No. 18-___

IN THE
Supreme Court of the United States

CARL B. DAVIS, CHAPTER 13 TRUSTEE,
Petitioner,

v.

TYSON PREPARED FOODS, INC.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

By operation of law, when a debtor files a bankruptcy petition, a bankruptcy "estate" is created consisting of all of the debtor's property "wherever located and by whomever held." 11 U.S.C. §541. In addition, the Bankruptcy Code provides that the filing of a petition "operates as a stay, applicable to all entities, of . . . (3) any act to obtain possession of property of the estate . . . or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien . . .; [and] (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. §362(a). Five Courts of Appeals have held that these prohibitions include passively holding or obtaining an interest in property of the debtor or the estate. Thus, a creditor's passive retention of seized property or the creditor's passive acquisition of a lien violates the automatic stay. Two Courts of Appeals, including the court below, have held that these prohibitions do not encompass passively holding or obtaining an interest in property, but apply only to affirmative conduct. Thus the passive retention of seized property or the passive acquisition of a lien do *not* violate the stay. The question presented is:

Should the Court grant certiorari to resolve an entrenched and acknowledged conflict among the courts of appeals over whether section 362(a) applies to a creditor's passively holding or obtaining an interest in property of the debtor or the estate?

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is published at 740 Fed. Appx. 163, and is reproduced in the appendix at Pet. App. 1a. The opinion of the bankruptcy court is published at 2017 WL 2951439 (Bankr. D. Kan., July 7, 2017), and is reproduced at Pet. App. 5a.

JURISDICTION

The court of appeals entered its judgment on October 17, 2018. The court had jurisdiction under 28 U.S.C. §158(d). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The following statutory provisions are relevant to this matter:[1] 11 U.S.C. §§362(a), 501(a), 502(a), 541(a)(1), 542(a).

PRELIMINARY STATEMENT

This matter arises out of the Chapter 13 bankruptcy proceedings of Robert and Elizabeth Garcia (the "Garcias"). The Garcias commenced their bankruptcy case on March 11, 2013. Petitioner Carl B. Davis ("Petitioner" or "Trustee") is the Chapter 13 trustee appointed to serve in the matter. *See* 11 U.S.C. §1302(a). Among other things, the Trustee is responsible for supervising the case and objecting to claims, *see* 11 U.S.C. §§1302(b), 704(a)(5), including

[1] The relevant portions of these provisions are reproduced in Petitioner's Appendix. *See* Pet. App. 22a.

the claim asserted by Respondent, Tyson Prepared Foods, Inc. ("Tyson").

By operation of law, the commencement of the Garcia's bankruptcy case created a bankruptcy "estate" consisting of all of their property "wherever located and by whomever held." 11 U.S.C. §§541, 1306. In addition, the filing of their case triggered the automatic stay—a statutory injunction set out in section 362(a) of the Bankruptcy Code that generally bars debt collection activities against debtors like the Garcias, as well as a creditor's exercise of control over their assets and the creation of liens against their property. 11 U.S.C. §362(a); *see Board of Governors of Fed. Res. Sys. v. McCorp Fin., Inc.*, 502 U.S. 32, 39 (1991) ("The filing of a bankruptcy petition operates as an automatic stay of several categories of judicial and administrative proceedings" to obtain possession or ownership of a debtor's property outside the bankruptcy process). In relevant part, section 362(a) provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . (3) any act to obtain possession of property of the estate . . . or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien . . .; [and] (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. §362(a). The question presented is whether the automatic stay applies to a creditor's passively holding or obtaining an interest in property of the debtor or the estate, as the Second, Seventh, Eighth, Ninth, and Eleventh Circuits have held, or whether it applies only to

affirmative conduct, as the Tenth and D.C. Circuits have concluded.

In *In re Cowen*, 849 F.3d 943, 950 (10th Cir. 2017), the Tenth Circuit held that, after the debtor filed his bankruptcy petition, a creditor's passive act of retaining property seized before the bankruptcy filing did not violate the stay. In reaching its conclusion, the court acknowledged that the majority rule, adopted by most of the Courts of Appeals to have addressed the issue, is that a creditor's passive conduct may indeed violate the stay. *Id.* at 948-49. In contrast, the minority rule requires active conduct. *Id.* Rejecting the majority approach, the court stated that "we adopt the minority rule: only affirmative acts to gain possession of, or to exercise control over, property of the estate violate [the stay]." *Id.* at 950.

In its decision in this case, the Tenth Circuit followed its prior holding in *Cowen*, concluding that a lien that arises passively by operation of law after the debtors commenced their bankruptcy case likewise does not violate the automatic stay. Pet. App. at 3a-4a ("As it is undisputed that Tyson's subrogation lien arose solely by operation of law, the logic and the holding of *Cowen* compel our conclusion that the lien is valid and enforceable, and that no violation of the automatic stay has occurred."). The court reached this conclusion on the ground that, although *Cowen* involved section 362(a)(3) (applicable to a creditor's possession and exercise of control over property of the estate), and this matter involves section 362(a)(4) (applicable to the creation of liens against property of the estate), the relevant *dispositive* language is the same and must be interpreted in the same way: both

provisions require that the creditor's conduct must constitute an "act" of some kind, and, according to *Cowen*, passive conduct is not an "act." Pet. App. at 3a-4a & n.1 ("The common statutory language that stands at the center of both this case and *Cowen* appears frequently throughout § 362(a) as operative language for establishing the boundaries of the automatic stay. *See* 11 U.S.C. § 362(a)(3)-(6) ('any act . . .')."). Adhering to its prior decision in *Cowen*, the court below reasoned that "we, too, must read the statutory term 'act' to encompass only affirmative conduct on the part of the lienholder." *Id*.

Certiorari is warranted because the decision below conflicts irreconcilably with authoritative decisions of the Second, Seventh, Eighth, Ninth, and Eleventh Circuits. Contrary to the Tenth and D.C. Circuits, the Second, Seventh, Eighth, Ninth, and Eleventh Circuits take a broader view of the phrase "any act" as it appears in section 362 and interpret it to include passive acts. *See Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. Gen'l Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *State of California Emp. Dev. Dep't v. Taxel (In re Del Mission Limited)*, 98 F.3d 1147 (9th Cir. 1996); *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004). As these decisions make plain, the prohibitions of the automatic stay encompass not merely affirmative acts, but also such conduct as "passively holding onto an asset" notwithstanding the stay. *See Thompson*, 566 F.3d at 703.

Certiorari is further warranted because the decision below conflicts with this Court's precedents.

As this Court has explained, it is immaterial whether a creditor obtains property of the estate before or after bankruptcy is filed. *See United States v. Whiting Pools*, Inc., 462 U.S. 198, 203-05, 209 (1983) ("We conclude that the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization."). That is so, the Court explained, because "[b]oth the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate." *Id.* at 204. The Court then emphasized: "The Bankruptcy Code provides secured creditors various rights . . . and these rights *replace* the protection afforded by possession." *Id.* at 207 (emphasis added). Critically, the kind of conduct this Court identified as *within* the reach of, and modified by, the Code—mere possession of property of the estate—is precisely the kind of "passive" conduct the court below concluded falls *outside* the scope of the automatic stay. The decision below thus conflicts with the reasoning of *Whiting Pools*. *See also Midlantic Nat. Bank v. New Jersey Dept. of Envt'l Protection*, 474 U.S. 494, 504 (1986) (discussing the intended breadth of section 362).

Certiorari is further warranted because the question presented involves a vitally important and recurring issue of federal law. The automatic stay is foundationally critical to the operation of the entire bankruptcy system. *See* H.R. Rep. No. 95-595, at 340-41 (1977). Moreover, because the stay applies in *every* bankruptcy case, the correct interpretation of its scope is vital to the administration of bankruptcy

proceedings generally. *See* 11 U.S.C. § 103(a) (applying the provisions of Chapter 3 of the Bankruptcy Code, including section 362, to cases under Chapters 7, 11, 12, and 13 of the Code). Likewise, the issue is a recurrent one, as the depth of the conflict among the courts of appeals demonstrates.

Finally, certiorari is warranted because the decision below is wrong. Most fundamentally, it rests on a misunderstanding of the nature of the bankruptcy process and the role of the automatic stay in the orderly administration of bankruptcy cases. By adopting the minority rule, the court below has created a standard that impairs the rights and interests of debtors and creditors alike, while wrongly claiming a more faithful interpretation of the governing provisions of the Bankruptcy Code.

