Legal Double Dipping?

Why Actions Against Guarantors

Should Not Be Stayed

Pursuant to 11 U.S.C. § 362(a)

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I. INTRODUCTION

One of the most formidable and fundamental debtor protections provided by the American bankruptcy laws today is the automatic stay provision in 11 U.S.C. § 362(a). The stay is a very potent provision because it gives the debtor a miraculous breathing spell[1] from its creditors.[2] It stops all collection efforts, all harassment, and all foreclosure actions.[3] It freezes time, albeit for a while. Under the protection of the stay, the weary debtor can attempt a repayment or reorganization plan, or simply be relieved of the financial pressures that drove it into bankruptcy in the first place.[4]

Even creditors enjoy protections afforded by the powerful stay. The stay ensures the equitable distribution of the debtor's assets to all creditors by preventing a race to the courthouse and recovery by the fastest creditor to the detriment of other creditors.[5] These economic protections are the policies underlying the enactment of the automatic stay.

Even though only the debtor seems the darling favored by this body of law, others currently try to slide under this umbrella of protection. The literal language of Section 362(a) halts or "stays" actions against the "debtor" only. No such relief is available to the non-bankrupt guarantor in a Chapter 11 bankruptcy proceeding.[6] Nevertheless, many hopeful guarantors of a debtor's obligations have also attempted to invoke the benefit of the bankruptcy stay under various theories. However, the stay under Section 362(a) is not a motion to be granted[7] liberally or to be taken lightly especially given that the Bankruptcy

Code does not expressly extend the stay to guarantors of the Chapter 11 debtor. This article explores the widely debated issue of whether Section 362(a)'s automatic stay provision should apply to guarantors of a Chapter 11 debtor. This discussion analyzes the Code, case law and examines why Section 362(a) should not extend to such guarantors. The author also highlights the commercially undesirable consequences of an alternative interpretation of the Bankruptcy Code and recommends certain measures to stem the wave of lawsuits generated on this issue.

This article reveals precisely when guarantors of the obligations of a Chapter 11 debtor may use bankruptcy law to enjoin litigation against them. Since Chapter 11 pertains solely to business reorganizations, in this discussion, the Chapter 11 debtor refers to a business entity. Specifically, first, this article introduces and explains the automatic stay provision of the Bankruptcy Code in Section 362(a). Second, it examines whether chapter 11 guarantors should be able to invoke the automatic stay under Section 362(a). Third, it reveals and discusses the guarantor's alternative route to obtaining the stay through Section 105(a) of the Code. Fourth, this article examines the practical impact that enjoining collection actions against guarantors has on commercial lenders. Finally, it recommends alternative tests that respect the intent and purpose of the Bankruptcy Code.

II. THE AUTOMATIC STAY OF SECTION 362(a)

The filing of a bankruptcy petition triggers Section 362(a) of the Bankruptcy Code[8], and prevents the commencement or continuation of any proceeding against the debtor that was or could have been commenced prior to the filing. Basically, the petition halts recovery on pre-petition claims.[9] For debtors, the automatic stay constitutes an extraordinary "fortress" of protection.[10] Specifically, the automatic stay enjoins a lender from seeking to collect from the debtor on the lender's indebtedness.[11] The stay allows the Chapter 11 debtor to continue its business and reorganize without pressures to repay its debts immediately.

Relying on the literal interpretation of Section 362, some courts have held that guarantors, as non-debtors, cannot avail themselves of the protection of the automatic stay.[12] Those courts that indeed do extend the protection to non-debtors often justify their decisions based on the Bankruptcy Code's policy considerations of permitting the debtor to reorganize successfully, and of protecting all creditors[13].

The plain language of Section 362 supports the rule that the automatic stay protects debtors.[14] In a Chapter 11 bankruptcy proceeding, The Bankruptcy Code limits the stay specifically to the debtor.[15] As a result, actions against a debtor's guarantor, surety, agent, or partner are not statutorily enjoined by the debtor's filing of a petition for relief under Chapter 11 of the Code.[16] This view is further supported by language that is conspicuously absent from Section 362.

A fundamental rule of statutory construction dictates that when a specific provision is included in one part of a legislative enactment and excluded in another part, that "reflects Congressional intent that the exclusion was not inadvertent."[17] Section 1301 of the Bankruptcy Code,[18] specifically provides for the automatic stay of actions against a limited category of individual cosigners of consumer debts in Chapter 13 cases.[19] Thus, Congress indeed knew how to extend the automatic stay to non-debtors when it wished to do so. Congress did so only with regard to a narrow situation in such Chapter 13 proceedings. Section 362(a) fails to provide this same protection to chapter 11 guarantors.[20] The principles and policies of American bankruptcy law "fix a logical stopping place" to the protection co-debtors may enjoy from collection proceedings.[21]

Section 362(a)(3) stays any action, whether it is against the debtor or a third-party, to obtain possession or to exercise control over "property of the estate," which can include a broad array of possessions.[22] Accordingly, if the property in dispute is the money that would serve as the payment on the guarantee, and that money is considered property of debtor's estate because debtor has an equitable or legal interest in it, any action against that property is stayed. A landmark case that establishes this analysis is A.H.Robins Co. v. Piccinin.[23]

In that case, where product liability insurance policies purchased by the debtor were considered to be property of debtor's estate, the Fourth Circuit Court of Appeals held that actions against the insurer to recover on those insurance policies were to be stayed under Section 362(a)(3).[24] Therefore, under Section 362(a)(3), whenever litigation has an effect on "property" of the bankruptcy estate --as it is broadly defined in Section 541[25]-- such litigation may be subject to the automatic stay.[26]

The rationale underpinning the rule protecting guarantors from collection on such debts is to uphold the Code policy of preventing a destructive race-for-assets among creditors.[27] However, allowing a creditor to collect from a third party guarantor does not frustrate this Code policy if the creditor is not acquiring an asset of the estate but the guarantor's own separate asset!

