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Can I Get My Car Back?

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On Jan. 14, 2021, the U.S. Supreme Court resolved a circuit split over whether the mere retention of property after a bankruptcy violates the automatic stay in 11 U.S.C. § 362(a)(3), finding that it does not.[1] The filing of a bankruptcy petition automatically creates an estate containing all of the debtor's "legal and equitable interests in property," with some exceptions, and automatically stays all efforts to collect pre-petition debts outside of bankruptcy.[2] The automatic stay's prohibition of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"[3] is the central issue in dispute in *City of Chicago v. Fulton*.

Fulton involved four consolidated appeals out of the Seventh Circuit where the City of Chicago refused to turn over vehicles that it had impounded, pre-petition, for each debtor's failure to pay fines for motor vehicle infractions.[4] A split among several circuits emerged in such situations, with some circuits imposing an affirmative duty on the creditor to turn the repossessed property over to the debtor if the creditor was violating the stay, while other circuits held that the creditor's retention was not.

The Supreme Court found that the plain language of § 362(a)(3) requires the creditor to take affirmative steps to exercise control over property of the estate.[5] Writing for the unanimous 8-0 Court,[6] Justice Samuel Alito stated that "the most natural reading of the terms — 'stay,' 'act,' and 'exercise control' — is that § 362(a)(3) prohibits affirmative acts that would disturb the *status quo* of estate property as of the time the bankruptcy petition was filed."[7] In retaining the property that had been repossessed pre-petition, the creditor is maintaining the *status quo*, which is the mandate of § 362.

Fulton is not a death blow for debtors whose property has been repossessed pre-petition. The Supreme Court was explicit to note that it was not determining the "meaning of other subsections of § 362(a)," or "how the turnover obligation in § 542 operates."[8]

On remand, the Seventh Circuit followed the Supreme Court's instruction as to the narrowness of its holding and remanded two of the four cases on appeal to have the bankruptcy court judgments vacated where the debtors only raised a violation under § 362(a)(3). It also remanded the other two cases on appeal to have the bankruptcy court conduct further proceedings to address claims under §§ 362(a)(4) and (a)(6) and the applicability of § 542.[9]

Sections 362(a)(4) and (a)(6) operate as a stay against any act "to create, perfect or enforce any lien against property of the estate," and "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title," respectively. Neither issue was addressed on appeal when the Seventh Circuit originally found that the City of Chicago violated § 362(a)(3), therefore it did not to reach a decision on § 362(a)(4) or (a)(6).

What to Do if a Debtor's Property Is Repossessed Pre-Petition

As debtor's counsel, the first step to take would be to contact the lender to see whether the lender will voluntarily turn the vehicle over to the debtor. However, contact should generally be made with the lender's bankruptcy department, which would be more knowledgeable about the bankruptcy process and understand the consequences of failing to comply with applicable laws. Sometimes, finding contact information for the bankruptcy department can be difficult. However, there are resources, such as ABI and other voluntary associations, that provide databases or message boards where questions, such as for contact information, are posted. In the Southern District of Florida, the institutional lenders are generally represented by a handful of local attorneys. These attorneys can be resources for debtor's attorneys trying to contact these lenders to obtain turnover of the repossessed property.

Once you get someone on the phone, you should find out what it will take to get your client's vehicle returned and how to quickly accomplish that. Most lenders only want their money and repossession costs, so if a client can catch up on payments and reimburse the costs, you should be able to get the car returned.

1 *City of Chicago v. Fulton*, 141 S. Ct. 585, 208 L. Ed. 2d 384, 2021 U.S. LEXIS 496, 2021 WL 125106 (2021). For another perspective on this case, *see* George H. Singer, "Supreme Court Decides 'Mere Retention' of Property Does Not Violate Automatic Stay," XL *ABI Journal* 3, 12-13, 58, March 2021, *available at* abi.org/abi-journal.
2 *See* 11 U.S.C. §§ 362(a) and 541(a). *See also Fulton*, 141 S. Ct. at 589.
3 11 U.S.C. § 362(a)(3).
4 *Fulton* at 589.
5 *Id.* at 590-592.
6 Arguments in *Fulton* were held on Oct. 13, 2020, at which time Justice Amy Coney Barrett had not been appointed. Therefore, she did not take part in the consideration or decision of the case. Further, Justice Sonia Sotomayor issued a concurring opinion.
7 *Fulton* at 590.
8 *Id.* at 592 (Sotomayor, J., concurring).
9 *In re Fulton*, 2021 U.S. App. LEXIS 10322 (7th Cir. April 21, 2021).

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If the lender is unwilling to voluntarily turn the property over, then seeking remedies under other provisions of §§ 362, such as (a)(4) or (a)(6), and 542 would be the next step. The concern here is that in subsections (a)(4) and (a)(6), the terms "stay" and "act" remain "operative" words in both subsections and the definitions are not changed from those expressed by Justice Alito in *Fulton*,[10] and unless it is determined that the remaining operative terms in § 362(a)(4) or (a)(6) are not satisfied by the retention of property, the outcome will be the same.

Another issue, addressed specifically by Justice Sotomayor in her concurring opinion, is the delay in obtaining turnover where an adversary must be brought, stating that the statistics evidence that the average turnover adversary proceeding lasts for 100 days.[11]

Some keys (no pun intended) to getting judicial relief in your favor is whether there is equity in the vehicle, the condition of the vehicle, and whether there is insurance required by the loan on the car. If you are not in compliance with the loan or the car is upside down, you are not likely to prevail over the lender's arguments.

So, your client is not automatically going to get the vehicle returned from the lender's possession just because the client filed for bankruptcy. You must work with the lender to work out loan terms, have insurance, and have equity to protect to get your client's car back. abi

10 141 S. Ct. at 590 ("'[S]tay' is commonly used to describe an order that "suspend[s] judicial alteration of the *status quo*" ... "'act' is '[s]omething done or performed ...; a deed.'") (internal citations omitted).

11 *Fulton*, 141 S. Ct. at 594 (Sotomayor, J., concurring).