STATEMENT

As noted, the filing of a bankruptcy petition triggers the creation of a bankruptcy "estate" consisting of "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. §541(a)(1), including property of the debtor "wherever located and by whomever held . . . ," *id.* at §541(a). Thus, property of the debtor that a creditor seizes on the eve of bankruptcy becomes property of the estate, even though the property is otherwise legally in the creditor's possession pending foreclosure. *See United States v. Whiting Pools, Inc.*, 462 U.S. at 203-05, 209-11 (when a lienholder, including the IRS, seizes property, it remains property of the debtor pending foreclosure and becomes property of the estate upon the bankruptcy filing).

Critically, the creation of the estate is both substantively and jurisdictionally foundational. The jurisdiction of the bankruptcy court is fundamentally *in rem*, with all property of the estate constituted *in custodia legis*—in the custody of the court. *See, e.g., Tennessee Student Assistance Corp. v. Hood,* 541 U.S. 440, 447-48 (2004); *Straton v. New*, 283 U.S. 318, 321 (1931) (the jurisdiction of the bankruptcy court "is so far in rem that the estate is regarded as in custodia legis from the filing of the petition"); *Gross v. Irving Trust Co.*, 289 U.S. 342, 344-45 (1933). Thus, the commencement of a bankruptcy case not only consolidates the debtor's property into a single legal entity—the bankruptcy estate—it likewise places that property within the bankruptcy court's exclusive jurisdiction. *See Hood*, 541 U.S. at 447; *Straton*, 283 U.S. at 321 (bankruptcy jurisdiction "is exclusive"); *Gross*, 289 U.S. at 345; 28 U.S.C. §1334(e) (vesting "exclusive" bankruptcy jurisdiction over property of the estate).

In light of these provisions, together with the ancient principle of non-interference with property in the custody of a federal court, *see, e.g., Straton*, 283 U.S. at 321 (liens cannot be created against property in the custody of the court); *Collie v. Ferguson*, 281 U.S. 52, 55 (1930) (same), it is unsurprising that the filing of a bankruptcy petition also triggers an "automatic stay"—a statutory injunction that prevents most forms of debt collection activity against the debtor and the debtor's property (now property of the estate), including the creation of liens and the seizure of assets, in order to protect the debtor, the debtor's creditors, the integrity of the estate, and the bankruptcy court's exclusive *in rem* jurisdiction. In

particular, section 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of . . . (3) any act to obtain possession of property of the estate . . . or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien . . .; [and] (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. §362(a).

As is relevant here, these provisions protect the interests of debtors by, among other things, providing a "breathing spell from his creditors." S. Rep. No. 95-989, 95th Cong. 2d Sess., 57. They protect the creditors' interests by, among other things, preventing some creditors from obtaining payment ahead of others, prescribing instead an orderly process "under which all creditors are treated equally." *Id.* at 51. More specifically, section 362 "stays lien creation against property of the estate" because to "permit lien creation after bankruptcy would give certain creditors preferential treatment by making them secured instead of unsecured." *Id.* at 52. These provisions likewise protect the integrity of the estate and the bankruptcy court's exclusive jurisdiction by preventing the alteration of, or interference with, the estate's interest in the debtor's property.

In turn, a debtor's obligations are treated as "claims" against the bankruptcy estate, and a creditor holding a claim is entitled to file a proof of claim with the bankruptcy court. 11 U.S.C. §§101(5), 101(10), 501(a), 502; Fed. R. Bankr. P. 3001, 3002; *see Gardner*

v. New Jersey, 329 U.S. 565, 574 (1947); *Katchen v. Landy*, 382 U.S. 323, 336 (1966) ("bankruptcy . . . converts the creditor's legal claim into an equitable claim to a pro rata share of the *res*"). Further, section 542 directs the turnover of estate property by "an entity . . . in possession, custody, or control . . . of [such] property . . . unless such property is of inconsequential value or benefit to the estate." 11 U.S.C. §542(a); *see Whiting Pools*, 462 U.S. at 209 (IRS required to turn over seized property of the estate). Quite clearly, the provisions of the automatic stay are both central and foundational to the operation of bankruptcy law as a whole.

Background

On March 11, 2013, the Garcias filed a petition for relief under Chapter 13 of the Bankruptcy Code. Pet. App. 8a. In accordance with the provisions of Chapter 13, the Garcias were required to disclose their assets and file a plan that provided for the payment of their debts over time. One of the Garcias' assets was a personal injury claim eventually reduced to settlement in the amount of $45,000. *Id.* at 6a.

The personal injury claim arose from injuries Ms. Garcia suffered while working for Tyson, her employer. Specifically, Ms. Garcia slipped on a wet floor mat supplied by a third party vendor, Aramark. After the incident, which occurred on June 25, 2012, Ms. Garcia reported her injury to Tyson, and Tyson thereafter "began paying [Ms.] Garcia's medical expenses and other workers' compensation benefits." *Id.* at 8a. Tyson paid Ms. Garcia "workers compensation benefits of $27,641.31 before her bankruptcy and another $22,061.25 after she filed,"

with final payment occurring around June of 2014. *Id.* at 9a.

Shortly after "settl[ing] her workers compensation claim" with Tyson, Ms. Garcia filed a personal injury action against Aramark on June 25, 2014. *Id.* As the bankruptcy court explained, "Kansas workers compensation law permits an injured worker to receive workers compensation benefits from her employer *and* pursue a recovery by court action against the third party tortfeasor who caused the injury." *Id.* at 12a (citing Kan. Stat. Ann. § 44-504(a)). In 2016, Ms. Garcia "settled the Aramark lawsuit for $45,000." *Id.* at 10a.

The Garcias then sought the bankruptcy court's approval of the settlement on November 29, 2016, as required by applicable bankruptcy procedures, *see* Fed. R. Bankr. P. 9019, but Tyson objected. In particular, Tyson asserted that, by operation of law, it held a lien on the settlement owing to the workers' compensation payments it had previously paid to Ms. Garcia. As the bankruptcy court explained, "Kan. Stat. Ann. § 44-504(b) grants an employer that pays workers compensation benefits to an injured employee a right to subrogation and a lien against any recovery the injured worker obtains from a third party tortfeasor up to the amount of benefits paid by the employer." Pet. App. 12a.

In light of Tyson's objection, the bankruptcy court approved the personal injury "settlement and the payment of attorney's fees and expenses, but also ordered" $25,359.37 be held to cover Tyson's claim to the funds "pending further litigation concerning the validity of Tyson's lien." *Id.* at 10a. Thereafter, the

Trustee challenged the validity of Tyson's lien on the ground that the lien violated the automatic stay and so that the proceeds of the settlement could be used to fund the Garcias' Chapter 13 plan and pay the claims of creditors generally. While the litigation was pending, the Tenth Circuit handed down its decision in *Cowen*, which, as noted, held that only affirmative acts violate the automatic stay. *Id.* at 18a. Following *Cowen*, the bankruptcy court ruled in Tyson's favor, framing the dispositive issue as whether Tyson's lien on the personal injury claim was invalid because it violated the stay. *Id.* at 11a-13a.