In addition, since Section 362(a) operates as a stay on actions that were or that could have been filed against the debtor prior to its bankruptcy, a guarantor may arguably enjoin actions against it to collect debts that could or have been filed as claims against the debtor itself.[28] Claims that could not have been filed against the debtor proper may not be enjoined, and may be pursued through ordinary collection proceedings.[29]

Moreover, such injunctions should be temporary rather than permanent. The Ninth Circuit Court of Appeals has held that a bankruptcy court lacks jurisdiction and power to permanently enjoin a creditor from enforcing a state court judgment against the debtor's guarantor.[30] Those courts that do determine that it is proper to grant an injunction for actions against the guarantor must make the injunction a temporary one. In addition, they must note that the temporary injunction does not equal a discharge of the guarantor's debt in bankruptcy. Section 524(e) of the Code states that the discharge of debtor's debts does not affect the liability of any other entity on such debt.[31] The Ninth Circuit Court of Appeals has held that the bankruptcy court has no power to discharge liabilities of a non-debtor even if the creditors consent as part of the plan of reorganization.[32] It reasoned that the power to discharge a debtor stems from the operation of the bankruptcy laws and not from the consent of the creditors.[33]

Yet another fundamental rule of statutory construction further supports the general proposition that Section 362(a) does not extend the protection of the automatic stay to guarantors. This fundamental rule dictates that Code Sections must be interpreted so as to avoid conflict with other Code Sections.[34] Hence, when Sections 502(e)[35] and 509[36] already address the rights of guarantors, these parties should not attempt to utilize Section 362. Therefore, interpreting Section 362(a) as protective of guarantors violates this fundamental rule of statutory construction when Sections 502(e) and 509 already expressly protect guarantors. Specifically, guarantors of debtors proceeding in bankruptcy under Chapter 11 are limited to claims for subrogation to the rights of the creditor under Section 509, or reimbursement to the extent allowed under Section 502(e).

Section 509 pertains to co-debtors generally.[37] The legislative history of this Section reveals that this provision is rooted in the notion that the only rights available to a surety or guarantor consist of reimbursement and subrogation.[38] Section 509(a) subrogates the guarantor to the rights of the creditor. In other words, it allows the guarantor to "step into the shoes" of the creditor only to the extent such guarantor pays such creditor.[39] The guarantor then asserts the creditor's claim against the estate. This usually occurs where the guarantor, out of its own pocket, has already paid the creditor. This scheme protects the creditor "to the extent that a surety or co-debtor is not permitted to compete with the creditor he has assured until the assured party's claim has been paid in full."[40] A reading of Section 362(a) enjoining a creditor from proceeding against its guarantor conflicts with the express provisions of Section 509 of the Code.

In addition, Section 502(e) does not allow the claim for reimbursement or contribution of a co-debtor, surety or guarantor of an obligation of the debtor, unless the claim of the creditor on such obligation has been paid in full. The Section also prevents competition between a creditor and his guarantor for the limited properties of the estate.[41] The effect of Sections 502(e)(1)(B) and 502(e)(2) is that a surety or guarantor is generally permitted a claim for reimbursement to the extent that the surety or guarantor has paid the creditor. Under 502(e)(1)(C), such guarantor's claim is not allowed to the extent it requests subrogation under Section 509. Accordingly, the surety or guarantor chooses his or her own remedy. To the extent that a claim for reimbursement would be advantageous --as in the case of a secured claim-- a guarantor may opt for reimbursement under Section 502(e).[42] On the other hand, to the extent that subrogation is more advantageous, the guarantor may elect subrogation under Section 509.[43] Therefore, in accordance with statutory construction, the interests of guarantors are solidly guarded under either provision.

Consequently, there are two ways that a guarantor can get paid if it has already paid the party to whom it gave the guarantee, the creditor. The guarantor can either be reimbursed or have a claim for subrogation. Either way, the lender will be paid in full and the guarantor will only receive partial payment of his claim in bankruptcy, cents on the dollar.

It is clear, therefore, that the Code has expressly dealt with guarantors, or sureties, in Sections 502(e) and 509, by limiting their recoveries in bankruptcy to a request for reimbursement or subrogation, because it knew that creditors will always attempt to collect from the guarantors. That is why Congress did not foresee a need to stay collection actions against guarantors. Apparently, Congress realized that in the commercial world, this is precisely what guarantees are for: a security blanket for lenders in case the borrower defaults. The guarantor's express rights under the Code, coupled with the traditional purpose of guarantees in the commercial sphere, are in harmony with the fundamental rule of statutory interpretation to avoid conflict between Code Sections. These factors combined dictate but one outcome: that the automatic stay in Section 362(a) is not designed nor should it ever be used to protect guarantors in a chapter 11 proceeding.

III. THE POWER OF THE BANKRUPTCY COURT: SECTION 105(a)

Whenever the Bankruptcy Code fails to expressly provide[44] a specific remedy, parties to a bankruptcy proceeding attempt to utilize Section 105(a)[45] to obtain the desired relief. This provision of the Bankruptcy Code gives the bankruptcy court the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this tile."[46] Congress has expressly granted very broad powers in this Section to bankruptcy judges.[47] Therefore, one attractive alternative for guarantors who seek the protection of the stay is to assert that although Section 362(a) does not specifically protect them, bankruptcy courts still have the power to enjoin actions against guarantors or other co-debtors of the debtor under Section 105(a)[48]. However, this type of argument poses two particular problems. First, it poses statutory problems. Second, it overlooks the threshold issue of the scope of authority of the bankruptcy court, or the issue of jurisdiction. Section 105(a) has not been considered as granting jurisdiction to issue injunctions; rather it has been applied to define the scope of the bankruptcy court's authority in the area of the issuance of injunctions. The following discussion of case law illuminates the fallacies in such an argument.

A. The Statutory Construction Problems Involved in Utilizing Section 105(a)

The statutory problems posed by utilizing Section 105(a) to give guarantors what the Code could very well have given them --but does not-- are twofold. First, this again creates conflict between three Code provisions: Section 105(a) against Sections 502(e) and 509. While Section 105(a) empowers the court to do what is "necessary", what is necessary cannot contradict other express provisions in the Bankruptcy Code.

Second, Section 105(a) must not be used to circumvent the Code. If the claim against the guarantor is really a claim against the debtor and therefore an attempt at an "end run" around the automatic stay, the stay would not be granted.[49] For example, in In re Third Eighty-Ninth Associates, the court found that a suit on guarantees against certain guarantors of the Chapter 11 debtor was not a "back" door attempt to acquire assets of debtor because it was an action on independent obligations of the guarantors.[50] That court did not stay the suit because two of the guarantors were "not even general partners of the debtor."[51] Since no threat to the debtor appeared to exist, the stay would have been utilized for the impermissible purpose of circumventing the Code.

