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THE GUARANTOR’S LIFEBUOY IN THE BANKRUPTCY OCEAN

E. Jason Dennis & Carter S. Plotkin***

When a corporate entity files bankruptcy, creditors routinely turn to guarantors to collect. Attorneys representing those guarantors should make strong use of the corporate entity’s automatic stay. But they must be aware of (1) how to secure extension of the automatic stay against the guarantors if it is contested, and (2) the paperwork pitfalls that can preclude the extension of the automatic stay to the litigation against the guarantors. This article explores the contours of the automatic stay; arguments for extending the automatic stay to proceedings against guarantors and codefendants under federal and Texas law; applicable recent developments at the Supreme Court; and how to ensure that appropriate claims are filed in the bankruptcy court to avoid preclusion of the extension of the automatic stay.

I. THE AUTOMATIC STAY

Title 11 of the United States Code provides that a debtor’s filing of a bankruptcy petition triggers an automatic stay—applicable to *all* entities and proceedings—against the commencement or continuation of any judicial proceeding “against the debtor” or “to recover a claim against the debtor,” including “any act to obtain possession [or control] of property” of the debtor’s bankruptcy estate, among other things.¹ “The automatic stay is indeed a

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powerful tool of the bankruptcy courts.”²

The debtor’s bankruptcy estate is defined broadly. The estate is comprised of, among other things, “all legal or equitable interests of the debtor in property as of the commencement of the case,” “wherever located and by whomever held.”³ This definition includes tangible and intangible property.⁴

The automatic stay extends to the debtor’s estate. It is “one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions.”⁵ In order to protect the debtor “from the tentacles of his or her creditors” and ensure the fair distribution of the bankruptcy estate, the bankruptcy code confers the power “to stay proceedings *pending in other courts* which might have some effect on the ability of the bankruptcy judge to manage the estate.”⁶ “The stay insures that the debtor’s affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditors’ interests with one another.”⁷

However, in general, “Section 362 is rarely . . . a valid basis on which to stay actions against non-debtors” or preclude severance of claims against a bankrupt debtor company’s officers or codebtors.⁸ Ordinarily, sureties and guarantors have independent contractual duties to satisfy a debt.⁹ Courts have noted that Section 362 “provides only for an automatic stay of any judicial proceeding ‘against the debtor.’”¹⁰ Whereas a different provision of the bankruptcy code extends the automatic stay to certain codebtors,¹¹ “[n]o such shield is provided Chapter 11 co-debtors by § 362(a).”¹² Extending the automatic stay to guarantors, codefendants, or codebtors therefore requires the application of an exception.

1. 11 U.S.C. § 362(a); *cf.* U.S. CONST. art. I, § 8, cl. 4. (providing Congress’s right to establish “uniform Laws on the subject of Bankruptcies throughout the United States”).

2. *Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of Fox Masonry & Expert Restorations*, 140 F.3d 661, 666 (7th Cir. 1998).

3. 11 U.S.C. § 541(a)(1).

4. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983).

5. S. REP. NO. 95-989, at 54 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5840.

6. *Edwards v. Armstrong World Indus.*, 6 F.3d 312, 314 (5th Cir. 1993) (emphasis added), *rev’d on other grounds sub nom. Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).

7. *Fid. Mortg. Inv’rs v. Camelia Builders, Inc.*, 550 F.2d 47, 55 (2d Cir. 1976).

8. *Arnold v. Garlock, Inc.*, 278 F.3d 426, 436 (5th Cir. 2001) (citing *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir. 1983)); *see Credit All. Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988) (“Nothing in § 362 suggests that Congress intended that provision to strip from the creditors of a bankrupt debtor the protection they sought and received when they required a third party to guaranty the debt.”).

9. *See Willis v. Celotex Corp.*, 978 F.2d 146, 148–49 (4th Cir. 1992).

10. *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 126 (4th Cir. 1983) (quoting 11 U.S.C. § 362(a)(1)).

11. *Williams*, 851 F.2d at 121 (citing 11 U.S.C. § 1301(a)) (“Congress knew how to extend the automatic stay to non-bankrupt parties when it intended to do so. Chapter 13, for example, contains a narrowly drawn provision to stay proceedings against a limited category of individual cosigners of consumer debts.”).

12. *Wedgeworth*, 706 F.2d at 544.

II. EXTENDING THE AUTOMATIC STAY TO GUARANTORS

A. EXTENDING THE AUTOMATIC STAY UNDER FEDERAL LAW

There is an exception to the general rule that the automatic stay does not extend to nondebtors: when the bankrupt debtor indemnifies a defendant, generally no lawsuit may proceed against that defendant. Attorneys representing guarantors—commonly a debtor corporation's officers—of a debtor entity's debt may avail themselves of this vital exception.