In conducting its analysis, the bankruptcy court first characterized Tyson's lien as a statutory lien under section 101(53) of the Bankruptcy Code, 11 U.S.C. § 101(53),[2] that arose after the Garcias has filed their bankruptcy case (and thus after the automatic stay went into effect). Tyson's lien is properly a statutory lien because "[i]n interpreting [Kan. Stat. Ann.] § 44-504(b), the Kansas state courts have held that the lien arises automatically by operation of law when the injured worker obtains a recovery 'by judgment, settlement, or otherwise' from the third party tortfeasor." Pet. App. 14a (citing *Smith v. Russell*, 274 Kan. 1076, 1082 (2002); *Ballard*

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[2] The Bankruptcy Code provides a general definition of a lien: A "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37). The Code then divides liens into three distinct subcategories, statutory liens, judicial liens, and security interests. 11 U.S.C. §§ 101(53), (51), (36). A statutory lien is one "arising solely by force of a statute on specified circumstances or conditions." 11 U.S.C. § 101(53).

v. Dondlinger & Sons Const. Co., 51 Kan. App. 2d 855, 867-68 (2015)). And because Ms. Garcia did not settle her claim with Aramark until after the filing of the bankruptcy case, Tyson's lien thus arose after the automatic stay was in place. In general, a lien taken in violation of the automatic stay is void. *See Kalb v. Feuerstein*, 308 U.S. 433, 438 (1940) (actions taken in violation of bankruptcy law that interfere with the exclusive jurisdiction of the bankruptcy court over property of the debtor are "void").[3]

Following the court of appeals' decision in *Cowen*, however, the bankruptcy court concluded that Tyson's lien did not in fact violate the automatic stay. For purposes of interpreting the scope of the stay, the court observed that *Cowen* distinguished affirmative acts, which may violate the stay, and "[t]he act of passively holding onto an asset," which may not. Pet. App. 18a. Although *Cowen* involved section 362(a)(3) applicable to a creditor's possession and exercise of control over property of the estate, and this matter involves section 362(a)(4) applicable to the creation of liens against property of the estate, the court concluded that the difference was immaterial because "[s]ection 362(a)(3), (4), (5), and (6) each contain the phrase 'any act,'" and "[t]here is no reason to believe that the Tenth Circuit Court of Appeals would interpret the word 'act' in [section] 362(a)(4) differently than it did in section 362(a)(3)." *Id.* at 19a. The court concluded that, because Tyson's

[3] The Trustee has separately commenced an action to avoid Tyson's lien under a different provision of the Bankruptcy Code—an action that would not be necessary if Tyson's lien were void as violating the automatic stay.

"subrogation lien arose by operation of law, and without Tyson committing any affirmative post-petition act that breached [section] 362(a)(4)," the automatic stay was not violated. *Id.* at 20a.

On direct appeal to the Tenth Circuit, the court of appeals affirmed. *See* 28 U.S.C. §158(d). As the court explained, "[i]n *Cowen*, we construed the same statutory term—albeit for the purposes of 11 U.S.C. § 362(a)(3), rather than § 362(a)(4)—to encompass only affirmative conduct." Pet. App. 3a (citing *Cowen*, 849 F.3d at 948). Reasoning that "the same term must be construed in the same way within the same statute," *id.*, the court concluded (as it had in *Cowen*) that the term "act" should be limited "to encompass only affirmative conduct on the part of the lienholder," *id.* at 3a-4a; *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86 (2006) (the same words used in different parts of the same statute are presumed to have the same meaning). Accordingly it affirmed the bankruptcy court's decision that Tyson's lien did not violate the automatic stay because it "arose solely by operation of law," and not by virtue of any active conduct on Tyson's part. Pet. App. 4a.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because the decision below conflicts with the authoritative decisions of other courts of appeals that have concluded that the provisions of section 362(a) apply to both passive and active conduct. The decision below hews to the court's prior holding in *Cowen*, and thus deepens a divide among the courts of appeals regarding the proper scope of the automatic stay. Under the standard adopted by the Second, Seventh, Eighth, Ninth, and

Eleventh Circuits, Tyson's lien would violate the stay. Under the minority view adopted by the Tenth and D.C. Circuits, however, Tyson's lien does not. This Court's review is necessary to resolve this entrenched and intractable conflict among the courts of appeals.

In addition, certiorari is warranted because the decision below conflicts with this Court's precedents. Decades ago, this Court acknowledged in *Whiting Pools* that the IRS' "passive" conduct of merely holding property seized before bankruptcy fell within the Bankruptcy Code's remedial provisions, and affirmed a decision that the conduct was subject to the automatic stay. By recognizing the opposite—that passive conduct may not violate the stay—the decision below stands at odds with this Court's reasoning.

Certiorari is further warranted because the question presented is a vitally important issue of federal law. The automatic stay is essential to the successful operation of the bankruptcy system. Its proper construction materially affects the rights of debtors and creditors alike, as well as the integrity of the bankruptcy estate and the bankruptcy court's exclusive jurisdiction. It is likewise a recurring issue ripe for resolution.

Finally, the decision below is wrong. The standard adopted by the court below impairs the orderly functioning of the bankruptcy process and skews the treatment of creditors, creating an unwarranted and unauthorized exception to the principle of equality of distribution that the automatic stay seeks to promote. Although as a general rule creditors may not take affirmative action to create, perfect, or enforce a lien on property of the estate, the decision below allows

them to essentially jump the line if their lien rights arise passively. This result is clearly at odds with Congress's carefully crafted system, as well as centuries of bankruptcy precedent. For these reasons, the Trustee respectfully requests that the Court grant certiorari review in this matter.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The decision below conflicts irreconcilably with authoritative decisions of the Second, Seventh, Eighth, Ninth, and Eleventh Circuits. *See, e.g.*, *Weber v. SEFCU (In re Weber)*, 719 F.3d 72 (2d Cir. 2013); *Thompson v. Gen'l Motors Acceptance Corp., LLC*, 566 F.3d 699 (7th Cir. 2009); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *State of California Emp. Dev. Dep't v. Taxel (In re Del Mission Limited)*, 98 F.3d 1147 (9th Cir. 1996); *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004).

In *Weber*, the debtor financed his truck with a loan from a creditor. 719 F.3d at 74. Under the terms of the loan agreement, the debtor granted a lien on the truck to the creditor to secure repayment of the loan, which lien permitted the creditor to "repossess Weber's vehicle upon default." *Id.* After the debtor defaulted, the creditor repossessed the vehicle. Four days later, the debtor filed a Chapter 13 bankruptcy petition. *Id.* Notably, repossession of the vehicle did not divest the debtor of his ownership interest in the truck; it simply permitted the creditor to possess the vehicle pending foreclosure. Thus, when the debtor filed for bankruptcy, the truck became property of the debtor's bankruptcy estate notwithstanding the

creditor's possession. Following this Court's analysis in *Whiting Pools*, the Second Circuit held that, upon the bankruptcy filing, the creditor had a duty to turn over the vehicle to the estate. *See id.* at 79. It further held that the creditor's passive failure to do so constituted a violation of the automatic stay as an act to "'exercise control' over the property of the estate." *Id.* at 79 (quoting 11 U.S.C. § 362).

The Second Circuit focused its analysis on the fact that, by retaining possession of the truck, the creditor was impermissibly exercising control over estate property. *Id.* at 79-80. But the court also found support for its holding in the 1984 amendments to the Bankruptcy Code, which "broadened the already sweeping provisions of the automatic stay even further to prohibit expressly not only 'acts to obtain possession' of property of the estate, but also 'any act . . . to exercise control over the property of the estate.'" *Id.* at 80 (citing Pub. L. No. 98-353, 98 Stat. 333, 371). The court viewed this expansion as a further effort to ensure that the debtor's property is handed over for orderly bankruptcy administration. *Id.* Citing precedent from the Seventh Circuit, the court stated that, "[a]lthough Congress did not provide an explanation of that amendment, the mere fact that Congress expanded the provision to prohibit conduct above and beyond obtaining possession of an asset suggests that it intended to include conduct by creditors who seized an asset pre-petition." *Id.* (quoting *Thompson*, 566 F.3d at 702). Any other outcome, the Second Circuit determined, would "place on the debtor or trustee the burden of undertaking a series of adversary proceedings to pull together the bankruptcy estate"—an outcome inconsistent with

Whiting Pools and the turnover provisions of section 542. *Id.*

The Seventh Circuit arrived at the same conclusion in *Thompson v. Gen'l Motors Acceptance Corp., LLC*, *supra*. There the court held that a creditor's failure to return a vehicle it had lawfully repossessed before the debtor filed for bankruptcy also violated the automatic stay. 566 F.3d at 700. Like the Second Circuit, the court based its analysis on "a plain reading of the Bankruptcy Code's provisions," the strong directives of *Whiting Pools*, and "various practical considerations" involving the rights of debtors and the orderly operation of the bankruptcy system. *Id.*

In particular, the court rejected the argument that a creditor must do more than passively hold a previously repossessed vehicle in order to violate the stay, such as by affirmatively "selling the car," concluding that such an "interpretation is at odds with the plain meaning of 'exercising control.'" *Id.* at 702 (citing Merriam-Webster's Collegiate Dictionary (11th Ed. 2003)). Rather, the mere act of "[h]olding onto an asset" or "refusing to return it" properly constitutes a form of acting in a way that exercises control. *Id.* Citing *Whiting Pools*, the Seventh Circuit also found that the creditor's interpretation would disserve the goals Congress envisioned for its bankruptcy scheme. *Id.* And like the Second Circuit, the Seventh Circuit read into the 1984 amendments an intention to prohibit passively "'exercising control' over any asset belonging to the bankruptcy estate" as distinct from affirmative action "to obtain possession." *Id.* In addition to these decisions of the Second and

Seventh Circuit, the Eighth, Ninth, and Eleventh Circuits have likewise adopted the view that passive conduct may violate the automatic stay. *See Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773 (8th Cir. 1989); *State of California Emp. Dev. Dep't v. Taxel (In re Del Mission Limited)*, 98 F.3d 1147, 1151 (9th Cir. 1996) (holding the "State's continued retention of the disputed taxes" violated the automatic stay provision); *In re Rozier*, 376 F.3d 1323 (11th Cir. 2004). As noted, the court below acknowledged this line of reasoning as the "majority" approach. *In re Cowen*, 849 F.3d at 948-49.