The Seventh Circuit Court of Appeals has held that under Section 105(a) a court has the authority to enjoin actions which threaten the integrity of a debtor's estate, including the power to issue an injunction enjoining third parties from pursuing actions which are the exclusive property of a debtor's estate.[52] It appears, therefore, that guarantors could utilize Section 105(a)'s broad scope to invoke the stay. However, the Ninth Circuit Court of Appeals has correctly cautioned that Section 105(a) does not empower bankruptcy courts to issue orders that defeat rather than carry out other explicit provisions of the Bankruptcy Code.[53]

B. The Bankruptcy Court's Jurisdiction and Scope of Authority under Section 105 (a):

Unfortunately, case law in this area is unclear. The Circuit Courts of Appeals have been inconsistent in their interpretation of this issue.[54] Some courts have merely held that whenever the debtor's opportunity to reorganize is jeopardized,[55] the issuance of an injunction against the guarantor under Section 105(a) is proper. Others have been more analytical and detailed and have first considered the threshold issue of jurisdiction, which is the better view in light of both the legislative history and a literal reading of the Code.

In effect, whenever the guarantor, who is not in bankruptcy, requests the bankruptcy court to issue an injunction against a proceeding to recover from the guarantor, a jurisdictional issue is raised. When such a motion is brought, the bankruptcy court must address the issue of whether it has jurisdiction over a dispute between non-debtors, namely the creditor and the guarantor.

Hence, the issue could -- and should -- be framed as whether a bankruptcy court has the jurisdiction and the power under Section 105(a) to enjoin parties from proceeding in state court against third parties. This first issue is a jurisdictional one.

The seminal case in this area, In re Otero Mills, Inc. found jurisdiction under Section 1471 of Title 28[56] and under Section 105(a) of the Code.[57] Section 1471 allowed the court to decide "all civil proceedings arising under title 11 or arising in or related to cases under title 11."[58] In turn, Section 105(a)'s language empowered the court to issue all orders necessary to carry out the provisions of Title 11. Furthermore, the legislative history of Section 105 reveals that it is designed to remove the limitation on the power of a bankruptcy judge to enjoin a court as inconsistent with the increased powers and jurisdiction of the new bankruptcy court.[59] Consequently, the combined authorities from the language of both Sections bestowed upon the bankruptcy court the jurisdiction necessary to enjoin state court proceedings against non-bankrupts when that state court proceeding relates to a case arising under Title 11.

Following a finding that the proceeding is "related to" a case arising under Title 11, the court may have jurisdiction. According to Otero Mills, the next inquiry becomes what circumstances constitute a sufficient relationship to the bankruptcy case to give rise to jurisdiction[60]. A sufficient relationship seems to exist whenever a state court proceeding will affect the debtor's estate and adversely influence the debtor.[61] When these conditions exist, only the jurisdictional requirement is met under Sections 1471 and 105(a). In other words, at that point the bankruptcy court merely has jurisdiction to enjoin a state court action against third parties.[62] Having jurisdiction to enjoin does not mean issuing the injunction would be proper. And this point is precisely what is missing in the calculus of various cases dealing with this layered issue.

C. The Propriety of the Issuance of An Injunction Based on Facts of the Case:

Subsequently, the second inquiry becomes whether it is indeed proper for the court to issue the injunction that it indeed has the power to issue. In other words, the question is whether it is proper to enjoin that particular creditor's action against that particular third party. In contrast to the initial jurisdictional inquiry, this inquiry –as to the appropriateness of the grant-- turns solely on the facts of the case before the court.[63]

In re Otero Mills, Inc. establishes a standard for determining the propriety of granting an injunction against guarantors based on the facts of the case under the equitable powers of Section 105.[64] This standard is a balancing of four interests: (1) irreparable harm to the bankruptcy estate; (2) strong likelihood of success of reorganization; (3) No harm or minimal harm to creditors; and (4) the public interest.[65]

First, irreparable harm to the bankruptcy estate must be shown to ensue if enforcement of the state court judgment were not enjoined. A debtor who plans to reorganize inevitably tries to maximize the assets of the bankruptcy estate in order to run a successful business which in turn will maximize profits and dividends to its creditors. When allowance of the state court judgment results in losing an asset of the estate, the contribution to the estate diminishes and the value of the estate decreases. Since creditors will ultimately receive payment from proceeds of the estate, irreparable harm to the estate will decrease their incentive to cooperate with the debtor so that he can sort out his financial problems.[66] Other creditors will not cooperate at the plan confirmation stage if they believe another creditor is getting "first crack" at assets "which were earmarked to pay all creditors."[67] When these challenges to the integrity of the debtor's estate occur, the factor of irreparable harm to the estate is satisfied. The courts also deem this factor satisfied if the creditor either fails to object to such evidence put on by the guarantor or fails to disprove it.[68] In effect, the bankruptcy courts that have "actually issued" injunctions enjoining proceedings against non-debtors have generally found that their jurisdiction to do so stems from the need to protect the bankruptcy estate or to protect the debtor's ability to successfully reorganize.[69]

Moreover, irreparable harm to debtor could consist of the diversion of its human resources from reorganization to the defense of pre-petition actions.[70] An example of such diversion is when the debtor or its key employees would become embroiled in major litigation at a time when their efforts should be directed toward reorganization. Courts have generally held that to allow the state court action to proceed when the debtor is under such constraints "would directly frustrate the purpose of Section 362 and would sanction what is in effect, if not intent, an end run around the proscription of that Section."[71]

Second, a strong likelihood of success of reorganization must be demonstrated. The debtor's goal is to promote a successful Chapter 11 reorganization. In <u>In re Third Eighty-Ninth Associates</u>, where the court found that a guarantor's involvement in Chapter 11 debtor's business and reorganization would be sufficiently impeded by action on guaranty to be a burden on the estate, the court warranted staying of action against that guarantor.[72] In order to reach its conclusion that the guarantor was sufficiently involved in debtor's business, the court relied on the following facts. The movant established the "key" nature of the guarantor's role in debtor's business and reorganization with sufficient evidence.

Courts have stayed creditor actions against non-bankrupt third parties under this rationale where, for example, an officer devoted over fifty percent of his time to and was "irreplaceable" in the reorganization process,[73] where an officer was a "key staff member" of the reorganization team,[74] where the principals-guarantors performed all or most of the debtor's business,[75] and where the general partner was "intimately connected" with the management of the debtor's business.[76] Recently, it has been held that solvent guarantors of a Chapter 11 debtor are not entitled to the protection of the automatic stay in a suit on the guarantee.[77] The court's rationale was that even though the guarantors were officers of the debtor, the action against them was not based upon any acts committed in their capacity as officers, but rather resulted from their personal guarantees.[78] The court emphasized that the "very purpose of having [a guarantee] was to provide an alternate avenue of recovery in case [of default]."[79] Therefore, staying such actions would work a hardship on the creditor by giving an unwarranted immunity from suit to solvent guarantors, which would contravene the purposes underlying the automatic stay.