Some courts have held that the automatic stay extends to indemnified corporate officers, even if a creditor is proceeding against them independently. The leading case is *A.H. Robins Co. v. Piccinin*.¹³ A conspectus of the case illuminates the exception. A.H. Robins Company manufactured and marketed an intrauterine contraceptive device until “an avalanche of actions filed in various state and federal courts throughout the United States” charged that the device injured its users.¹⁴ Some suits named only A.H. Robins Company as a defendant, but others named co-defendants.¹⁵ Eventually, the company filed for bankruptcy under chapter 11 of the bankruptcy code.¹⁶ While there was no dispute that the automatic stay halted proceedings against the company, “a number of plaintiffs in suits where there were defendants other than Robins . . . sought to sever their actions against Robins” and proceed with their claims against the other defendants.¹⁷ The company filed an adversary proceeding in the bankruptcy court seeking “injunctive relief restraining the prosecution of the actions against its co-defendants.”¹⁸ The district court granted a preliminary injunction enjoining the various civil suits against the guarantors under 11 U.S.C. §§ 362 and 105,¹⁹ thereby protecting the various co-defendants from the continuation of actions against them.

The Fourth Circuit affirmed. The court noted that the bankruptcy court had jurisdiction to stay the various proceedings under Section 362 “to protect the debtor from an uncontrollable scramble for its assets in a number of uncoordinated proceedings in different courts, . . . and to provide the debtor *and its executives*” with respite so they could accomplish a bankruptcy reorganization.²⁰ Whereas the automatic stay is usually reserved for debtors, it can extend to nondebtors such as company executives “when there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor.”²¹ Unusual circumstances may also authorize the extension of the automatic stay to

13. 788 F.2d 994 (4th Cir. 1986).

14. *Id.* at 996.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 996–97.

19. *Id.* at 997.

20. *Id.* at 998 (emphasis added).

21. *Id.* at 999.

codebtors when “proceedings against non-debtor codefendants would reduce or diminish ‘the property of the debtor [such as the debtor’s insurance fund or pool] to the detriment of the debtor’s creditors as a whole.’”²²

The Fourth Circuit went on to provide a crucial illustration of the circumstances that would elicit an extension of the automatic stay: “a suit against a third-party who is entitled to *absolute indemnity* by the debtor on account of any judgment that might result against them in the case.”²³ The court held that, “[t]o refuse application of the statutory stay in that case would defeat the very purpose and intent of the statute” because the debtor company’s obligation to fully indemnify its guarantor executive for a company-related liability effectively imputes the nondebtor’s liability to the debtor.²⁴ If the action against the nondebtor was not stayed, that action would imperil the debtor’s estate for the simple reason that the debtor would be liable to indemnify the nondebtor.²⁵ In other words, permitting actions against company guarantors to proceed would frustrate the congressional intent to provide debtor relief “by permitting indirectly what is expressly prohibited in the Code.”²⁶ The Fourth Circuit held that indemnified guarantors must be entitled to the full value of their indemnification:

[I]f the indemnitee, who has suffered a judgment for which he is entitled to be absolutely indemnified by the debtor, cannot file and have allowed as an adjudicated claim the actual amount of the judgment he has secured but must submit his claim for allowance in the bankruptcy proceeding with the prospect that his claim may not be allowed in the full amount of the judgment awarded in favor of him, the indemnitee will be unfairly mulcted by inconsistent judgments and his CONTRACT OF INDEMNITY IN EFFECT NULLIFIED. We do not accept such reasoning with its shocking result and would find a stay under (a)(1) acceptable.²⁷

The Fourth Circuit ultimately held that the automatic stay “must be extended to enjoin litigation against others if the result *would be binding upon the debtor’s estate*,” irrespective of whether the action is severed or the debtor is a party.²⁸ An analogy is that a collection action against an individual partner seeking to collect partnership debts should be automatically stayed because that action would diminish “the general fund to which [all] partnership creditors look to

22. *Credit All. Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988) (alteration in original) (quoting *A.H. Robins Co.*, 788 F.2d at 1008).

23. *A.H. Robins Co.*, 788 F.2d at 999 (emphasis added).

24. *Id.*

25. *Id.* at 1000 (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 995 (3d Cir. 1984) (“[A]ction against the guarantor-indemnitee ‘could and would affect the estate in bankruptcy,’ since, under the indemnity agreement, ‘a judgment in favor of the [plaintiff] in the guaranty action would automatically result in indemnification liability against’ . . . [the indemnitor]. Accepting this language one would have difficulty in *not* concluding that the action was in effect one against the debtor and as such would qualify for relief under (a)(1).” (emphasis added)).