The Ninth Circuit's decision in *Del Mission* illustrates the conflicting approaches of the courts of appeals in a somewhat different context. There, the court addressed a dispute over California's refusal "to approve the sale of Chapter 7 debtor Del Mission Limited's … liquor license until it paid all outstanding taxes and interest…." 98 F.3d at 1149. The bankruptcy court ruled that California's refusal to approve the sale violated the automatic stay and ordered the state to return the disputed tax payments to Del Mission. *Id.* Despite the bankruptcy court's order, however, the State refused to timely return the funds. *Id.* at 1150.

The Ninth Circuit held "that the State's [continued] retention of the disputed taxes did violate the automatic stay." *Id.* Referencing the 1984 bankruptcy amendments, which it viewed "as broadening the scope of § 362(a)(3) to proscribe the mere knowing retention of estate property," the court held that a creditor's passive act of retaining property already in its possession violates the plain language

of the automatic stay. *Id.* at 1151. In so holding, the Ninth Circuit recognized the automatic stay's linkage to the turnover provision. *See id.* ("11 U.S.C. § 542(a) provides that an entity in possession of estate property 'shall' deliver such property to the trustee."). Citing *In re Knaus*, the Ninth Circuit affirmed that "the underlying purpose of the automatic stay . . . is to alleviate the financial strains on the debtor," a purpose that is effected by placing "the onus to return estate property . . . upon the possessor" and not the debtor. *Id.*

Knaus similarly involved a creditor's retention of property seized from the debtor prior to the bankruptcy filing. There the Eighth Circuit recognized that, without the stay and the "supervision or oversight by the bankruptcy court" that it facilitates, debtors would face great difficulty in continuing their business or conducting their affairs. 889 F.2d at 774-75 ("The automatic stay is fundamental to the reorganization process, and its scope is intended to be broad.") (quoting *SBA v. Rinehart*, 887 F.2d 165 (8th Cir. 1989)). The court likewise observed that the passive act of retaining the debtor's property is as deleterious to the smooth functioning of the bankruptcy process as an affirmative act of taking property outright. *See id.* at 775. Applying these principles, the Eighth Circuit held that the creditor's retention of the debtor's property after the debtor filed for bankruptcy relief violated the automatic stay. *Id.*

Contrary to the consistent and well-reasoned opinions that comprise the majority approach, the Tenth Circuit's decision below follows the court's own

prior decision in *Cowen*. As noted, *Cowen* held that a creditor's passively retaining the debtor's property did not amount to an "act" exercising control over the property, and thus did not violate the automatic stay. 849 F.3d at 950. In conducting its analysis, *Cowen* focused on the word "act," observing that the ordinary meaning suggests "tak[ing] action" or "do[ing] something." *Id.* at 949. Based on its sense of what constitutes an act, the court opined that section 362(a)(3) "stays entities from *doing* something to . . . exercise control over the estate's property. It does not cover 'the act of passively holding onto an asset.'" *Id.* (quoting *Thompson*, 566 F.3d at 703). It likewise disagreed with the majority that the 1984 amendments reflected any congressional intent to sweep passive conduct under the purview of the automatic stay. In particular, it noted the absence of a congressional explanation for the 1984 amendments, and held that those changes "are equally 'consonant' with another, less sweeping conclusion." *Id.*

Rejecting the majority approach, the Tenth Circuit instead adopted the minority rule that affirmative conduct is required to demonstrate a violation of the stay. *See id.* at 950. Although the court's holding plainly conflicts with the majority approach, it is fully consistent with the view taken by the D.C. Circuit in *United States v. Inslaw, Inc.*, 932 F.2d 1467 (D.C. Cir. 1991). There the court also restricted the scope of the stay, rejecting an argument that a creditor's continued use of the debtor's intellectual property rights violated its provisions. 932 F.2d at 1472.

As these decisions indicate, the correct legal standard for determining stay violations is an important and recurring issue. Moreover, the conflict among the courts of appeals over the correct legal standard is widespread and unlikely to resolve itself absent this Court's intervention. Further, this case presents an ideal vehicle to resolve the conflict because the court below disposed of the question exclusively as an issue of law. Finally, the resolution of the question is outcome-determinative—as the court below observed, resolution of the Trustee's objection to Tyson's lien turns on whether *Cowen* properly construed the scope of the automatic stay. *See* Pet. App. 2a-4a.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

Certiorari is also warranted because the decision below conflicts with this Court's prior analysis of the proper scope and purpose of various remedial provisions of the Bankruptcy Code. *See Whiting Pools*, 462 U.S. at 202-03, 208-09; *see also Midlantic Nat. Bank* 474 U.S. at 504 (recognizing the breadth of the automatic stay provision). In *Whiting Pools*, the Court recognized that a creditor in possession of property of the estate is subject to the stay and held that the creditor may be compelled to turnover that property under section 542 of the Bankruptcy Code, 11 U.S.C. § 542(a). *Whiting Pools*, 462 U.S. at 211-212. In so holding, the Court affirmed the bankruptcy court's decision in that case, which had relied on the automatic stay as a basis for compelling return of the property. *See id.* at 201.

Although *Whiting Pools*—which was decided prior to the 1984 bankruptcy amendments—focused primarily on the import of section 542, it also rejected the idea that creditors who simply retain seized property are necessarily immune from the Code's remedial reach. As the Court observed, it is immaterial whether a creditor obtains property of the estate before or after bankruptcy is filed. *See* 462 U.S. at 203-05, 209 ("We conclude that the reorganization estate includes property of the debtor that has been seized by a creditor prior to the filing of a petition for reorganization."). That is so, the Court explained, because "[b]oth the congressional goal of encouraging reorganizations and Congress' choice of methods to protect secured creditors suggest that Congress intended a broad range of property to be included in the estate." *Id.* at 204. The Court then emphasized: "The Bankruptcy Code provides secured creditors various rights . . . and these rights replace the protection afforded by possession." *Id.* at 207. Notably, the kind of conduct the Court identified as *within* the reach of, and modified by, the Code—mere possession of property of the estate—is precisely the kind of "passive" conduct the court below concluded falls *outside* the scope of the stay. The decision below thus conflicts with the reasoning of *Whiting Pools*.

As various courts of appeals have recognized, the turnover and automatic stay provisions are closely aligned. *See Weber*, 719 F.3d at 76 ("[T]he automatic stay provisions of section 362 work with sections 541 and 542 to shelter the debtor's estate from action by creditors, enabling the debtor to get the relief and fresh start that are among the goals of the bankruptcy regime.") (citing H.R. Rep. 95-595 at 340-41);

Thompson, 566 F.3d at 702 ("The primary goal of reorganization bankruptcy is to group *all* of the debtor's property together in his estate such that he may rehabilitate his credit and pay off his debts. . . .") (citing *Whiting Pools*, 462 U.S. at 203-04); *In re Del Mission Ltd.*, 98 F.3d at 1151 (explicitly linking section 542(a) with section 362(a)(3)). As these courts have recognized, the turnover provisions of section 542(a) and the automatic stay provisions of section 362(a) are two sides of a single coin. Both operate to modify the rights and duties of creditors and debtors for the sake of the orderly administration of the bankruptcy process.