In contrast, this factor did not justify a stay under Section 105(a) where a guarantor testified about his duties for the debtor "largely in generalities" and was "extremely vague on [his] projected personal financial commitments to the debtor's rehabilitation."[80] Nor did it justify a stay where there was no evidence that securities pledged by general partners were actually available to the debtor or could be used realistically in the reorganization efforts.[81]

Third, the guarantor must establish that creditors will suffer no harm or minimal harm. American bankruptcy laws also protect creditors, through the equitable distribution of assets by prohibiting a dash to the courthouse and recovery by the speediest creditor. No single creditor should obtain repayment at the expense of the other creditors. The creditors do not desire, and the Code discourages and hinders decreases in assets "earmarked" for distribution. American bankruptcy laws are intended to ensure that the assets of a bankrupt are efficiently and fairly distributed among all of its creditors instead of being devoured by the one creditor who manipulates the code and obtains relief from the automatic stay.[82]

Creditors can also be harmed by a "lack of adequate protection" of their collateral. Upon a determination of lack of adequate protection, a creditor could successfully move for relief from the automatic stay. Furthermore, a creditor could also be harmed by impairment of his rights under the debtor's plan of reorganization.[83] However, "a person who gets the benefits of its original bargain is not impaired even if the terms of the contract are altered."[84] Thus, the court must look at the debtor's plan of reorganization and decide under 1124(2) whether the creditor is impaired. If creditors are impaired or suffer from lack of adequate protection of the goods or of the money they have lent the debtor, they can move for the stay to be lifted under Section 362(d)(1).[85] Creditors can also request that the court frame the injunction narrowly so as to cover only the specific property which is needed for reorganization[86] and subject to the stay.

Finally, the fourth factor consists of the public interest. The public interest, in bankruptcy law, lies in promoting a successful reorganization.[87] A successful reorganization translates into more creditors receiving larger payments closer to the actual amounts owed to them. The adverse impact on creditors minimized, creditors are less likely to declare bankruptcy as a result of suffering a loss. Finally, the public interest is served when the debtor has successfully reorganized and continued its business until all of its creditors claims are paid under the plan. Having viable business entities and maximizing economic strength are certainly in the public interest. Should the court refuse to issue an injunction, debtor's possible liquidation would not serve the public interest as well as its reorganization.[88]

Landmark Air Fund II,[89] bolsters this principle. There, the court issued an injunction to restrain a bank from enforcing its judgment against the guarantor-partners pursuant to its powers under Section 105(a).[90] The court also set forth the above four factors in determining whether to issue a preliminary injunction against the co-debtors.[91]

In addition to the four part test of Otero Mills, "unusual circumstances" might also create an exception to the general rule. An example of such a circumstance is, as the Fourth Circuit Court of Appeals held in A.H. Robins, where there is "such identity between the debtor and the [guarantor] that the debtor may be said to be the real party defendant and that a judgment against the [guarantor] will in effect be a judgment or finding against the debtor."[92] In that case, the court held that in such situations, a stay under Section 105(a) is proper where proceeding against the guarantor would clearly harm the reorganization efforts.[93] One could argue that in cases where the guarantor is so close to the debtor, the recipient of the guarantee should have realized that he is more at risk than if he had received the guarantee from someone more removed from the debtor's business operations. In essence, the recipient has received a "lower quality" guarantee. In the practical commercial world, individuals and businesses are familiar with this reality.

In summary, only certain circumstances that jeopardize a debtor's reorganization efforts are grave enough to merit the allowance of the stay for guarantors.[94] To determine whether the stay should be granted, courts can either utilize the four part balancing test of <u>Otero Mills</u> or find the existence of an unusual circumstance that would exempt the creditor from the application of the general rule. Therefore, guarantors who seek the protection of the stay cannot do so under Section 362(a), which is expressly reserved for debtors. Only under Section 105(a) and only under "unusual and limited circumstances"[95] may guarantors seek, and should courts grant, the protection of such a powerful right originally reserved only for debtors. However, barring those unusual circumstances, the grant of a stay on actions against guarantors is not justified as an exercise of the court's equitable powers under Section 105(a) because it violates the language and intent of the Code and the clear policy of Chapter 11.

In conclusion, in determining whether bankruptcy enjoins litigation against guarantors of a Chapter 11 debtor, the Code's automatic stay provision does not seem applicable. Guarantors are best advised to utilize Section 105(a), which is more in keeping with the spirit and letter of bankruptcy policies. The following is a discussion of how staying actions against guarantors under Section 362(a) or 105(a) subvert the purpose of the Bankruptcy Code and endanger the world of commercial certainty by rendering the value of guaranties questionable.

IV. ANALYSIS OF IMPACT ON COMMERCIAL LENDERS

The commercial world has long relied on the guaranty agreement as an important component of commercial loan transactions.[96] A traditional and fundamental purpose of a guaranty is to ensure repayment to the lender regardless of the borrower's success or failure in business.[97] "The very purpose of a guaranty is to assure the creditor that in the event the [debtor] defaults, the creditor will have someone to look to for reimbursement."[98] Interpreting Section 362(a) to stay a creditor's action against a non-bankrupt guarantor frustrates the traditional purpose of a guarantee. How else could lenders or creditors have confidence in the guarantees they receive? At least two negative consequences ensue from lack of confidence. First, lenders will not lend as readily to truly needy borrowers or to "financially insecure" ones. Second, they will raise interest rates or employ other devices to cushion their risk of loss due to defaults by both the borrower and its guarantor.

Furthermore, all parties involved in a guaranty agreement have reasonable expectations. The creditor expects to initiate collection proceedings against the guarantor if the debtor does not repay his debt. The guarantor expects to and must repay the lender if the debtor defaults on its obligation. And the debtor expects the guarantor, who has paid debtor's debt, to file for reimbursement from debtor. A refusal to enforce a guaranty simply discards this important tenet of commercial practice and upsets the reasonable expectations of all the parties to a great extent.[99]

Extending the stay in Section 362(a) to guarantors renders a disservice to the parties most deserving of protection and merely rewards the guarantor, a party whom Congress never intended to protect through Section 362(a). Under the Code, the parties most deserving of protection are the debtor and its creditors -- whereas, Congress provided guarantors with "reimbursement or subrogation" under Sections 502(e) and 509, as discussed above. Thus, the arguments for commercial certainty and for avoiding conflict within the Code are intertwined and dovetail harmoniously.