26. *Id.* at 999 (quoting *Plessey Precision Metals, Inc. v. Metal Ctr., Inc.* (In re *Metal Ctr., Inc.*), 31 B.R. 458, 462 (D. Conn. 1983)).

27. *Id.* at 1000 (emphasis added).

28. *Id.* at 999 (emphasis added) (quoting *In re Metal Ctr., Inc.*, 31 B.R. at 462).

satisfy partnership debts.”²⁹ In other words, creditors may not indirectly attack the same funds that the automatic stay protects.

The Third Circuit held similarly. In a suit involving a plaintiff suing a distributor for damages from asbestos exposure, the distributor impleaded as a third-party defendant the manufacturer, who later filed bankruptcy.³⁰ The Third Circuit recognized that, in that case, there is “no *automatic* creation of liability against [the debtor manufacturer] on account of a judgment against [the distributor]” because the distributor was neither a guarantor nor indemnitor of the manufacturer, so any judgment against the distributor “could not give rise to any *automatic liability* on the part of the estate” of the manufacturer.³¹ If there was such automatic liability created by a “contract to indemnify, a contrary result would have been in order.”³² This automatic creation of liability via indemnity or otherwise is vital; merely guarantying a bankrupt debtor’s debt is insufficient to warrant the protections of the automatic stay.³³ Thus, courts have held that the automatic stay protects only the debtor “unless the debtor and some third party have such a similarity of interests that failure to protect the third party will mean that the assets of the debtor itself will fall into jeopardy.”³⁴

The Fifth Circuit has also “recognized the *A.H. Robins Co.*’s exception.”³⁵ In 2001, the court held that “a bankruptcy court may invoke § 362 to stay proceedings against nonbankrupt co-defendants” when there is a close identity of interests such that a judgment against the codefendant “will in effect be a judgment or finding against the debtor.”³⁶ The *Arnold* court distinguished *A.H. Robins Co.*, however, because the “non-debtor co-defendants were *indemnified* associates, employees or insureds of the debtor,” whereas the defendant in *Arnold* was a manufacturer of asbestos with no relationship to the bankruptcy debtor except for a claim of contribution under Texas law against the debtor.³⁷ The *Arnold* court held that the manufacturer had “no claim of a formal tie or

29. *Old Orchard Inv. Co. v. A.D.I. Distributors, Inc.* (In re *Old Orchard Inv. Co.*), 31 B.R. 599, 601 (W.D. Mich. 1983).

30. *Pacor, Inc.*, 743 F.2d at 986.

31. *Id.* at 995 (emphases added).

32. *Piccinin*, 788 F.2d at 1001.

33. *See Credit All. Corp. v. Williams*, 851 F.2d 119, 121 (4th Cir. 1988).

34. *Fox Valley Constr. Workers Fringe Benefit Funds v. Pride of Fox Masonry & Expert Restorations*, 140 F.3d 661, 666 (7th Cir. 1998); *see Ritchie Capital Mgmt., L.L.C. v. Jeffries*, 653 F.3d 755, 763 (8th Cir. 2011) (“In other words, the automatic stay will apply to non-debtors only when ‘a claim against the non-debtor will have an immediate adverse economic consequence for the debtor’s estate.’” (quoting *Queenie, Ltd. v. Nygard Int’l*, 321 F.3d 282, 287 (2d Cir. 2003))).

35. *Reliant Energy Servs., Inc. v. Enron Can. Corp.*, 349 F.3d 816, 825 (5th Cir. 2003); *see S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc.* (In re *S.I. Acquisition, Inc.*), 817 F.2d 1142, 1148 (5th Cir. 1987) (“[W]hen the liability of the nonbankrupt is not independent of the debtor’s liability and a judgment against the nonbankrupt will be binding upon the debtor’s estate, *the stay protection must be extended* to encompass actions against the nonbankrupt.” (emphasis added)).

36. *Arnold v. Garlock, Inc.*, 278 F.3d 426, 436 (5th Cir. 2001) (citing *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986)).

37. *Id.* at 431, 436 (emphasis added); *see Sterling v. Greater Hou. Transp. Co.*, No. 4:20-cv-910, 2021 WL 5155683, at *3 (S.D. Tex. Sep. 14, 2021) (“The Fifth Circuit has found that the automatic stay provision does not apply to a nondebtor defendant when ‘no claim of a formal tie or contractual indemnification had been made to create an identity of interests between the debtor and nondebtor.’” (quoting *Reliant Energy*, 349 F.3d at 825)).

contractual indemnification to create such an identity of interests” with the debtor.³⁸

In accordance with this reasoning, the Fifth Circuit declined to extend the automatic stay to a surety of a debtor’s supersedeas bond because “[t]he surety’s obligation on a supersedeas bond once the appeal has been completed is” sufficiently “separate and independent from the principal’s obligation.”³⁹ In that case, the reason was because “the appellate process had been completed and [the debtor] no longer had an interest, reversionary or otherwise, in this particular supersedeas bond, [so] the automatic stay provisions will not prevent [the surety] from fulfilling its obligation.”⁴⁰ Put differently, there was no *automatic* triggering of liability that would impact the debtor’s estate, so the surety could not avail of the bankruptcy stay.