Consistent with this interplay, *Whiting Pools* further recognized the "congressional goal of encouraging reorganizations" and observed "that Congress intended a broad range of property to be included in the estate . . . ." *Id.* at 204. Such property includes "property of the debtor repossessed by a secured creditor," *id.* at 206, because a property interest is broader than, and not coterminous with, a possessory interest. *Id.* at 205, 210-11. And because creditor possession of property does not equate to creditor ownership, *id.* at 210-11, a creditor must await and abide the bankruptcy proceedings to resolve the proper disposition of the property. Without this approach—if creditors could unilaterally seize, retain, or create liens on property—the current bankruptcy system would be substantially impaired in its operation. *See id.* at 206-07 ("As does all bankruptcy law, § 542(a) modifies the procedural rights available to creditors to protect and satisfy their liens," and the "Code provides secured creditors various rights . . .,

and these rights replace the protection afforded by possession."); *see also Weber*, 719 F.3d at 81-82.

As the foregoing illustrates, the court below adopted an approach that is fundamentally inconsistent with this Court's reasoning in *Whiting Pools*. Accordingly, this Court's review is warranted.

III. THE QUESTION PRESENTED IS A VITALLY IMPORTANT QUESTION OF LAW.

Certiorari is further warranted because the question presented involves a profoundly important issue. The automatic stay is essential to the sound functioning of the entire bankruptcy system. *See* H.R. Rep. No. 95-595, at 340-41 (1977). It arises in every bankruptcy case as a primary means to protect the debtor's property, the competing rights of creditors, the integrity of the estate, and the exclusive jurisdiction of the bankruptcy court over the debtor's and the estate's property.

As the conflicting decisions of the courts of appeals demonstrates, the proper interpretation of the scope of the automatic stay dramatically impacts the rights of the parties with various competing interests. *See Thompson*, 566 F.3d at 702 (citing *Whiting Pools*, 462 U.S. at 203-04). The facts of *Cowen* are illustrative. There the property in question consisted of vehicles the debtor needed to operate his business. Following the debtor's filing of his bankruptcy case, the individuals who had repossessed the vehicles refused to return them. As a result, the debtor was forced to pursue an adversary proceeding to recover the vehicles, but in the meantime was unable to generate

income owing to his inability to use the vehicles. *See Cowen*, 849 F.3d at 945-46. The effect was prejudicial not only to the debtor, but also the administration of his case: "[W]ithout the trucks, Mr. Cowen had no regular income, which rendered him ineligible for Chapter 13 relief" and caused "the bankruptcy court [to] dismiss[] the underlying bankruptcy case." *Id.* at 946. It was likewise prejudicial to the debtor's other creditors. Without income, the debtor was unable to formulate or fund a repayment plan for the purpose of paying claims generally.

As numerous courts have recognized (including this Court in *Whiting Pools*), one of the main points of the automatic stay is to prevent precisely this kind of impairment of the bankruptcy system. Yet the Tenth Circuit's decisions in *Cowen* and in the case below essentially sanction it, so long as the creditor's retention of the property or acquisition of a lien is merely "passive." The better view is the majority approach, which leverages the injunctive authority of the automatic stay to prevent the passive sabotage of the bankruptcy system by, for example, placing "the onus to return estate property . . . upon the possessor" rather than on the debtor to recover it. *In re Del Mission*, 98 F.3d at 1151.

Under the minority rule adopted by the court below, property of the estate is protected only from the effects of active conduct. In contrast, the majority rule protects the estate, as well as the larger processes of the bankruptcy system as a whole, from both active and passive effects that threaten its integrity and operation. Because of the importance of the question presented, this Court's review is warranted.

IV. THE DECISION BELOW IS WRONG.

Finally, this Court's review is warranted because the decision below improperly unsettles longstanding bankruptcy precedents. As noted, it is a fundamental (and ancient) principle of bankruptcy law that creditors may not interfere with, and liens may not be created on, property of the bankruptcy estate subject to the bankruptcy court's exclusive jurisdiction and control. *See, e.g., Straton v. New*, 283 U.S. at 321 (1931). Consistent with this principle, section 362(a) expressly proscribes "(3) any act to obtain possession of property of the estate . . . or to exercise control over property of the estate; (4) any act to create, perfect, or enforce any lien against property of the estate; (5) any act to create, perfect, or enforce against property of the debtor any lien . . .; [and] (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." 11 U.S.C. §362(a). Following *Cowen*, however, the Tenth Circuit has adopted a legal standard that sanctions what bankruptcy law has heretofore always denied: that a creditor may indeed obtain a lien on property of the estate so long as the lien arises passively. That is not only at odds with the letter and spirit of section 362(a), it is fundamentally contrary to the policies the automatic stay promotes as well as the history of how bankruptcy law treats and administers property of the estate.

Cowen itself clearly recognized that it was following a minority approach. The court justified its decision primarily on the basis of a dictionary definition of the term "act." *See Cowen*, 849 F.3d at 949. While chiding the majority rule as "driven more

by 'practical considerations,' *Weber*, 719 F.3d at 80, and 'policy considerations,' *Thompson*, 566 F.3d at 703, than a faithful adherence to the text," *Cowen*, 849 F.3d at 948-49, the court's analysis actually ignored much of the larger body of evidence—both textual and otherwise—that effectively refutes its interpretation. Because the minority rule adopted by the court below is contrary to the text of the Code viewed in proper context, as well as settled principles of bankruptcy law and the sound administration of the bankruptcy system, certiorari is warranted.

CONCLUSION

For the foregoing reasons, the Trustee respectfully requests that the Court grant certiorari review of the decision below.

Respectfully submitted,

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Dated: January 14, 2019

APPENDIX

APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED OCTOBER 17, 2018

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 17-3247
(D.C. No. 6:17-CV-01207-JTM).
(D. Kan.).

In re: ROBERT PHILLIP GARCIA;
ELIZABETH PAULINE GARCIA,

Debtors.

CARL B. DAVIS, CHAPTER 13 TRUSTEE,

Petitioner-Appellant,

v.

TYSON PREPARED FOODS, INC.,

Respondent-Appellee.

October 17, 2018, Filed

Before TYMKOVICH, Chief Judge, HOLMES, and PHILLIPS, Circuit Judges.

Appendix A

ORDER AND JUDGMENT*

In this appeal from the bankruptcy court, Carl Davis, a Chapter 13 Trustee, asks us to hold that the so-called "automatic stay" contained within 11 U.S.C. § 362(a) encompasses not only affirmative conduct against the property of the bankruptcy estate, but also any liens that may nonetheless arise in the absence of affirmative conduct. According to the Trustee, Tyson Prepared Foods's lien—which arose in the aftermath of post-petition worker-compensation payments to the debtor—violates the automatic stay.

In an adversary proceeding initiated by the Trustee, the bankruptcy court relied on our decision in *WD Equip., LLC v. Cowen (In re: Cowen)*, 849 F.3d 943 (10th Cir. 2017), to conclude that Tyson's subrogation lien was both valid and enforceable. In *Cowen*, we held the meaning of "act" for the purposes of 11 U.S.C. § 362(a)(3) is limited to affirmative conduct. *Id.* On appeal, both parties concede that *Cowen* controls the outcome of this case. But the Trustee nonetheless asks this panel to reconsider *Cowen*, or—at a minimum—to call its reasoning into question.

Absent *en banc* review or intervening Supreme Court precedent, it is well-settled that one panel of the Tenth Circuit cannot overturn the work of another. *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) ("The

* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

precedent of prior panels which this court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law."). Since the Trustee argues only that *Cowen* was wrongly decided, this principle marks both the beginning and the end of our inquiry.

In *Cowen*, we construed the same statutory term—albeit for the purposes of 11 U.S.C. § 362(a)(3), rather than § 362(a)(4)—to encompass only affirmative conduct. 849 F.3d at 948.[1] Both parties concede that the same term must be construed in the same way within the same statute, in keeping with well-recognized rules for statutory interpretation. *Cf.* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, 170-74 (2012) (on the "Presumption of Consistent Usage").

Accordingly, when construing the text of § 362(a)(4) at issue in this case—which proscribes "any act to create, perfect, or enforce any lien"—we, too, must read the statutory term "act" to encompass only affirmative

1. The common statutory language that stands at the center of both this case and *Cowen* appears frequently throughout § 362(a) as operative language for establishing the boundaries of the automatic stay. *See* 11 U.S.C. § 362(a)(3)-(a)(6) ("any act . . ."). The statutory provision at issue in *Cowen* reads "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The statutory provision at issue here reads "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4).

conduct on the part of the lienholder. As it is undisputed that Tyson's subrogation lien arose solely by operation of law, the logic and the holding of *Cowen* compel our conclusion that the lien is valid and enforceable, and that no violation of the automatic stay has occurred.[2]

The judgment of the bankruptcy court is accordingly AFFIRMED.

