

Vehicle Finance Lenders Beware: The Coming Wave of Post-Fulton Automatic Stay and Turnover Adversary Proceedings

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By now, you likely are aware of the recent Supreme Court decision in [City of Chicago, Illinois v. Fulton](#). The Court rightly found that merely retaining possession of a vehicle repossessed pre-petition is not a violation of Bankruptcy Code § 362(a)(3) as an exercise of control over property of a debtor's chapter 13 estate. However, the Court left open the possibility that such retention could be a violation of two other subsections of the automatic stay section of the Bankruptcy Code – § 362(a)(4) and § 362(a)(6) – as an act to enforce a lien or as an act to collect a claim, respectively. *Fulton* also did not resolve whether the turnover provision, Bankruptcy Code § 542(a), requires immediate transfer of possession of a repossessed vehicle to a chapter 13 debtor upon commencement of the bankruptcy case.

Debtors in chapter 13 cases are flowing quickly into the gaps left open by *Fulton*. Recovery of property in a bankruptcy case requires the filing of a complaint commencing an [adversary proceeding](#). An adversary proceeding is time-consuming because it is conducted largely under normal federal civil procedure rules governing ordinary lawsuits.

Debtors are short-circuiting that timeline by filing expedited motions to recover possession of repossessed vehicles in their adversary proceedings. These motions often require vehicle finance lenders to make quick decisions on whether to relinquish possession of repossessed vehicles, or to contest turnover based on a lack of adequate protection (see [Bankruptcy Code §§ 542\(a\), 363\(e\) and 361](#)).

But even if the lender turns over possession of the vehicle, the litigation most likely will not end. Debtors also are asserting claims against the lender based on alleged violations of § 362(a)(4), § 362(a)(6) and § 542(a). The economics of chapter 13 practice make such claims virtually inevitable. “No look” (i.e., court pre-approved) fees for chapter 13 debtors' counsel may not include the extra work counsel must provide to commence and prosecute a turnover adversary proceeding. Successful automatic stay violation claims in these circumstances invariably include fee awards to debtors' counsel, thereby shifting those costs to the lenders.

This coming wave of chapter 13 debtor lawsuits necessitates a thoughtful, coordinated response by vehicle

finance lenders. With respect to turnover, a lender may wish to establish a policy as to what constitutes a minimum level of adequate protection of the lender's security interest in a repossessed vehicle prior to relinquishing possession. At a minimum, adequate protection includes appropriate insurance on the vehicle to protect the lender against loss of its collateral. Based on particular circumstances, adequate protection also may include pre-confirmation cash payments to approximate the depreciation in the value of the vehicle resulting from its use by the debtor. If a debtor provides evidence which satisfies that minimum, then counsel for the lender may consider arranging for turnover of the vehicle with debtor's counsel consistent with local practice regarding these matters.

Importantly, however, lenders may seek to contest any automatic stay violation claims brought in a turnover adversary proceeding because such claims are not viable under *Fulton*. The rationale of *Fulton* is that the automatic stay freezes the petition date status quo. If the lender does nothing more than retain possession of the vehicle, that rationale supports the position that the lender is not violating any subsection of automatic stay under § 362 of the Bankruptcy Code. Further, § 542(a), the turnover section, should not be construed as a self-executing mandatory injunction which compels a lender to turnover a repossessed vehicle upon a debtor's demand. Therefore, absent violation of a court order compelling turnover, a lender should not be held to violate § 542(a) simply by retaining possession of a repossessed vehicle.

McGlinchey is experienced at defending these types of adversary proceedings brought by chapter 13 debtors in various jurisdictions. We can do so directly as litigation counsel and can coordinate with local counsel in defending these cases. We also can assist in the preparation of policies and procedures for handling these lawsuits when they are filed. Please contact the author or a member of the [Creditors' Rights team](#) for further guidance on these issues.

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