

BUSINESS BANKRUPTCY ALERT

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A GLOBAL LAW FIRM FOR THE 21st CENTURY

SEPTEMBER 5, 2001

AUTOMATIC STAY OF BANKRUPTCY MAY BE ANNULLED UNDER CERTAIN CIRCUMSTANCES

One of the primary benefits for a debtor in bankruptcy is the automatic stay. As is evident from its name, the automatic stay commences upon the initial bankruptcy filing and protects the debtor from all collection efforts or attempts to take possession of the debtor's property.

In many cases involving secured creditors, the debtor will file for bankruptcy immediately preceding a foreclosure sale. In some instances, however, the foreclosure sale may actually be completed by the secured lender without knowledge or notice of the bankruptcy filing. In these instances, it benefits a secured lender to seek to have the automatic stay annulled – rather than merely lifted – in order to avoid the unnecessary cost of a subsequent reforeclosure.

A recent bankruptcy court decision outlines the factors to be considered in determining whether or not the automatic stay may be annulled or merely lifted upon a proper showing by the parties seeking to have the stay lifted. *In re Williams*, 257 B.R. 297 (Bankr. W.D. Mo. 2001). These factors include the following:

1. whether the creditor had actual or constructive knowledge of the bankruptcy filing
2. bad faith of the debtor

3. whether there is equity in the property
4. whether the property is necessary for an effective reorganization
5. if the grounds for relief from stay exists and if filed would have been granted prior to the violation
6. whether failure to grant the retroactive relief would cause unnecessary expense to the creditor
7. whether the creditor has detrimentally changed its position on the basis of the action taken
8. whether the creditor took some affirmative act postpetition to bring about the violation of the stay, and
9. whether the creditor promptly seeks a retroactive lifting of the stay and approval of the action that has been taken.

Based upon the decision in *In re Williams* and other decisions regarding this issue, where a foreclosure sale has occurred and is technically complete but for the bankruptcy filing, it is worthwhile to seek an annulment of the automatic stay to avoid the cost associated with subsequent foreclosures. This allows the creditor to avoid unnecessary costs and expenses. As a practical matter, in many instances the foreclosure sale purchaser will not be able to obtain title insurance absent an order annulling the automatic stay or dismissing the bankruptcy case where the sale is completed postpetition. As a consequence, title insurance issues are further reason to seek annulment of the automatic stay.

IF YOU HAVE ANY QUESTIONS OR COMMENTS ABOUT ANY OF THE FOREGOING, WISH TO BE REMOVED FROM THIS DISTRIBUTION LIST OR KNOW OF SOMEONE WHO WOULD LIKE TO BE ADDED, PLEASE CONTACT:

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