ENTERED FOR THE COURT

Timothy M. Tymkovich
Chief Judge

2. In the event this panel were so inclined to revisit *Cowen*, Tyson maintains several alternative grounds for distinguishing this case. At oral argument, counsel emphasized that—unlike in other cases that address this issue—the underlying financial transactions here took place *post*-rather than pre-petition, such that Tyson's payments to the debtor had the effect of benefitting the bankruptcy estate. In briefing, Tyson likewise contends that 11 U.S.C. § 362(a) is not applicable to the facts of this case because § 362(a) stays only the acts of "entities," rather than claims arising solely by operation of law. We need not reach these questions since *Cowen* controls regardless.

APPENDIX B — OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS, FILED JULY 7, 2017

UNITED STATES BANKRUPTCY COURT
D. KANSAS

Case No. 13-10458
Adv. No. 17-5006

IN RE: ROBERT PHILLIP GARCIA,
ELIZABETH PAULINE GARCIA,

Debtors.

CARL B. DAVIS, CHAPTER 13 TRUSTEE,

Plaintiff,

vs.

TYSON PREPARED FOODS, INC.,

Defendant.

July 7, 2017, Decided

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

Robert E. Nugent, United States Bankruptcy Judge.

Appendix B

When Kansas workers are injured on the job, the Kansas Workers Compensation law requires their employers to cover their medical expenses and lost wages. If a third party caused the worker's injury, the worker can sue and the employer is subrogated to whatever recovery "by judgment, settlement, or otherwise" the worker receives and a lien attaches to that recovery by operation of law.[1] Whether the creation of that lien violates the automatic stay of "any act" to create, perfect or enforce any lien against property of the estate that a worker's bankruptcy triggers is the issue in this case.[2]

Before she filed this bankruptcy case, Elizabeth Garcia slipped on a wet floor mat and fell while working for Tyson Prepared Foods, Inc. ("Tyson"). Aramark Services had placed the mat at her workplace. After settling her workers compensation claim against Tyson, and after filing bankruptcy, Garcia sued Aramark for her injuries, settling her personal injury claim for $45,000. Now Tyson claims a right of subrogation and a lien against the settlement proceeds to recoup the $22,061.25 in workers compensation benefits it paid her post-petition. The chapter 13 trustee contends that Tyson's lien never attached, or if it did, that it is void as having being created in violation of the automatic stay. Because Tyson's subrogation lien arose by operation of law when Garcia settled with Aramark, and not because of any affirmative act by Tyson, neither the right of subrogation nor the lien violated the automatic stay and Tyson's statutory lien on the Aramark recovery is not void.[3]

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1. KAN. STAT. ANN. § 44-504(b) (2000).

2. 11 U.S.C. § 362(a)(4).

3. The Chapter 13 Trustee Carl Davis appears by his attorney Karin N. Amyx. Tyson Prepared Foods, Inc. appears by its attorney Michael D. Fielding.

Appendix B

Summary Judgment Standards

Summary judgment is appropriate if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. An issue of fact is material if under the substantive law it is essential to the proper disposition of the claim.[4] Only disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. Substantive law identifies which facts are critical and which facts are irrelevant.[5] Even where the material facts are uncontroverted, those facts must demonstrate that the movant is entitled to judgment under the applicable law.[6] Because this proceeding requires the Court to interpret and apply the Bankruptcy Code's automatic stay provision and the Kansas workers compensation lien statute to the uncontroverted facts, it is particularly suited for disposition by summary judgment.[7]

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4. Fed. R. Civ. P. 56(a). Fed. R. Bankr. P. 7056 makes Rule 56 applicable in adversary proceedings. *See Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d 1153, 1160 (10th Cir. 2011).

5. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

6. *See Clifton v. Craig*, 924 F.2d 182, 183-84 (10th Cir.1991) (if material facts are not in dispute, "we must next determine if the substantive law was correctly applied."); *Black v. Baker Oil Tools, Inc.*, 107 F.3d 1457, 1460 (10th Cir. 1997).

7. *Thomas v. Metropolitan Life Ins. Co.*, 631 F.3d at 1160 (Statutory interpretation is a matter of law appropriate for resolution on summary judgment).

Appendix B

Facts

Elizabeth Garcia was working at Tyson Prepared Foods, Inc.[8] on June 25, 2012, when she slipped and fell on a wet floor mat that Aramark had supplied at her work place. When she reported her injury, Tyson began paying Garcia's medical expenses and other workers' compensation benefits as required by Kansas law. After Garcia completed medical treatment for her injury (and after she filed this bankruptcy case), she and Tyson settled her workers compensation claim on June 23, 2014 for a final lump sum payment of $20,000, $13,590.10 of which represented compensation for her permanent partial disability.

Before that, and apparently unbeknownst to Tyson or the workers compensation system, Garcia and her husband filed this chapter 13 bankruptcy on March 11, 2013. She didn't disclose her pending workers compensation claim or her potential personal injury claim against Aramark in the schedules, but she did note in the Statement of Current Monthly Income that she was receiving $1,423 monthly for "Workers Comp."[9] But Garcia also represented in her Statement of Financial Affairs that her "Workers

8. Tyson Prepared Foods, Inc. is a subsidiary of Tyson Foods, Inc., which is self-insured and pays the worker's compensation claims filed by its employees and those of its subsidiaries. For ease of reference, the court will use Tyson to describe either entity, depending upon the context.

9. Doc. 1, pp. 65.

Comp." benefits ended in February 2013.[10] In fact, Tyson paid Garcia workers compensation benefits of $27,641.31 before her bankruptcy and another $22,061.25 after she filed. The Garcias' second amended chapter 13 plan was confirmed on September 4, 2013 and provided for them to make monthly plan payments of $874.00 over sixty months. Tyson didn't learn of Garcia's bankruptcy until 2016.[11]

On June 25, 2014, two days after Garcia settled her workers compensation claim with Tyson, she sued Aramark in state court and Aramark removed the case to the United States District Court for the District of Kansas.[12] The chapter 13 trustee learned of the Aramark lawsuit in late August of 2015 and on November 5, 2015 filed a motion for turnover of any lawsuit recovery "by way of settlement, judgment or otherwise" as property of the estate.[13] Debtors amended Schedule B on November

10. *See* Doc. 1, p. 32, No. 2. This representation was inaccurate. Tyson paid Garcia over $22,000 in workers compensation benefits during the pendency of her bankruptcy case, in addition to the $20,000 final settlement of her workers compensation claim.

11. The affidavit of Lisa Lein, Tyson's workers compensation Claims Supervisor, states that Tyson was unaware of Garcia's bankruptcy until 2016, when she learned of it from Aramark. Adv. Doc. 6-1, p. 3 at ¶ 13. The trustee does not controvert this fact. *See* Tyson Fact ¶ 18, Adv. Doc. 6, p. 6 and Trustee's Response, Adv. Doc. 9, p. 4, ¶ 18.

12. There is nothing in the summary judgment record to show that Garcia gave Tyson notice of the Aramark lawsuit to permit it to intervene and participate in the action as contemplated by § 44-504(b).

13. Doc. 44.

9, 2015 to disclose that Garcia "*may* have a slip and fall case against Aramark; however she had received workers comp benefits for the injury and the workers comp carrier [sic] has claimed a lien against any personal injury case relating to the same issue."[14] On February 10, 2016, the Court granted the turnover motion without objection and directed the debtors to apply for bankruptcy court approval of the employment of Melinda G. Young, their special counsel, to represent Ms. Garcia in the Aramark lawsuit. Ms. Young's employment was approved and, in 2016, she settled the Aramark lawsuit for $45,000.

On November 29, 2016, the debtors filed a motion for approval of the compromise under Fed. R. Bankr. P. 9019 and to allow Garcia's attorney's fees and expenses in the Aramark suit. Tyson objected, asserting its subrogation and lien for $22,061.25 of post-petition workers compensation benefits it had paid to or on Garcia's behalf.[15] The Court approved the settlement and the payment of attorney's fees and expenses, but also ordered that Ms. Young hold the remaining $25,359.37 of the Aramark settlement proceeds in her trust account pending further litigation concerning the validity of Tyson's lien. The trustee commenced this adversary proceeding to determine the validity of Tyson's subrogation lien. In his complaint, the trustee asserted only that the lien had either never attached because the settlement had yet to be approved or, if the lien had attached, that it is void because Tyson

14. Doc. 46. Emphasis added.

15. Doc. 65, 68.

created it post-petition in violation of the automatic stay.[16] Both the trustee and Tyson move for summary judgment on the complaint.