In essence, a stay of proceedings against nonbankrupt parties requires that “[t]here must be an actual, as opposed to an alleged or potential, identity of interests, such that a judgment against the nonbankrupt parties would in fact be a judgment against the bankrupt party.”⁴¹ Courts have usually found such circumstances when the debtor company is obligated to indemnify its guarantor officer. For example, when a debtor company’s “corporate charter contain[ed] an indemnification clause, obligating [the company] to indemnify its officers for all legal claims arising out of acts performed in their capacity as [company] officers,” the United States District Court for the Southern District of New York held that the automatic stay would be extended to litigation against the officers, even to claims of fraudulent misrepresentation “made in their capacity as [company] officers.”⁴²

Similarly, when the City of Chicago sued numerous defendants of a joint venture that was guarantied by a bankrupt codefendant, the United States District Court for the Northern District of Illinois held that the automatic stay must extend to all codefendants because the guarantor “would be bound by a judgment in th[e] case regardless of whether it was involved in the litigation because [it is the joint venture’s] guarantor under the contract and agreed to indemnify the other defendants.”⁴³ Because of the agreement to indemnify, the court held that any “judgment in favor of the City could have a significant impact on [the guarantor’s] estate in its bankruptcy proceeding,” so “an extension of the stay to the solvent parties” was “clearly warranted.”⁴⁴

38. *Id.* at 436.

39. *Edwards v. Armstrong World Indus.*, 6 F.3d 312, 317 (5th Cir. 1993), *rev’d on other grounds by Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).

40. *Id.*

41. *Beran v. World Telemetry, Inc.*, 747 F. Supp. 2d 719, 724 (S.D. Tex. 2010).

42. *Lomas Fin. Corp. v. N. Tr. Co.* (In re *Lomas Fin. Corp.*), 117 B.R. 64, 68 (S.D.N.Y. 1990); *accord N. Star Contracting Corp. v. McSpedon* (In re *N. Star Contracting Corp.*), 125 B.R. 368, 371 (S.D.N.Y. 1991) (“[The president of the debtor company] has a right of indemnification with respect to [the debtor company] and thus any recovery by [the plaintiff] in the state court action will adversely affect [the debtor company’s] assets.”).

43. *Trimec, Inc. v. Zale Corp.*, 150 B.R. 685, 687 (N.D. Ill. 1993).

44. *Id.*

In yet another instance, the United States Bankruptcy Court for the Eastern District of Virginia held that, “[a]s a guarantor on the debtor’s note, [the limited partner] received a right to indemnification for any sums he became [liable] for as a result of his position as guarantor.”⁴⁵ Therefore, he was entitled to a stay of the creditor suit against him.⁴⁶

Examples are legion. Numerous cases nationwide apply and enforce the *A.H. Robins Co.* exception.⁴⁷ By understanding the nuances of applying the automatic stay to indemnified guarantors, practitioners add a powerful tool to their arsenal against to defend against creditor claims.

B. EXTENDING THE AUTOMATIC STAY UNDER THE COURT’S DISCRETION

A bankruptcy court “may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the bankruptcy code.⁴⁸ Bankruptcy courts accordingly have the discretionary power to temporarily stay a creditor’s suit against a nondebtor codefendant to “facilitate the reorganization process.”⁴⁹ In other words, courts may “issue a discretionary stay against a nonbankrupt codefendant even when an automatic stay is not appropriate under § 362.”⁵⁰ The stay imposed “may not be extended post-confirmation in the form of a permanent injunction that effectively relieves the nondebtor from its own liability to the creditor,”⁵¹ but may provide temporary relief even to an ordinary guarantor of the debtor’s payment obligation.⁵²

“A stay can be justified only if, based on a balancing of the parties’ interests, there is a clear inequity to the suppliant who is required to defend while another action remains unresolved and if the order granting a stay can be framed to

45. *First Nat’l Bank of Louisville v. Kanawha Trace Dev. Partners (In re Kanawha Trace Dev. Partners)*, 87 B.R. 892, 896–97 (Bankr. E.D. Va. 1988).