In the commercial world, the protection of lenders, who obtained guarantees from the debtor and provided financing to its business, benefits not merely that lender alone but also all the other creditors. This holds true regardless of whether the guarantees were obtained before bankruptcy or during the process of reorganization after having declared bankruptcy. Often, the money that the lender provides, whether in the crucial period before the debtor succumbs to bankruptcy, or whether during its struggle to reorganize, is the glue that holds the entire business operation together. Without the lender's infusion of capital, the business simply would not continue, let alone thrive once again in order to pay off all the creditors. Without the lender's assistance, the debtors could not continue their businesses in order to reorganize. Accordingly, the denigration of the value of a guarantee hurts all three parties. When the recipient of the guarantee is hurt, the effect trickles down to the debtor and to the other creditors who consequently also suffer when they do not receive the full value of their claims.

Interestingly, the protection of lenders is even more crucial after the debtor has filed its petition in bankruptcy. Guarantees become crucial in post-petition financing because at that time the debtor generally does not possess any unencumbered assets on which to give a lien to the lender. Yet, the debtor is at this time in dire straits and urgently needs money to undertake its reorganization. In fact, the Code specifically encourages post-petition financing to the debtor.[100] However, when a creditor lends money to the debtor, it will generally request some security in exchange. That security can be in the form of a lien, thus making the lender a secured creditor, or in the form of a guarantee. A secured lender will often require that its collateral be adequately protected so as to not diminish in value while the debtor continues to operate its business and takes the time to reorganize.[101] Therefore, an unsecured lender --who merely receives a guarantee and not a security interest on goods or on real property-- will demand solid protection before it accepts a guarantee as security for the money it is investing. That guarantee must be stable and reliable or else creditors, especially lenders, will no longer supply businesses in financial trouble with the much needed cash to rehabilitate themselves.

The ensuing lack of capital inevitably harms financially insecure businesses, and future as well as current debtors. Lenders will stop lending on guarantees, as guarantees lose their meaning in the commercial world.[102] Lenders will stop lending if they cannot rely on guarantees and the commercial world will suffer. Economic growth will falter. As it is, the lender's goal is to "avoid any increased monetary exposure to the debtor".[103] Accordingly, denying the lender the benefit of his bargain, the guarantee, would strip the lender of his or her peace of mind.

Fearful of never being repaid, lenders would refrain from financing debtors' reorganizations. Conversely, when recipients of guarantees know that they can count on the guarantees they receive and will ultimately be repaid, they will not hesitate to supply the debtor with cash, to breathe fresh life into the debtor and enable it to continue its existence as a viable business entity.

Finally, the remaining creditors will suffer harm as debtor's reorganization efforts are hampered from a lack of funds. The continuation of the business is more desirable than liquidation where the creditors must be satisfied with receiving a mere portion of their original claim. When debtor continues to operate its business during a Chapter 11 reorganization, creditors receive more on their claims than they would in a liquidation. A successful operation of the business would have maximized the dividend to creditors.

Besides creating a reluctance to lend to debtors, the denigration of the value of a guarantee has yet another adverse impact on the commercial realm: creditors will charge <u>higher interest rates</u>. It has been established that "[T]o the extent that a creditor ...

bears some risk ... he will raise the debtor's interest rate."[104] When courts relegate the traditionally "rock-solid" guarantee to the position of a questionable form of security, they create uncertainty as to the value of the guarantee. In turn, that uncertainty creates the need for "loss-cushioning devices such as increased interest rates."[105] Uncertainty has its costs. "To the extent that collection is uncertain, interest rates will rise overall."[106] This holds true in the context of secured as well as unsecured creditors.[107] In unsecured transactions, if the creditor merely receives a guarantee, the degree of risk of the subsequent collection on that guarantee will affect the price that these creditors will charge in connection with the transaction.[108]

In addition to charging higher interest rates to all debtors to compensate for higher risks, creditors who receive guarantees may engage in other forms of "loss-cushioning" such as purchasing insurance for uncollectible debts.[109] However, these loss-cushioning devices also have their own costs.[110] These increased costs "raise the price of the loan to the borrower."[111]

It seems that the certainty and the reliability of a guarantee have far reaching impacts on the economy. In summary, unreliable guarantees have two major negative impacts on the commercial world. The first negative consequence is a lower likelihood of successful Chapter 11 reorganizations as less cash is available to the debtor. This result, in turn, has its own economic ramifications. One undesirable economic impact is the increase in unemployment as companies fail in their bankruptcy reorganizations. Such an increase would contribute to unemployment and to a budget deficit. One less company shutting its doors means that fewer people will lose their jobs. The overall impact on the economy would therefore be cushioned. Economic growth cannot result when viable businesses do not have the means to rehabilitate themselves because no one will lend on guarantees anymore.

The second undesirable consequence on the commercial world is higher interest rates. Higher interest rates further adversely affect a weak economy. With higher rates, borrowing is more expensive and so is the cost of doing business. This practice further hurts commerce.

Consequently, not only are the parties that the Code intended to protect hurt, but also the only party that benefits is already provided for elsewhere in the Code. That party is the guarantor. The purpose of a guaranty agreement is to "substitute the guarantor's indemnity claim for the creditor's direct claim against the debtor."[112] Therefore, when the debtor files a bankruptcy petition, if the guarantor winds up paying a creditor on the guarantee, the guarantor has an allowable claim in bankruptcy, will get cents on the dollar similar to any other creditor.[113] But in any case, the creditor should receive the full amount of his claim from the debtors' guarantors.

Hence, guarantors are adequately protected. They should not get more protection merely because they might become creditors of the debtor and receive less than the full amount of their claims. As guarantors, they are precisely in the business of risking their money and they charge fees and interest rates to cover their risks. As Professors Coppel and Renda reveal "as a practical matter, guarantors very rarely rely upon their right to be 'indemnified' by the debtor, since creditors normally enforce guaranties where they have been unable to collect from the debtor."[114]

Ironically, the extension of the stay to guarantors directly benefits only the guarantor whose protection is already expressly rooted in the Code Section 502(a) and Section 509: a right to reimbursement or to subrogation or as discussed above.

An injunction staying proceedings against the guarantor of a Chapter 11 debtor not only harms the parties the bankruptcy Code intends to protect --debtors and creditors-- but also has commercially undesirable consequences as it creates chaos and uncertainty in the world of commercial lending by rendering suspect the value of a guarantee. As discussed earlier, other problems with the extension of the stay under Section 362(a) are that: (1) it is contrary to legislative intent of Code §362(a); (2) it protects a party whom the Code did not intend to protect in this particular manner; (3) it provides a double remedy for guarantors; and (4) it creates conflict between Code provisions.

