, constitute a violation of the automatic stay?

The automatic stay only applies to property of the bankruptcy estate. Thus, a preliminary issue is whether or not after repossession, the car continues to be property of the estate.

In *In re Kalter*, 257 B.R. 93 (M.D. Fla. 2000), the debtor's car was lawfully repossessed pre-petition. The day after repossession, the debtors filed Chapter 13. The debtors notified the secured creditor, Bel-Tel Federal Credit Union ("Bel-Tel"), which decided not to return the car to the debtors. The debtors filed a Motion for Turnover and a Motion for Sanctions against Bel-Tel.

The Bankruptcy Court found that the car was property of the bankruptcy estate, and directed Bel-Tel to return the car to the debtors. The Bankruptcy Court also directed the debtors to make adequate protection payments to Bel-Tel. Subsequently, the Bankruptcy Court granted the debtors' Motion for Sanctions, and sanctioned Bel-Tel \$6,435. Bel-Tel appealed both Orders.

The issue on appeal was whether a car subject to a security interest and lawfully repossessed pre-petition was property of the bankruptcy estate at the time of the filing of the debtors' bankruptcy petition. Judge Young, the District Court Judge, first reviewed the 11th Circuit case

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**FILING A MOTION FOR
 RECONSIDERATION OF AN ORDER
 DISMISSING A CHAPTER 13 CASE
 DOES NOT STAY A SECURED
 CREDITOR FROM EXERCISING ITS
 DEFAULT REMEDIES**

The automatic stay bars collection action by a secured creditor against collateral until the earlier of the time a case is closed, dismissed, or a discharge is granted or denied. [11 U.S.C. Section 362(c)(2)]. Upon dismissal of a Chapter 13 case, however the automatic stay imposed by Section 362 is immediately terminated on the effective date of the order of dismissal, unless otherwise ordered by the Court.

The filing of a motion for reconsideration of a dismissal order by the debtor does not stay the effect of the order of dismissal. Even if granted (and the case reinstated), a motion for reconsideration does not have retroactive effect. As the Court noted in *In re Nagel*, 245 B.R. 657 (D. Az. 1999): "a retroactive reinstatement of the 'automatic stay' is squarely at odds with the plain reading of subsection 362(c)(2) and Congress' intent that the parties be returned to the *status quo ante* . . . and would [divest] otherwise vested rights from parties previously properly restored to the *status quo ante* pursuant to subsection 362(c)(2)." 245 B.R. at 661.

The immediate termination of the automatic stay upon dismissal is consistent with Section 349(b)(3), which provides that dismissal of a case "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case . . ." [11 U.S.C. Section 349(b)(3)]. The legislative intent of Section 349 was to "undo the bankruptcy case as far as practicable, and restore all property rights to the position in which they were

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of In re Lewis, 137 F.3d 1280 (11th Cir. 1998). The 11th Circuit found in Lewis that under Alabama law [where Lewis filed Chapter 13], the bankruptcy estate retained only the debtor's right to redeem the repossessed car; otherwise, the ownership and possessory interest in the car had vested in the creditor pre-petition, at the time of repossession. Judge Young analyzed Florida Statute 319.28(1)(b), which states that upon repossession the party from whom the car was repossessed is the "former owner." Judge Young stated that "the Florida courts construed Florida Statute Section 319.28 as causing ownership to pass, regardless of the fact that formal title had not yet transferred pursuant to Florida Statutes 319.22, .33, or .28." Judge Young ruled that title had passed to the secured creditor at the time of repossession under Florida Statute 319.28. Accordingly, the District Court reversed the rulings of the Bankruptcy Court and entered judgment in favor of Bel-Tel.

Judge Friedman in the Southern District followed Kalter in In re Ragan 264 B.R. 776 (Bankr. S.D. Fla. 2001). In Ragan, the debtor filed an Emergency Motion for Turnover. Judge Friedman stated that "upon careful consideration of the Eleventh Circuit's ruling in Lewis, in conjunction with the ruling in Kalter, this Court concludes that, under Florida law, pre-petition repossession of a motor vehicle by a secured creditor divests the debtor of all rights and interest in such vehicle, with the exception of a right of redemption." As a result, Judge Friedman denied the debtor's Emergency Motion for Turnover.

Judge Paskay in the Middle District has recently followed Kalter. In In re Martinez (Case No. 01-16101-9P3) (November 5, 2001), the Court reviewed Judge Young's decision in Kalter and stated "There is no doubt that this Statute radically changes the previously held generally accepted view that, notwithstanding a repossession of a vehicle, the Debtor retains ownership until the vehicle is sold and the creditor who repossessed the automobile has an absolute duty under Section 542 of the Code to turn over the automobile to the Debtor provided, however, that the Debtor is able and willing to furnish adequate protection of the collateral to the repossessing creditor." Judge Paskay concluded that the Court could not "ignore the reach and the scope of [Florida Statute 319.22, 23 and 28] as construed

by the District Court in Kalter... ." As a result, Judge Paskay denied the debtor's Motion for Turnover and Motion for Sanctions.

Several bankruptcy Judges have rejected the holding in Kalter. For example, in In re Baker, 264 B.R. 759 (Bankr. M.D. Fla. 2001), Judge Funk noted the case of In re Chiodo, 250 B.R. 407 (Bankr. M.D. Fla. 2000), in which an Orlando Bankruptcy Court denied a creditor's request for relief from the stay to sell a vehicle repossessed from the debtor pre-petition. In Chiodo, the Bankruptcy Court found that the debtor maintained an interest in the repossessed vehicle until a new Certificate of Title was issued. Judge Funk also cited In re Ratliff, 260 B.R. 526, 530 (Bankr. M.D. Fla. 2000), which adopted the reasoning of the Bankruptcy Court in Chiodo [Note—the Bankruptcy Court's decision in Chiodo also was reversed by Judge Young, relying on Kalter].