46. *Id.*

47. *E.g.*, *48th Street Steakhouse, Inc. v. Rockefeller Grp., Inc. (In re 48th Street Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987) (holding that extension of the automatic stay against nonbankrupt codebtors “is permissible where a non-debtor’s interest in property is *intertwined*, as in the present case, with that of a bankrupt debtor. If action taken against the non-bankrupt party would inevitably have an adverse impact on property of the bankrupt estate, then such action should be barred by the automatic stay.” (emphasis added)); *Harsh Inv. Corp. v. Bialac (In re Bialac)*, 712 F.2d 426, 432 (9th Cir. 1983) (holding that courts may not decline to extend the automatic stay protections “where it might frustrate the purposes of the Act” because of the property interest involved); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1491 n.3 (9th Cir. 1993) (collecting four cases); *Gillman v. Cont’l Airlines, Inc.*, 177 B.R. 475, 479 n.4 (D. Del. 1993) (collecting eight cases).

48. 11 U.S.C. § 105(a).

49. *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 760 (5th Cir. 1995) (quoting *Landsing Diversified Properties–II v. First Nat’l Bank & Tr. Co. of Tulsa (In re W. Real Estate Fund, Inc.)*, 922 F.2d 592, 601 (10th Cir. 1990)).

50. *Gigi’s Cupcakes, LLC v. 4 Box LLC*, No. 3:17-cv-3009-B, 2019 WL 1767003, at *1 (N.D. Tex. Apr. 22, 2019).

51. *In re Zale Corp.*, 62 F.3d at 760 (quoting *In re W. Real Estate Fund, Inc.*, 922 F.2d at 601).

52. *In re Seatco, Inc.*, 257 B.R. 469, 477 (Bankr. N.D. Tex. 2001) (“Kester and the Debtor enjoy an identity of interest. Kester guaranteed payment of the Debtor’s obligations to CIT. A suit against Kester is essentially a suit against the Debtor.”).

contain reasonable limits on its duration.”⁵³ This most often arises in cases involving individuals “who, for all intents and purposes, were the debtor, and where the debtor’s reorganization would rise or fall with that individual.”⁵⁴ Mere “overlap between shareholders and guarantors” is probably insufficient,⁵⁵ but critical involvement such as evidence that the nondebtor’s departure would cause key managers and customers to leave,⁵⁶ or that the debtor “will survive and creditors will be paid under the plan only if [the codefendant] is allowed to conduct the business of the [d]ebtor without distraction,”⁵⁷ have secured discretionary stays. Courts have also issued discretionary stays when the codefendant’s case “will involve at least many of the same witnesses and documentary proof, such that judicial economy would not be facilitated by resolving them in separate actions and potentially with separate trials.”⁵⁸ In other words, “when the allegations raised against co-defendants are ‘inextricably interwoven’ with claims against the debtor, making severance inappropriate, a court may stay proceedings against the non-debtor co-defendants until the § 362 stay is lifted against the debtor.”⁵⁹

Some courts analyze whether to grant a discretionary stay under the four traditional factors governing the issuance of preliminary injunction: (1) substantial likelihood of success, (2) a threat of irreparable injury, (3) that the harm to the movant outweighs the harm to the nonmovant, and (4) that the injunction will not disserve the public interest.⁶⁰ This approach might reflect these courts’ wariness of overbreadth in applying Section 105(a).⁶¹ However, the Bankruptcy Code does not itself impose such exacting requirements for enforcing the automatic stay.

C. EXTENDING THE AUTOMATIC STAY UNDER TEXAS STATE LAW

If a creditor sues a guarantor in state court, defense counsel’s first resort should be to that forum to move the state judge to hold that the automatic stay applies to the suit. Texas courts “possess the authority, absent a provision for

53. *GATX Aircraft Corp. v. M/V Courtney Leigh*, 768 F.2d 711, 716 (5th Cir. 1985).

54. *In re Couture Hotel Corp.*, 536 B.R. 712, 752 (Bankr. N.D. Tex. 2015).

55. *Id.*

56. *In re Seatco, Inc.*, 257 B.R. at 476.

57. *In re Bernhard Steiner Pianos USA, Inc.*, 292 B.R. 109, 117 (Bankr. N.D. Tex. 2002).

58. *Blundell v. Home Quality Care Home Health Care, Inc.*, No. 3:17-cv-1990-L-BN, 2017 WL 5889715, at *6 (N.D. Tex. Nov. 29, 2017).

59. *Abrams v. Integrated Pro Servs.*, No. CV 07-8426, 2015 WL 7458604, at *4 (E.D. La. Nov. 24, 2015) (quoting *Fed. Life Ins. Co. (Mut.) v. First Fin. Grp. of Tex., Inc.*, 3 B.R. 375, 376 (S.D. Tex. 1980)); *accord Galvan v. Rathmann & O’Brien, LLC*, No. DR-08-CV-035-AM/VRG, 2011 WL 13175208, at *1 (W.D. Tex. Mar. 30, 2011) (finding claims “inextricably intertwined”).