VI. RECOMMENDATIONS:

The Code's silence creates significant problems and will generate more lawsuits on this point. The establishment of a clear rule or guideline is necessary in this area, and would not be tantamount to judicial legislation. Rather, it would specifically implement the clear legislative intent.

One alternative consists of making the stay available only to guarantors who can argue Section 105(a) power of the court and raising the standards under that Section.

That would entail increasing the burden on the claimant to argue that the court has jurisdiction, the power to grant the relief sought, and to show with the requisite degree of proof that the four factors outlined by the court in Otero Mills are met. It is a well established principle that an injunction is an extraordinary and drastic remedy which may be granted only upon a clear and convincing showing that the movant has carried its heavy burden on each element under Federal Rule of Civil Procedure 65 as adopted by Bankruptcy Procedure 7065.[115] The drastic nature of this extraordinary remedy merits this heavy burden imposed on the claimant.

One reason for adopting this stricter view is that the judicial system does not exist in a vacuum. It is true that the interpretation of Section 362(a) must rely on the statute's legislative history and on case law. However, we are dealing with the commercial realities of the world of lending money and relying on guarantors. With the wheels of commerce grinding to a halt when lenders can no longer rely on guarantees, we cannot afford to solve this problem with traditional legal arguments alone. The judicial system must now look to the social and economic ramifications of each interpretation of Section 362(a) and Section 105(a) in the context of power over non-debtor entities. This article recommends the adoption of the stricter view for several reasons. Not only does this view respect the principles of bankruptcy law, but its application has fewer negative impacts on commerce and the national economy.

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V. CONCLUSION

Cases are in conflict as to whether the automatic stay of Section 362(a) of the Bankruptcy Code should extend to guarantors of the Chapter 11 debtor. Nevertheless, the legislative history and the correct interpretation of policies underlying the Bankruptcy Code indicate that the automatic stay should not be granted to guarantors in a chapter 11 proceeding under Section 362(a).

Guarantors seeking the protection of the stay under Section 362(a) should instead use Section 105 of the Code where the burden is heavier. The burden is heavier under Section 105(a) since there are two hurdles to overcome. First, the guarantor must establish that the bankruptcy court has jurisdiction to hear the matter. Then it must establish that issuance of the injunction is proper under the facts before the court. Two factors justify this heavier burden. First, "[b]ecause the practical effect of such an injunction is to broaden the scope of the automatic stay beyond the terms of [362(a)], this is a power that must be used 'sparingly'."[116] Second, the guarantor is obtaining the "extraordinary and drastic remedy" of an injunction.[117] "Although the bankruptcy court has broad equitable power under Section 105, this power does not include relieving a party of his burden of proving an essential requisite for injunctive relief."[118] Given the difficulty of establishing a case for an injunction under Section 105(a), if the guarantor satisfies all the requirements of both the jurisdictional and the injunction test, it is less likely that the granting of a stay under Section

105 would be contrary to legislative intent, to the Code, or in violation of the principles of bankruptcy law.

1. S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5840-5841.

2. J. Kennedy, Automatic Stays Under the New Bankruptcy Law, 12 U. Mich. J.L. Rev. 1 (1978).

3. 11 U.S.C.A. § 362(a)(2) (West Supp. 1987).

4. See supra note 1.

5. H.R. Rep. No. 595, 95th cong., 2d Sess. 349 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 6297.

6. Aetna Casualty & Surety Co. v. Namrod Development Corp., 140 B.R. 56 (Bankr. S.D.N.Y. 1992) (solvent guarantors of debtor were not entitled to protection of automatic stay); In re Rohnert Part Auto Parts, Inc., 113 B.R. 610 (Bankr. 9th Cir. 1990) (held that Section 362(a) does not authorize stays to co-debtors); Credit Alliance Corp. v. Williams, 851 F.2d 119, at 120, (4th Cir. 1988) (automatic stay did not protect guarantor from creditor's action to enforce default judgment entered on Chapter 11 debtor's note).

7. It is noteworthy that with regard to the debtor, the stay is automatic. In other words, the debtor does not even have to motion the court in order to be granted the stay. The instant the debtor files a petition for bankruptcy, the stay applies to the debtor. It is not something the debtor even needs to ask for, he receives it "automatically" upon filing a petition for bankruptcy. Thus, when a party seeks the protection of the automatic stay, it is understood that this party is not the debtor, rather one hoping to benefit from the same protection which the automatic stay of Section 362(a) affords the debtor.

7. 11 U.S.C.A. § 362(a) (West. Supp. 1987).

9. 11 U.S.C.A. § 362(a)(1) (West Supp. 1987).

10. G. Hisae Ishii-Chang. Litigation and Bankruptcy: The Dilemma Of The Codefendant Stay. 63 Am. Bankr. L.J. 257, 258.

11. 11 U.S.C.A. § 362(a)(1) (West supp. 1987).

12. Credit Alliance Corp. v. Williams, 851 F.2d 119, at 121, (4th Cir. 1988); Pitts v. Unarco Indus., Inc., 698 F.2d 313 (7th Cir. 1983) (automatic stay does not protect nondebtors).

13. See supra, notes 1 and 4; See also In re A.H. Robins, 788 F.2d at 999 (stay against third party defendant is proper if there is such an "identity of interest" between the two entities that judgment against such defendant will be in effect judgment against debtor); In re A.H. Robins Co., Inc., 828 F.2d 102, 105 (4th Cir. 1987) (creditor's action against co-debtor stayed where action interfered with debtor's reorganization).

14. Wedgeworth v. Fiberboard Corp, 706 F.2d 541, 544 (5th Cir. 1983) (the language of the Code "clearly focuses on the insolvent party". There are "repeated references to the debtor."); Williford v. Armstrong World Indus., Inc., 715 F.2d 124 (4th Cir. 1983) (held that co-defendants could not avail themselves of the stay).

15. 11 U.S.C.A. § 362(a)(1) (West supp 1987).

16. Credit Alliance Corp. v. Williams, 851 F.2d 119, at 121, (4th Cir. 1988).

17. Wedgeworth v. Fibreboard Corp., 706 F.2d at 544 (5th Cir. 1983); Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, at 1197 (6th cir. 1983); John J. Lawson, Creditors Beware! 94 Dick.L.Rev. 157 (1989).

18. 11 U.S.C.A. § 1301 (West 1979).

19. 11 U.S.C.A. § 1301(a) (West 1979).