Analysis

The facts necessary to resolve the validity of Tyson's claimed workers compensation lien are uncontroverted, save one. Tyson complains that it received no notice from either the trustee or debtor of the Garcia bankruptcy. That is immaterial to the issue here which is whether Tyson's statutory subrogation rights and its lien are valid.[17] Did Tyson violate the automatic stay when its lien attached post-petition? No.

The filing of a bankruptcy petition triggers the automatic stay.[18] The stay of an act against property of the estate continues until such property is no longer property

16. The Trustee's complaint stated no affirmative claim for avoidance relief under Chapter 5 of the Bankruptcy Code. As no pretrial order has been filed in this case, the issues and claim posed in the complaint are the only ones before this Court.

17. Whether Tyson had notice of Garcia's bankruptcy would be important if it was alleged that Tyson "willfully" violated the automatic stay, subjecting it to potential liability for damages under § 362(k)(1). *See In re Kline*, 472 B.R. 98, 103 (10th Cir. BAP 2012), *aff'd* 514 Fed. Appx. 810 (10th Cir. Apr. 18, 2013). That claim is not alleged here. Instead, the trustee alleges Tyson's lien is void because actions taken in violation of the automatic stay are void and of no force or effect, even when there is no knowledge of the bankruptcy and existence of the stay. *Id.*

18. 11 U.S.C. § 362(a).

of the estate.[19] Under Garcia's confirmed chapter 13 plan, property of the estate does not revest in Garcia until dismissal or discharge.[20] Here, the stay came into effect on March 11, 2013 when the Garcias filed this chapter 13 case and remains in effect at present.

Kansas workers compensation law permits an injured worker to receive workers compensation benefits from her employer *and* pursue a recovery by court action against the third party tortfeasor who caused the injury.[21] KAN. STAT. ANN. § 44-504(b) grants an employer that pays workers compensation benefits to an injured employee a right to subrogation and a lien against any recovery the injured worker obtains from a third party tortfeasor up to the amount of benefits paid by the employer. This statute preserves injured workers' claims against third party tortfeasors and prevents double recovery by injured workers.[22] It permits an employer to recoup the workers compensation benefits it previously paid an injured employee from the employee's recovery from the third-party tortfeasor who caused the injury. Section 44-504(b) states, in relevant part:

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19. 11 U.S.C. § 362(c)(1).

20. 20 Doc. 32, p. 3. Confirmation of a plan vests all of the property of the estate in the debtor, unless the plan or confirmation order provides otherwise. *See* 11 U.S.C. § 1327(b)

21. KAN. STAT. ANN. § 44-504(a) (2000).

22. *See Edwards v. Anderson Engineering, Inc.*, 284 Kan. 892, 896-97, 166 P. 3d 1047 (2007).

> In the event of recovery from such other person [the tortfeasor] by the injured worker . . . by judgment, settlement or otherwise, the employer shall be subrogated to the extent of the compensation and medical aid provided by the employer to the date of such recovery and shall have a lien therefor against the entire amount of such recovery, excluding any recovery, or portion thereof, determined by a court to be loss of consortium or loss of services to a spouse. The employer shall receive notice of the action, have a right to intervene and may participate in the action.[23]

On June 25, 2014, after she filed her bankruptcy case, Ms. Garcia sued Aramark and, sometime in 2016, settled her personal injury case for $45,000.[24] The net post-petition settlement proceeds of $25,359.37 remain in Ms. Young's attorney trust account. Section 1306(a) makes them part of the chapter 13 case bankruptcy estate.[25] As KAN. STAT. ANN. § 44-504(b) provides, Tyson's statutory subrogation right arose when Garcia settled her action

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23. "Compensation and medical aid" as used in § 44-504(b) includes "all payments of medical compensation, disability compensation . . ., and any other payments made or provided pursuant to the workers compensation act." § 44-504(f).

24. The motion for approval of the settlement by the bankruptcy court as required by Fed. R. Bankr. P. 9019 was filed November 29, 2016 and approved, after hearing, in January of 2017.

25. *See* 11 U.S.C. § 1306(a).

against Aramark, resulting in a "recovery."[26] That right is secured by a lien. A "statutory lien" is defined by § 101(53) of the Bankruptcy Code as a "lien arising solely by force of a statute on specified circumstances or conditions . . . ."[27] In interpreting § 44-504(b), the Kansas state courts have held that the lien arises automatically by operation of law when the injured worker obtains a recovery "by judgment, settlement, or otherwise" from the third party tortfeasor.[28] Tyson's subrogation lien arose solely under the "specified circumstances or conditions" described in § 44-504(b).

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26. *Anderson v. National Carriers, Inc.*, 240 Kan. 101, 104-05, 727 P.2d 899 (1986) (employer's statutory subrogation right and lien does not arise "unless and until" there is a recovery).

27. 11 U.S.C. § 101(53). A "lien" is defined as a "charge against an interest in property to secure payment of a debt or performance of an obligation." §101(37). *See also Anderson v. National Carriers, Inc., supra* at 105 (referring to current § 44-504(b) as statutory subrogation right); *Smith v. Russell*, 274 Kan. 1076, 1086, 58 P.3d 698 (2002) (discussing potential subrogation lienholder's statutory right to intervene under § 44-504(b)).

28. *Smith v. Russell, supra* (no statutory requirement that a potential subrogation lienholder file a notice of lien; creation of lien occurs automatically); *Ballard v. Dondlinger & Sons Constr. Co.*, 51 Kan. App. 2d 855, 867-68, 355 P.3d 707 (2015) (lien amount is undisputed amount of compensation and medical expenses employer paid and no notice of lien is required; subrogation and creation of lien occurs automatically under § 44-504(b)); *Heimerman v. Rose*, 387 P.3d 194 (Table) (Kan. App. Ct., Jan. 13, 2017) (quoting *Ballard, supra* and stating under § 44-504 lien is created by operation of law).

Section 362(a)(4) stays "any act to create, perfect, or enforce any lien against property of the estate."[29] The trustee contends that because the automatic stay was in place when Tyson's subrogation lien on the Aramark settlement arose, it therefore violated the stay and is void. The trustee relies on two opinions issued by this Court that dealt with an automobile insurer's right of subrogation and PIP (personal injury protection) lien, as authority. The PIP lien statute, found at KAN. STAT. ANN. § 40-3113a, is nearly identical to the workers compensation lien statute in play in this case. Section 40-3113a(a) provides that when an automobile insurer pays PIP benefits to an injured insured under the Kansas Automobile Injury Reparations Act,[30] the insured retains the right to pursue a personal injury lawsuit against the person who caused the injury.[31] Subsection (b) of that statute subrogates the insurer to and grants it a lien on the injured person's recovery "by

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29. 11 U.S.C. § 362(a)(4).

30. KAN. STAT. ANN. § 40-3101, *et seq.*

31. In general, PIP benefits include medical, disability, rehabilitation, funeral, and survivor benefits. KAN. STAT. ANN. § 40-3103(q). Section 40-3113a(a) is very similar to §44-504(a) and states:

> (a) When the injury for which [PIP] benefits are payable under this act is caused under circumstances creating a legal liability against a tortfeasor pursuant to K.S.A. 40-3117 or the law of the appropriate jurisdiction, the injured person . . . shall have the right to pursue such person's remedy by proper action in a court of competent jurisdiction against such tortfeasor.