Judge Hyman in the Southern District also has rejected the analysis of Ragan and Kalter, and instead followed In re Chiodo and In re Baker. See, In re David Garcia (Case No. 01-28479)(April, 2002).

There is a related legal issue at work here – whether or not individual bankruptcy Judges within the Middle District of Florida are bound by Judge Young's decision in Kalter. In In re Baker, Judge Funk rejected the creditor's argument that he was bound by the District Court decision in Kalter. Judge Funk stated: "A Bankruptcy Court is not bound by *stare decisis* to follow the decision of a single district judge in a multi-judge district." See, e.g., In re Findley, Kumble, et al., 160 B.R. 882, 898 (Bankr. S.D. N.Y. 1993). **The District Court, however, has reversed Judge Funk and ruled that the bankruptcy Judges in the Middle District are bound by Kalter.** As a result, recent rulings from the bankruptcy Judges in Jacksonville have had to follow Kalter.

As the foregoing makes clear, the extent of the debtor's rights in a repossessed car on the date of filing is anything but clear. Parties will have to see how individual Florida bankruptcy Judges handle this issue, and wait to see whether the 11th Circuit ultimately resolves the issue.



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found at the commencement of the case." In re Weston, 110 B.R. 452, 446 (E.D.Cal. 19889), citing H.R. Rep. No. 95-595 (1977).

As further support of this position, Federal Rule 62(a) provides that "no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of 10 days after its entry." Bankruptcy Rule 7062, which adopts Federal Rule 62, does not alter the effect of Section 362(c)(2). Bankruptcy Rule 7062 provides that Rule 62 of the

Federal Rules of Civil Procedure applies only in *adversary proceedings*.

Thus, the dismissal of the Chapter 13 case restores a secured creditor to the position it had just prior to the commencement of the case. After the entry of an order of dismissal, a secured creditor can lawfully proceed with its contractual default remedies against the debtor and against its collateral, even where a Motion for reconsideration is pending.



RECENT CHANGES IN FLORIDA'S GARNISHMENT STATUTE

The Florida Legislature recently made changes in the garnishment statute. Section 77.055 of the Florida Statutes was amended to require that a written notice must be sent to the defendant within three days of the service of a Writ of Garnishment. In addition, when the garnishee files an answer, a copy of the garnishee's answer and a Notice advising the recipient that he or she must move to dissolve the Writ of Garnishment or assert an exemption, must be served on the defendant by the plaintiff within 20 days. The plaintiff's failure to comply with these notice requirements will result in the release of the garnishment.

Section 77.06(1) of the Florida Statute also was amended to provide that the service of the Writ of Garnishment makes the garnishee liable for all debts due to the defendant at the time of the service of the Writ, or at any time between the service and time of the garnishee's answer. In other words, the service of the Writ creates a lien on such property. This change in the statute overruled a prior 11th Circuit case which held that a lien arose only after the entry of a final judgment of garnishment. This change is significant. When the defendant files bankruptcy after the Writ of Garnishment is served on the garnishee, the Writ of Garnishment is now a lien on the defendant's property (i.e. a bank account). See *In re Giles*, 271 B.R. 903 (Bankr M.D. Fla. 2002)(J. Williamson)(the bank account garnishment did not have to be released). While no case has looked at the applicability of this provision to wage garnishments, it certainly is logical that a creditor would have a lien on the garnishable portion of wages due from the date of the service of the Writ of Garnishment on the employer to the date of the bankruptcy filing.



The Staff of Dennis LeVine & Associates

Dennis LeVine is Board Certified in both Business and Consumer Bankruptcy law by the American Board of Certification. Mr. LeVine was admitted to the Florida Bar in 1983, and practices in the federal courts of all three Florida districts. He has concentrated his practice in bankruptcy and collection law for 16 years.



BANKRUPTCY FILINGS SURPASS RECORD BREAKING MARK

The number of new bankruptcy cases filed during fiscal year 2001 rose to a historic high during the 12-month period ending Sept. 30. Bankruptcy cases for FY 2001 totaled 1,437,354, a 14 percent increase from the 1,262,102 cases filed in FY 2000, according to data released by the Administrative Office of the U.S. Courts. The total number of new bankruptcies filed in the third quarter of 2001 (July 1 to Sept. 30) was 359,518, a 16.5 percent increase over the same period a year ago. This is the second highest third quarter ever, surpassed only by the third quarter of 1998 when 361,205 new cases were filed. Through the first nine months of 2001, filings were up 19.5 percent from the same period in 1998.

In FY 2001, the largest number of filings continued to be under Chapter 7. Total Chapter 7 filings were 1,014,137, 16.5 percent increase from 870,805 in 2000. Chapter 13 filings, the next largest category, increased by 8.2 percent from 380,880 for the same period in 2000 to 412,272. Chapter 11 filings actually fell 31.2 percent, from 551 to 370. [Chapter 12 expired on Oct. 1, 2001] "Today's filing statistics confirm that we will set a new record for bankruptcies in 2001, said Samuel J. Gerdano, Executive Director of the American Bankruptcy Institute. "Hangover consumer debt from the free-spending '90s and a weakened economy today mean more families will face the need to file for protection well into next year," he added.

More information is available at
<http://www.abiworld.org/stats/newstatsfront.html>.





Things to Make You Think

- If you're too open-minded, your brains will fall out.
- A balanced diet is a cookie in each hand.
- Junk is something you've kept for years and throw away three weeks before you need it.
- Experience is a wonderful thing. It enables you to recognize a mistake when you make it again.



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