20. Credit Alliance Corporation v. Gary L. Williams, 851 F.2d 119, at 121, (4th Cir. 1988); Williford v. Armstrong World Indus., Inc., 715 F.2d at 126-127, (4th Cir. 1983).

21. Gerald K. Smith. Partners and Partnerships in Bankruptcy and Recommendations For Reform. 527 Practicing Law Institute Comm. 413, at 430. Order No. A4-4289. Commercial Law and Practice Course Handbook Series Advanced Bankruptcy Workshop 1990. Feb. 19, 1990.

22. 11 U.S.C.A. § 541(a) defines "property" of the bankruptcy estate very broadly. Property of the estate includes all kinds of property, including tangible or intangible property, causes of action, wherever located and by whomever held. Id.; See also United States v. Whiting Pools, Inc. 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed.2d 515,

(1983) (property seized by the Internal Revenue Service immediately prior to the filing of the debtor's chapter 11 petition is property of the estate, since the debtor, and not the IRS, retains an ownership interest in the property).

23. A.H. Robins Co. v. Piccinin, 788 F.2d 994, (4th Cir. 1986).

24. A.H. Robins Co. v. Piccinin, 788 F.2d 994, (4th Cir. 1986).

25. 11 U.S.C.A. § 541 (West supp 1987).

26. 11 U.S.C.A. § 362(a)(3) (West supp 1987).

27. See supra notes 1 and 2.

28. 11 U.S.C.A. §362(a)(1) (West Supp. 1987).

29. Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, at 1199 (6th Cir. 1983).

30. American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.), 885 F.2d 621 (9th Cir. 1989); Barry L. Zaretsky, Co-Debtor Stays In Chapter 11 Bankruptcy, 73 Cornell L.Rev. 626, January, 1988.

31. 11 U.S.C.A. §524(e) (West Supp. 1982).

32. Underhill v. Royal, 769 F.2d 1426, 1432 (9th Cir. 1985) (relying on Union Carbide Corp. v. Newboles, 686 F.2d 593, 595 (7th Cir. 1982) (per curiam)).

33. Id.

34. See, e.g., In re Rohnert Part Auto Parts, Inc., 113 B.R. at 616 (Bankr. 9th Cir. 1990) (Although Bankruptcy Code Section granting bankruptcy court power to issue necessary and appropriate orders endows court with general equitable powers, such Section does not authorize relief inconsistent with more specific laws).

35. 11 U.S.C.A. § 502(e) provides that:

(e)(1) Notwithstanding subSections (a), (b), and (c) of this Section and paragraph (2) of this subSection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that --

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under Section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subSection (a), (b), or (c) of this Section, or disallowed under subSection (d) of this Section, the same as if such claim had become fixed before the date of the filing of the petition. 11 U.S.C. § 502(e) (West Supp. 1987).

36. 11 U.S.C.A. §509 (West Supp. 1987).

37. 11 U.S.C.A. § 509 (West supp 1987).

38. H.R. No. 95-595, 95th Cong., 1st Sess. 358-359 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 73-74 (1978).

39. Id.

40. 124 Cong. Rec. H11089 (Sept. 28, 1978) (statement of Rep. Edwards), reprinted in 1978 U.S. Code Cong. & Admin. News, 6436, 6449-50.

41. House Rep. No. 95-595, 95th Cong., 1st Sess. 354 (1977); Senate Report No. 95-989, 95th cong., 2d Sess. 65 (1978).

42. 124 Cong. Rec. H 11,094 (Sept. 28, 1978); S 17,410-11 (Oct. 6, 1978).

43. 124 Cong. Rec. H 11,094 (Sept. 28, 1978); S 17,410-11 (Oct. 6, 1978).

44. Precisely because the Code does provide an express provision for reimbursement and subrogation for the guarantor, it is not quite the case that the guarantors who utilize Section 105(a) do so "because the Code does not provide an express remedy". In this case, the Code does entitle guarantors to a right of reimbursement or subrogation against the debtor. This is the protection that the Code expressly reserved for guarantors, just as it expressly reserved the protection of the stay for the debtor. The courts that grant the guarantor the protection of the stay are essentially rewriting the protections granted to guarantors by the Code.

45. 11 U.S.C.A. § 105(a) (West Supp. 1987).

46. 11 U.S.C.A. § 105(a) (West Supp. 1987).

47. Manuel D. Leal, The Power of the Bankruptcy Court: Section 105, 29 So.Tex. L.Rev. 487, 489 (1988).

48. In re Landmark Air Fund II, 19 B.R. 556 (Bkrtcy.N.D. Ohio 1982); In re Larmar Estates, Inc., 5 B.R. 328 (Bkrtcy E.D.N.Y 1980).

49. In re Lomas Fin. Corp., 117 B.R. 64, at 67-68 (S.D.N.Y. 1990) (suit against officers for making misrepresentation upon which creditor relied in making loan to debtor corporation; adverse judgment could collaterally estop debtor's defenses).

50. In re Third Eighty-Ninth Associates, 138 B.R. 144, at 149 (S.D.N.Y. 1992).

51. Id. at 149.

52. In the Matter of Energy Cooperative, Inc., 886 F.2d 921, (7th Cir. 1989).

53. Sea Harvest v. Riviera Land Co., 868 F.2d 1077, 20 C.B.C.2d 1269 (9th Cir. 1989).

54. Compare Pitts v. Unarco Indus., Inc., 698 F.2d 313 (7th Cir. 1983) (automatic stay does not protect nondebtors) with A.H. Robins, 788 F.2d at 994 (automatic stay protects nondebtors). See also, M. Leal, The Power of the Bankruptcy Court: Section 105, 29 So.Tex. L.Rev. at 496 (1988).

55. In re A.H. Robins Co., Inc., 828 F.2d 102, 105 (4th Cir. 1987) (creditor's action against co-debtor stayed where action interfered with debtor's reorganization); Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.), 25 B.R. 1018 (Bankr. D.N.M. 1982).

56. 28 U.S.C.A. 1471 (West Supp. 1982).

57. Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.), 25 Bankr. 1018 (D.N.M. 1982).

58. 28 U.S.C. § 1471 (1982); See also, M. Leal, The Power of the Bankruptcy Court: Section 105, 29 So.Tex. L.Rev. at 515 (1988) (That provision is no longer in effect. The jurisdictional grant is similar but not identical to that found at 28 U.S.C. § 157(a) - (b)(1) (Supp. III 1985)).