KAN. STAT. ANN. §; 40-3113a(a) (2000).

judgment, settlement or otherwise" from the tortfeasor to the extent the insurer has paid the insured PIP benefits.[32]

In both cases, *In re Veazey*[33] and *In re White*,[34] the chapter 7 trustees of accident victims filed adversary proceedings to avoid the automobile insurers' PIP liens in post-petition tort recoveries to repay reparations payments the insurers had made pre-and post-petition. In both cases, the insureds had been involved in prepetition car accidents and pursued separate actions against the tortfeasors.[35] Arguing that the insurer's post-petition PIP lien was void because it violated the automatic stay, the trustees invoked § 362(a)(4), stating that the liens were created while the stay was in effect as part of an attempt to exercise control over estate property. The insurers argued

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32. Similar to the workers compensation lien statute, KAN. STAT. ANN. § 40-3113a(b) (2000) states:

> (b) In the event of recovery from such tortfeasor by the injured person, . . . by judgment, settlement or otherwise, the insurer or self-insurer shall be subrogated to the extent of duplicative [PIP] benefits provided to date of such recovery and shall have a lien therefor against such recovery and the insurer or self-insurer may intervene in any action to protect and enforce such lien.

33. *Nazar, Trustee v. Allstate Insurance Company, et al. (In re Veazey)*, 272 B.R. 486 (Bankr. D. Kan. 2002).

34. *In re White*, 297 B.R. 626 (Bankr. D. Kan. 2003).

35. The insured's personal injury cause of action against the tortfeasor became property of the chapter 7 estate the moment debtor filed her bankruptcy petition. *See* 11 U.S.C. § 541(a).

that their lien interests arose pre-petition under Kansas law and could be perfected post-petition under § 362(b)(3).[36] I sided with the trustee in *Veazey*, stating that the insurer had no prepetition property interest in the debtor's cause of action because its interest only arises "'in the event of recovery' and not before."[37] By "asserting the [PIP] lien post-petition," the insurers acted to create, perfect, or enforce a lien against property of the estate in violation of § 362(a)(4). Lacking controlling Tenth Circuit authority, the Court relied on a Second Circuit Court of Appeals case that held § 362(a)(4) "applies to statutory liens, regardless of whether an 'act' is require[d] to create or perfect the lien."[38] While *In re White* arose in the context of a Rule 9019 motion, the governing rules remained the same.[39] The insurer's statutory PIP lien against the settlement proceeds did not arise before settlement and the insurer could not assert its post-petition PIP lien against the recovery without violating the stay.[40]

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36. Under § 362(b)(3) the filing of a bankruptcy petition does not stay "any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) . . ."

37. *Veazey* at 494-95.

38. *Id.* at 493, citing *In re Parr Meadows Racing Ass'n, Inc.*, 880 F.2d 1540, 1545 (2nd Cir. 1989) (a tax lien enforcement case).

39. Fed. R. Bankr. P. 9019(a).

40. 297 B.R. at 630, 636-37 (right of subrogation accrued only when there was a recovery from the tortfeasor, not upon the insurer's payment of PIP benefits).

Appendix B

Earlier this year, and while these motions have been pending, the Tenth Circuit Court of Appeals decided *In re Cowen*, interpreting § 362(a)(3) and the phrase "any act" as used in that subsection.[41] In *Cowen* two creditors repossessed the debtor's commercial trucks pre-petition. Debtor filed a chapter 13 bankruptcy the next day and demanded return of the vehicles. When the creditors refused, debtor filed an adversary complaint alleging a willful violation of the automatic stay and seeking damages. The bankruptcy court found a willful violation of the stay by the creditors' refusal to turn over the trucks and awarded damages in excess of $200,000. Section 362(a)(3) makes it a violation of the stay to commit "any act . . . to exercise control over property of the estate." The Court of Appeals reversed, holding that the plain meaning of the word "act" in this subsection is to "take action" or "doing something."[42] "The act of passively holding onto an asset" does not constitute a stay violation in the absence of an affirmative act to exercise control over property of the estate.

This is the minority view. Only our Circuit and the District of Columbia Circuit Court of Appeals interpret "act" as requiring an affirmative act to exercise control over estate property.[43] Nevertheless, *Cowen* suggests that

41. *WD Equipment, LLC. v. Cowen (In re Cowen)*, 849 F.3d 943 (10th Cir. 2017).

42. *Cowen*, 849 F.3d at 949.

43. *See United States v. Inslaw*, 932 F.2d 1467, 1474, 289 U.S. App. D.C. 383 (D.C. Cir. 1991) (stay provision applies only to acts taken after bankruptcy petition is filed; continuing use of intangible

a right of subrogation and lien that arises automatically upon the injured worker's recovery under § 44-504(b) would not amount to an act of possession or an act to exercise control of property of the estate. If anything, Tyson was more passive than the creditors in *Cowen*. The "act" that gave rise to the lien was the Aramark settlement and it was accomplished by Garcia, not Tyson. Tyson has never possessed, held, or committed an act to exercise control over the Aramark settlement proceeds.

Section 362(a)(3), (4), (5), and (6) each contain the phrase "any act."[44] There is no reason to believe that the Tenth Circuit Court of Appeals would interpret the word "act" in § 362(a)(4) differently than it did in § 362(a)(3) in *Cowen*.[45] I am duty bound to follow *Cowen*.[46] While it

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trade secret rights in enhancements to case-tracking software program after software developer filed bankruptcy did not constitute an act to exercise control over property of the estate).

44. Section 362(a)(3) stays "any act" to obtain possession of property of the estate or to exercise control over property of the estate. Section 362(a)(5) stays "any act" to create, perfect or enforce any lien against property of the debtor to the extent the lien secures a prepetition claim. Section 362(a)(6) stays "any act" to collect, assess, or recover a prepetition claim against debtor.

45. Identical words used in different parts of the same statute are presumed to have the same meaning. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 86, 126 S. Ct. 1503, 164 L. Ed. 2d 179 (2006); *First National Bank of Durango v. Woods (In re Woods)*, 743 F.3d 689, 697 (10th Cir. 2014).

46. *See also In re Waldrop*, 2017 Bankr. LEXIS 877, 2017 WL 1183937 (Bankr. W.D. Okla. Mar. 29, 2017) (following *Cowen*, judgment creditor and its attorney did not violate the automatic

does not specifically address the creation of a statutory subrogation lien, it provides controlling authority interpreting the words "any act" as used in § 362(a) that casts considerable doubt on my contrary conclusions in *Veazey* and *White*.

By applying *Cowen* in light of the summary judgment record here, I conclude that Tyson's subrogation lien arose by operation of law, and without Tyson committing any affirmative post-petition act that breached § 362(a)(4). Rather, its lien automatically arose under KAN. STAT. ANN. § 44-504(b) when Ms. Garcia recovered against Aramark by way of settlement. Tyson played no part in that lawsuit or in Garcia's obtaining a recovery. No action on Tyson's part was required to create or attach its subrogation lien. I therefore conclude that Tyson did not violate the automatic stay and has a valid statutory lien under § 44-504(b).

As noted previously, the trustee's complaint only sought a determination that Tyson's lien never attached or was void, having been "created, perfected and/or enforced" in violation of § 362(a)(4), and that no stay exception applies.[47] He did not plead in the alternative that the lien, if valid, may be avoided by the trustee's exercise of his avoiding powers under 11 U.S.C. §§ 545,

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stay after debtor's demand to contact garnishee bank and release funds garnished prepetition by instructing garnishee bank to retain possession of funds pending further order of the court).

47. *See* note 16, *supra*.

549 or other chapter 5 provisions.[48] Because no avoidance claim is properly before me, I express no opinion on the merits of such a claim.

Tyson's motion for summary judgment is GRANTED and the trustee's cross-motion for summary judgment is DENIED. A judgment on decision shall issue this day.

SO ORDERED.

48. While the trustee alleges in the jurisdictional allegations of the complaint that the adversary proceeding is brought under "11 U.S.C. §§ 544, 545, and/or 549," and titles its claim as one for "Determination of Lien Rights/Avoidance of Lien," none of the factual allegations are related in any fashion to lien avoiding powers under chapter 5 of the Bankruptcy Code. Indeed the exclusive legal basis asserted for the requested relief is § 362. *See* Adv. Doc. 1, ¶s 4, 16, 18-19.

APPENDIX C — TEXT OF PERTINENT STATUTORY PROVISIONS

11 U.S.C. Sec. 362. Automatic Stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

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11 U.S.C. Sec. 501. Filing of Proofs of Claim or Interests

(a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of interest.

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11 U.S.C. Sec. 502. Allowance of Claims or Interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a

partnership that is a debtor in a case under chapter 7 of this title, objects.

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11 U.S.C. Sec. 541. Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

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(b) Property of the estate does not include—

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

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(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law—

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

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11 U.S.C. Sec. 542. Turnover of Property to the Estate

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

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(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under a life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

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