60. *E.g., In re Seatco, Inc.*, 257 B.R. at 477 (citing *Commonwealth Oil Ref. Co. v. EPA* (In re Commonwealth Oil Ref. Co.), 805 F.2d 1175, 1188–89 (5th Cir. 1986) (“[T]he legislative history of § 105 makes clear that stays under that section are granted only under the usual rules for the issuance of an injunction.”)); *Feld v. Zale Corp.* (In re Zale Corp.), 62 F.3d 746, 765 (5th Cir. 1995) (reversing the district court’s injunction because of its failure to meet the procedural rules like the initiation of an adversary proceeding under Federal Rule of Bankruptcy Procedure 7001, and its failure to analyze the injunction factors).

61. *See, e.g., United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986) (commenting that Section 105(a) does not “constitute a roving commission to do equity”).

exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.”⁶² “In our federal system, a state trial court’s interpretation of federal law is no less authoritative” than a federal court below the Supreme Court.⁶³ Texas courts “are free to interpret federal law independently, though in the first instance [they] typically seek guidance from among the decisions of the lower federal courts.”⁶⁴ Those decisions are not binding, “although they are received with respectful consideration.”⁶⁵

Texas courts have recognized that they are appropriate forums for a guarantor or other codebtor to contend that they are entitled to the protections of an automatic stay. For example, Texas courts have held that “non-debtor, non-bankrupt co-defendant[s]” can benefit from the *A.H. Robins Co.* line of cases.⁶⁶ Like federal authorities, state courts recognize that:

To be entitled to the exception to the rule, the co-defendant must demonstrate either that (1) an identity between the debtor and the co-defendant exists such that the debtor may be said to be the “real party defendant” and the judgment against the co-defendant will, in effect, be a judgment against the debtor, or (2) extending the stay against the co-defendant contributes to the debtor’s efforts toward rehabilitation.⁶⁷

Also, similarly to the federal courts, Texas courts hold that mere business affiliation and common ownership are insufficient to fall within the exceptions without a more formal tie like indemnification.⁶⁸ But any “action taken in violation of the automatic stay is void, not merely voidable,” so creditors must be wary.⁶⁹

Texas courts have applied the exception to vacate judgments rendered in violation of the automatic stay. For example, the Fifth Court of Appeals held that, when the trial court found that a nonbankrupt codefendant “was individually liable under theories of alter ego, controlling person and denuding of assets,” those claims belonged to the debtor corporation and so constituted “‘property of the estate’ . . . to which the [debtor corporation] automatic stay was applicable.”⁷⁰ Because the trial court rendered its judgment against the codefendant individual while the automatic stay was in place, the court

62. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

63. *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

64. *Kiefer v. Cont’l Airlines, Inc.*, 882 S.W.2d 496, 502 (Tex. App.—Houston [1st Dist.] 1994), *aff’d*, 920 S.W.2d 274 (Tex. 1996).

65. *Hassan v. Greater Hou. Transp. Co.*, 237 S.W.3d 727, 731 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

66. *Theobald v. Morris Ventures, LLC*, No. 04-12-00481-CV, 2013 WL 3422035, at *2 (Tex. App.—San Antonio July 3, 2013, no pet.) (mem. op.).

67. *Paine v. Sealy*, 956 S.W.2d 803, 807 (Tex. App.—Houston [14th Dist.] 1997, no pet.) (citing *Beutel v. Dall. Cnty. Flood Control Dist.*, No. 1, 916 S.W.2d 685, 692–93 (Tex. App.—Waco 1996, writ denied)).

68. *R. Hassell Builders, Inc. v. Texan Floor Serv.*, 546 S.W.3d 816, 826–27 (Tex. App.—Houston [1st Dist.] 2018, pet. dismissed); *In re Pegasus Funds TFN Trading Partners, LP*, 345 S.W.3d 175, 177 (Tex. App.—Dallas 2011, orig. proceeding).

69. *Cont’l Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988) (per curiam); *accord Howell v. Thompson*, 839 S.W.2d 92 (Tex. 1992) (orig. proceeding) (per curiam).

70. *Audio Data Corp. v. Monus*, 789 S.W.2d 281, 287 (Tex. App.—Dallas 1990, no writ).

concluded the judgment was “inoperative” and void.⁷¹ The First Court of Appeals extended the automatic stay to litigation over assets in which a debtor had “possessory and ownership interests.”⁷² Other Texas Courts of Appeals have routinely reached similar holdings.⁷³

On the other hand, at least one Texas court has held that nonbankrupt codebtors cannot brandish the automatic stay, and that only debtors may “challenge a proceeding on the basis that it violates the automatic stay.”⁷⁴ This holding is questionable because it rests chiefly on one passing comment by one Bankruptcy Court.⁷⁵ Nevertheless, counsel defending guarantors would be wise to reach out to debtor’s counsel to obtain debtor’s joinder in any motions in state court seeking to apply the automatic stay to proceedings against guarantors and codebtors.