59. Senate Report No. 95-989, 95th Cong., 2d Sess. 29 (1978).

60. Otero Mills, 25 B.R. at 1020.

61. Id.

62. Otero Mills, 25 B.R. at 1021.

63. Id.

64. Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.), 25 Bankr. 1018 (D.N.M. 1982).

65. Otero Mills, at 1021.

66. See In re Otero Mills, Inc., 21 Bankr. 777, at 779 (Dist. N.M 1982).

67. In re Otero Mills, Inc. at 779.

68. Id. at 1021.

69. In re the Original Wild West Foods, Inc., 45 Bankr. 202, at 208 (Bankr. W.D. Tex. 1984).

70. Steven P. Nelson v. General Electric Capital Corp., (In re Steven P. Nelson), 140 B.R. 814, at 817 (Bankr. M.D. Florida, 1992).

71. In re Sudbury, Inc., 140 B.R. at 465, (N.D. Ohio 1992).

72. Id. at 148.

73. In re Lomas Fin. Corp., 117 B.R. 64, 66 (S.D.N.Y. 1990).

74. Id.

75. In re Rustic Manufacturing, Inc., 55 B.R. 25, 31 (Bankr. W.D.Wisc. 1985).

76. In re Northlake Building Partners, 41 B.R. 213, 233 (Bankr.N.D.Ill. 1984).

77. Aetna Casualty and Surety Co. v. Namrod Development Corp., 140 B.R. 56 (S.D.N.Y. 1992).

78. Id. at 60.

79. Id. at 60.

80. University Medical Ctr., 82 B.R. 754, at 756-758 (Bankr. E.D.Penn 1988).

81. In re Costa & Head Land Co., 68 B.R. 296, 301-302 (N.D.Ala. 1986).

82. See 11 U.S.C.A. §362(d); Cornfeld v. Investors Overseas Services, Ltd., 471 F. Supp. 1255, 1255, 1269 (S.D.N.Y.); aff'd, 614 F.2d 1286 (2d Cir. 1979).

83. 11 U.S.C.A. § 1124 (West supp. 1988).

84. Otero Mills, at 1027.

85. 11 U.S.C.A. § 362(d) (West Supp. 1987); In re Otero, 25 B.R. at 1022.

86. In re Otero, 25 B.R. at 1022.

87. Otero, at 1021; See, e.g., Unites States v. Whiting Pools, Inc., 462 U.S. 198, 204, 103 S.Ct. 2309, 2313, 76 L.Ed.2d 515 (1983).

88. In re Steven P. Nelson, 140 B.R. 814, at 817 (Bankr. M.D. Florida, 1992).

89. Landmark Air Fund II, 19 B.R. 556, (Bankr. N.D. Ohio 1982).

90. Id. at 559.

91. Id.

92. A.H. Robins, at 999. (compare to CAE Indus. Ltd. v. Aerospace Holdings Co., 116 B.R. 31, at 33 (S.D.N.Y. 1991) where, while acknowledging that indemnification agreements can be the basis for an extension of a stay to nondebtors of a chapter 11 debtor, the court held that such an extension is not warranted where the nondebtor is "independently liable" to the creditor).

93. Id. at 999.

94. Generes v. GTS Corporation, 1992 WL 165669 (E.D.La. July, 1992) (extension of bankruptcy stay to non-bankrupt defendants is limited to situations where action against such defendant could have a significant impact on the debtor).

95. See, e.g., Costa & Head, 68 B.R. at 298, (action against partner of debtor; stay denied); In re Otero Mills, Inc., 138 B.R. at 146; A.H. Robins Co. v. Piccinin, 788

F.2d 994 (4th Cir. 1986); In re Lomas Financial Corp., 117 B.R. 64 (S.D.N.Y. 1990).

96. John J. Lawson, "Creditors Beware! A guaranty May Not Be Such a Guarantee". 94 Dick. L. Rev. 157 (1989).

97. Black's Law Dictionary defines a "guaranty" as an agreement or promise to answer for the debt, default or miscarriage of another; a promise or a contract to answer for the debt, default or miscarriage of another. Black's Law Dictionary, p. 209. Second edition, 1984.

98. Rojas v. First Bank National Ass'n, 613 F.Supp. 968, 971 (E.D.N.Y. 1985). Aetna Casualty and Surety Co. v. Namrod Development Corp., 140 B.R. 56 (S.D.N.Y. 1992) (relying on CAE Indus. Ltd. v. Aerospace Holdings Co., 116 B.R. 31, at 32 (1991).

99. See, In re Sudbury, Inc., 140 B.R. at 466, (N.D. Ohio 1992).

100. Lenard Parkins, Keith D. Spickelmier, L. Farrell Crane, Jr. Defending the Lender Liability Case Against the Borrower in Bankruptcy. 468 Practicing Law Institute 527, at 533. PLI Order No. A4-4238. Commercial Law and Practice Course Handbook Series. Lender Liability Litigation 1988: Recent Developments. (9/1/88).

101. See 11 U.S.C.A. §361; See also supra note 100 at 531.

102. David G. Epstein, Guarantors of the Chapter 11 Debtor. 392 PLI.Comm. 595. 1986, Practicing Law Institute. Commercial Law and Practice Course Handbook Series Dealing with the Reorganizing Debtor: Transactions, Negotiations, and Litigation.

103. See supra, note 100.

104. Dan S. Schecter, Judicial Lien Creditors Versus Prior Unrecorded Transferees of Real Property: Rethinking The Goals of The Recording System And Their Consequences, 62 S.Ca.L.Rev. 105, at 156 footnote 50 (1988), citing Baird & Jackson, Possession and Ownership: An Examination of the Scope of Article 9, 35 Stan.L.Rev. 175, 183 (1983).

105. Id.

106. Id.

107. Id.

108. Id. at footnote 64.

109. Id.

110. Id. at footnote 67.

111. Id., citing Carlson & Shupack, Judicial Lien Priorities Under Article 9 of the UCC: Part I, 5 Cardozo L.Rev. 287, at 307 (1984).

112. John J. Lawson, Creditors beware! A Guaranty May Not Be Such A Guarantee. 94 Dick. L. Rev. 157, at 167.

113. 11 U.S.C.A. §502(e).

114. Coppel & Renda, Guaranty Agreements Impacted by 4th Circuit Dalkon Decisions, The Daily Rec., May 12, 1988, at 8, col. 1.

115. 28 U.S.C. § 65. (West 1988).

116. In re Third, at 146 (quoting In re University Medical Ctr., 82 B.R. 754, 755 (Bankr.E.D.Pa. 1988)).

117. Costa & Head, 68 B.R. at 298.

118. Costa & Head, at 300.