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## Bankruptcy Law

# Section 362(h): Use It or Lose It?

Despite absence of express statute of limitations, attorneys should assert stay violation claims as soon as possible

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**A** review of Bankruptcy Code §362(h), providing for the right to seek damages arising from a willful violation of the automatic stay, reveals no express time limitation within which a claim under that section must be asserted. Nor may such a limitation be found elsewhere in the code. Nevertheless, arguments regarding the timeliness of a §362(h) claim can be raised.

11 U.S.C. §362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Although claims for violation of the automatic stay can also be asserted under §362(a), or through a motion for civil contempt, this article primarily addresses claims asserted under §362(h).

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Courts have concluded, based on the absence of any language relating to time, that §362(h) does not have a statute of limitations. In *Price v. Rochford*, 947 F.2d 829 (7th Cir. 1991), the court stated that "Congress did not enact a statute of limitations [under section 362(h)]." And in *Bookout Holsteins, Inc. v. Superblend, Inc. (In re Bookout Holsteins, Inc.)*, 100 B.R. 427 (Bankr. N.D. Ind. 1989), the court noted that "Although Congress specifically limited the time within which certain rights given by the Code must be exercised, it did not impose a statute of limitations with regard to actions ... for violation of the stay of §362."

In reaching the same conclusion, the court in *Nelson v. Post Falls Mazda (In re Nelson)*, 159 B.R. 924 (Bankr. D. Idaho 1993), noted the lack of applicability of §108. "Section 108," the court observed, "is involved only where there is 'applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement' limiting the time in which an action may be brought." Meanwhile, it noted, "[s]ection 362(h) creates a federal bankruptcy cause of action, and no nonbankruptcy law is involved. ... Moreover, section 108 acts only to toll causes of action during the pendency of bankruptcy, not to provide a substantive statute of limitations."

### State Law Statute of Limitations

Notwithstanding the absence of an

express statute of limitations, a defendant sued under §362(h) may nevertheless raise a number of arguments relating to the timeliness of a claim under that section.

For instance, a defendant can argue that a state statute of limitations governs. In *DelCostello v. Teamsters*, 462 U.S. 151 (1983), the Supreme Court asserted that, in the absence of an expressly applicable federal statute of limitations, "[it] do[es] not ordinarily assume that Congress intended that there be no limit on such actions at all." "[R]ather," the Court asserted, "[its] task is to 'borrow' the most suitable statute or other rule of timeliness from some other source. ... [The Supreme Court has] generally concluded that Congress intended that the courts apply the most closely analogous statute of limitations under state law."

The *Nelson* court suggested in dicta that, insofar as a state law time limitation governs a §362(h) claim, the statute of limitations for trespass or conversion of goods may be appropriate.

Under New Jersey law, a plaintiff has six years to assert these causes of action. See N.J.S.A. 2A:14-1. A defendant can also argue that N.J.S.A. 2A:14-2 applies. That statute provides that "[e]very action at law for an injury to the person caused by the wrongful act, neglect or default of any person within this state shall be commenced within 2 years next after the cause of any such action shall have accrued."

However, in no published decision

has a court applied a state statute of limitations to a §362(h) claim. Moreover, the Supreme Court observed in *DelCostello* that “[i]n some circumstances ... state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law. ... In those instances, it may be inappropriate to conclude that Congress would choose to adopt state rules at odds with the purpose or operation of federal substantive law.” Quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355 (1977) the *DelCostello* Court noted:

[T]he Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. ‘Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.’

Hence, in some cases, the Supreme Court has declined to apply a state statute.

At least one Bankruptcy Court, citing this law, has indicated that application of any statute of limitations, imposed under state law or otherwise, for violation of the automatic stay would be inappropriate. The *Bookout Holsteins* court declined to apply the statute of limitations to an action for violation of an automatic stay on the basis that “[p]olicies underlying the creation of federal equitable claims are not well served by applying rigid limitations.”

#### Equitable Doctrines

A defendant also can invoke equitable doctrines. For instance, several courts have recognized laches as a viable defense to the assertion of a §362(h) claim.

For example, in *Bostanian v. American Hilton Corp. (In re Bostanian)*, No. 01-56446, 2002 WL

1418433, at \*1 (9th Cir. July 1, 2002), the court affirmed the Bankruptcy Appellate Panel’s application of laches to a §362(h) claim on the basis that “there [was] no reason the claims for willful violation of the stay could not have been brought earlier.” And in *Wolfkowitz v. Shearson Lehman Bros., Inc. (In re Weisberg)*, 193 B.R. 916 (B.A.P. 9th Cir. 1996), the court held that laches precluded a finding of liability for violation of an automatic stay because the debtor’s own inaction had caused the loss to the estate.

Likewise, courts have recognized laches as a defense to a stay violation claim asserted under §362(a) or through a motion for contempt.