D. A NOTE ABOUT *HARRINGTON V. PURDUE PHARMA L. P.*

While not directly relevant to a court’s power to extend the automatic stay to codefendants, the United States Supreme Court’s decision in *Harrington v. Purdue Pharma L. P.* warrants remark because “[t]he longstanding practice of staying litigation that could affect the bankruptcy estate is similar in important respects to non-debtor releases” that were at issue in the case.⁷⁶

In *Harrington*, the Court dealt with thousands of lawsuits against a pharmaceutical company and its predominant ownership and control by the Sackler family for their role in the opioid epidemic.⁷⁷ The Sacklers proposed to pay money into the bankruptcy estate if existing and potential civil claims against the Sacklers could be extinguished (even nonconsensually).⁷⁸ The bankruptcy court confirmed the Sacklers’ proposal, the district court reversed, and the Second Circuit reinstated a modified plan.⁷⁹ In a 5–4 decision, the Supreme Court reversed. The Court held that a bankruptcy court does not possess “a roving commission to resolve all such problems that happen its way”

71. *Id.*; see *Paine*, 956 S.W.2d at 807.

72. *Hou. Pipeline Co. v. Bank of Am., N.A.*, 213 S.W.3d 418, 427 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

73. See, e.g., *Paine*, 956 S.W.2d at 807; *Marroquin v. D & N Funding, Inc.*, 943 S.W.2d 112, 115 (Tex. App.—Corpus Christi–Edinburg 1997, no writ) (claim of alter ego, holding that the justifications for extending the automatic stay applied to the husband of a bankrupt debtor in a forcible detainer action).

74. *Lisanti v. Dixon*, 147 S.W.3d 638, 641–42 (Tex. App.—Dallas 2004, pet. denied) (collecting cases).

75. *Id.* at 642 (citing *Bamburg v. Townsend*, 35 S.W.3d 85, 90 (Tex. App.—Texarkana 2000, no pet.) (citing *Hadsell v. Estate of Fuel Oil Supply Terminaling, Inc. (In re Fuel Oil Supply & Terminaling, Inc.)*, 30 B.R. 360, 362 (Bankr. S.D. Tex. 1983) (“The automatic stay is for the benefit of the debtor and if it chooses to ignore stay violations other parties cannot use such violations to their advantage.” (emphasis added)))).

76. 603 U.S. 204, 275 (2024) (Kavanaugh, J., dissenting).

77. *Id.* at 210 (majority op.).

78. *Id.* at 211.

79. *Id.* at 213.

just because they are bankruptcy-related, even under the catchall provision of the applicable statute governing chapter 11 bankruptcy plan confirmations.⁸⁰

Justice Kavanaugh's opinion for the four dissenters highlights the relevance of *Harrington* to the extension of the automatic stay to nondebtors. The opinion points out that the automatic stay provision and the chapter 11 contents-of-plan provision at issue in *Harrington* are markedly similar because, "in each, the bankruptcy court invokes its broad jurisdiction and equitable power to 'augment' that authority, extending it to litigation and claims against nondebtors that might have a 'direct and substantial adverse effect' on the bankruptcy estate."⁸¹ Because the *Harrington* Court took a narrower view of bankruptcy court authority over nondebtors,⁸² it may portend the Supreme Court's skepticism over the power of the automatic stay to reach nondebtor proceedings.⁸³ Indeed, an article in the *Supreme Court Review* already laments that *Harrington* "will be disruptive to bankruptcy practice" by minimizing the proper role of bankruptcy courts in reaching all aspects of debtor liabilities.⁸⁴

III. FILING PROOFS OF CLAIM

Litigators must be wary to avoid procedural missteps that will preclude invocation of the *A.H. Robins Co.* exception. Attorneys representing guarantors who seek the protection of the automatic stay must be certain to timely file a proof of claim.

A right to indemnification is usually a pre-petition claim.⁸⁵ When an indemnification agreement or company bylaws conferring a right to indemnification are effective before the debtor's bankruptcy petition is filed, the "right to indemnification is a pre-petition 'claim' under the Bankruptcy Code."⁸⁶ This is true "even if the facts giving rise to actual liability did not occur" until after the petition was filed, after the bankruptcy court confirmed a plan, or even

80. *Id.* at 220. The courts below had invoked 11 U.S.C. § 1123(b)(6), which provides that the bankruptcy court may confirm a reorganization plan that includes "any other appropriate provision not inconsistent with the applicable provisions" of the bankruptcy code.