In *Thornton v. First State Bank of Joplin*, 4 F.3d 650 (8th Cir. 1993), the court affirmed the dismissal of a stay violation claim where the “[appellant] waited approximately four years after finding out about [appellee’s] alleged misconduct and two years after his bankruptcy proceedings had concluded before filing his complaint, and [where] he ... offered no explanation for his inaction.” In *Matthews v. Rosene*, 739 F.2d 249 (7th Cir. 1984), the court noted that “[s]uspension of Section 362 automatic stay provisions may be [warranted] when equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems” and affirmed the holding that laches defeated the debtor’s claim that creditor and attorney should be held in contempt for violating the automatic stay.

Moreover, some courts have observed, albeit in dicta, that laches is particularly appropriate in a case in which a party seeks §362(h) relief after termination of the underlying bankruptcy case.

For example, in *Nelson*, the court wrote that “[L]aches might be an appropriate defense, particularly where the [section 362(h)] action is brought after the dismissal or expiration of the term of the case.” And in *Thornton v. First State Bank of Joplin*, No. 90-5031-CV-SW-1, 1991 WL 530970, at \*3 (W.D. Mo. June 28, 1991), the court said that “Although the Bankruptcy Code does not specify when a claim under 11 U.S.C. §362 needs to be filed, it would

seem practical, as well as appropriate, that such a claim be brought during the pendency of the bankruptcy proceedings.”

On the other hand, in *Price*, the court held that, although “bankruptcy judges would be best suited to hear claims that the stay has been violated when the parties are already before them, ... the language of the statute does not support the limitation that ‘the right of action should come to an end when the stay does.’

A defendant can also raise equitable estoppel as a defense. In *Davis v. Illinois State Police Federal Credit Union (In re Davis)*, 244 B.R. 776 (Bankr. N.D. Ill. 2000), the court held that the debtor was equitably estopped from seeking relief under §362(h) against a credit union for post-petition payroll deductions where, on several occasions, the debtor had represented to the court and the credit union that he was voluntarily agreeing to repay the loan and, based on these representations, the credit union continued automatic payroll deductions.

Also, in *Nigro v. Oxford Dev. Co. (In re M.J. Shoearama, Inc.)*, 137 B.R. 182 (Bankr. W.D. Pa. 1992), the court rejected the argument that the successor trustee was equitably estopped from asserting a §362(h) claim on the grounds that the defendant failed to demonstrate that the former trustee had intentionally misled the defendant and defendant’s reliance upon any misrepresentation was not reasonable or justified.

#### Section 549(d)

Finally, a defendant can conceivably raise §549, if factually applicable, as a defense. Section 549(a) permits a trustee to recover unauthorized post-petition transfers. 11 U.S.C. §549(a) provides, in relevant part, that “the trustee may avoid a transfer of property of the estate (1) that occurs after the commencement of the case; and (2) (A) that is [unauthorized].”

Section 549(d) limits the time in which such an action may be commenced. “An action or proceeding under this section may not be commenced after the earlier of (1) two years after the date of the transfer sought to be

avoided; or (2) the time the case is closed or dismissed." 11 U.S.C. §549(d).

In *Michaels v. Nat'l Bank of Sussex County (In re E-Tron Corp.)*, 141 B.R. 49 (Bankr. D.N.J. 1992), a New Jersey Bankruptcy Court held that transfers in violation of the automatic stay are subject to this statute of limitations. Hence, insofar as its stay violation implicates an unauthorized post-petition transfer of property, a defendant sued under §362(h) can argue, on the basis of this holding, that the claim is barred if untimely under §549.

This argument is problematic, however. First, although certain authority suggests that the Third U.S. Circuit

Court of Appeals would not necessarily disavow the *E-Tron* Court's determination, that determination is a minority view. In *In re Siciliano*, 13 F.3d 748 (3d Cir. 1994), citing §549, the court notes in dicta that "the Code expressly permits certain post-petition transactions that occur in violation of the automatic stay ... [s]ome transactions, for example, will be valid unless voided by the trustee." And in *In re Ward*, 837 F.2d 124 (3d Cir. 1988), the court recognizes that §549(c) may protect a good faith purchaser in a foreclosure sale conducted in violation of the automatic stay.

However, in *Wills v. Heritage Bank (In re Wills)*, 226 B.R. 369 (Bankr. E.D. Va. 1998), the court noted that "[W]here

a creditor acts in direct violation of the stay, it may not seek refuge behind §549(d) when an injured party eventually calls upon it to account for its misconduct." More important, a plaintiff can argue that §549 covers only transfers, and not necessarily any damages arising from such transfers.

The absence of an express statute of limitations does not necessarily mean that parties seeking relief under §362(h) have an unlimited period within which to assert their claims. Indeed, the potential applicability, however remote, of a state statute of limitations, or the applicability of an equitable doctrine such as laches, should be sufficient to precipitate expeditious action. ■