81. *Harrington*, 603 U.S. at 276 (Kavanaugh, J., dissenting) (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 310 (1995)).

82. *See id.* at 220–21 (majority op.) ("[A] bankruptcy court's powers are not limitless and do not endow it with the power to extinguish without their consent claims held by nondebtors (here, the opioid victims) against other nondebtors (here, the Sacklers).").

83. *See id.* at 220 (holding that bankruptcy courts may not operate "blind to the role other mechanisms (legislation, class actions, multi-district litigation, consensual settlements, among others) play in addressing" bankruptcy-related issues).

84. Anthony J. Casey & Joshua C. Macey, *Purdue Pharma and the New Bankruptcy Exceptionalism*, 2024 SUP. CT. REV. 365, 367 (2025); *see id.* at 391 n.122 (citing *In re Boy Scouts of Am.*, 642 B.R. 504, 574 (Bankr. D. Del. 2022), *aff'd in part, rev'd in part*, 137 F.4th 126 (3d Cir. 2025), *petition for cert. denied sub nom.*, *Lujan Claimants v. Boy Scouts of Am.*, No. 25-490, 2026 WL 79599, at *1 (U.S. Jan. 12, 2026)) (discussing the "dueling debtor" problem that would be created by nonbankrupt codefendants filing for bankruptcy)).

85. *See Trevino v. HSBC Mortg. Servs.* (In re Trevino), 535 B.R. 110, 149 (Bankr. S.D. Tex. 2015).

86. *Lycoming Engines v. Superior Air Parts, Inc.* (In re Superior Air Parts, Inc.), 486 B.R. 728, 739 (Bankr. N.D. Tex. 2012).

after discharge.⁸⁷ This means that, directors, officers, guarantors, and others who may claim indemnity against the debtor may have that entitlement erased upon confirmation of the debtor's bankruptcy plan.⁸⁸

Even if an indemnitee does not ultimately claim indemnification against the debtor, attorneys should consider filing a proof of claim to preserve client rights. The bankruptcy court will set a deadline by which proofs of claim must be filed, and there are only limited exceptions that permit tardy submissions.⁸⁹ Untimely proofs of claim will likely be disallowed.⁹⁰

In the absence of a proof of claim for indemnification against the debtor's bankruptcy estate, there is no nexus between the guarantor and the debtor that could theoretically diminish the bankruptcy estate. In the absence of a proof of claim, the debtor's liability to indemnify the guarantor is siloed from the guarantor's liability to satisfy the guaranty. Thus, there would be little justification to find an identity between the guarantor and the debtor, and thus no warrant to apply the *A.H. Robins Co.* exception to extend the automatic stay to proceedings against the guarantor. Attorneys representing guarantors must therefore be highly attentive to proof of claim deadlines.⁹¹ Communication with debtor's counsel to ensure timely filings to protect the debtor's guarantors is advisable.

IV. CONCLUSION

The automatic stay is a powerful tool to ensure that guarantors are entitled to the full protection of their valuable corporate indemnity.⁹² Indeed, the failure to invoke the automatic stay to shield a corporate officer or guarantor effectively nullifies that individual's indemnification rights.⁹³ Savvy defense counsel should prevent creditors from effectively draining the bankruptcy estate, and vindicate their client's right to indemnification, by knowledgeably applying federal and state law protections and by diligently following procedural guidelines.

87. *Id.*

88. *See id.* (“[B]ecause the Plaintiffs failed to file proofs of claim asserting their right to indemnification in Superior’s bankruptcy case, the Court concluded when granting the Original Motion to Dismiss that the Plaintiffs were unable to recover on those claims . . .”).

89. FED. R. BANKR. P. 3003(c)(3).

90. *See* 11 U.S.C. § 502(b)(9).

91. *See* 11 U.S.C. § 501.

92. *See* *United States v. Lowe*, 29 F.3d 1005, 1010 (5th Cir. 1994) (“[A]lthough [the corporate officer] is personally liable, he may be entitled to indemnity. Indeed, if [the corporation’s] officers or directors were not subject to personal liability for acts or omissions arising out of their corporate positions, there would be little reason for the indemnity clause.” (citation omitted)); *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 (Del. 2005) (“Indemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of that service.”); *In re DeMattia*, 644 S.W.3d 225, 230 (Tex. App.—Dallas 2022, orig. proceeding) (holding similarly under Texas law).

93. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1000 (4th Cir. 1986) (holding that, if an indemnitee is forced to pay for the debtor corporation’s debts, “the indemnitee will be unfairly mulcted . . . and his contract of indemnity in effect nullified”).