



### FINDINGS OF FACT

1. On March 4, 1987, the Iowa District Court for Marshall County entered judgment in favor of G. Dean Garland and against Capital Resources Corporation, Paul W. Thielking, A.P.W. Thielking, Nick Feilen, Stephen K. Thielking, Armin F. Thielking, Paul M. Thielking, John Thielking, and the Debtor, John L. Henss.

2. On March 24, 1989, the Iowa District Court for Marshall County found that certain transfers of property and the rights to income by Defendants, their professional corporations, and their E.S.O.T.s were constructively fraudulent. The Court then entered an order imposing a constructive trust in favor of G. Dean Garland upon certain assets of the Debtor's professional practice and appointed a receiver to value those assets and to direct the liquidation of property up to the amount of the constructive trust.

3. Subsequently, Richard W. Kemler was appointed as receiver and began garnishing certain bank accounts and accounts receivable of Debtor, J. L. Henss, C.P.A., P.C., John L. Henss, C.P.A., P.C., and Oden, Henss, and Thielking. These garnishments were performed pursuant to the orders of the Marshall County District Court.

4. On September 23, 1993, Debtor filed a voluntary petition for bankruptcy relief under Chapter 7.

5. Thereafter, all garnishments were released against

the Debtor, individually. However, garnishments against the corporate entities remain in place.

6. Debtor holds no ownership interest in the professional corporations or the property currently subject to garnishment.

### **DISCUSSION**

Kemler brings this Motion From Relief From Stay to permit him to proceed with his duties as the appointed receiver including, but not limited to, the garnishment of bank accounts, accounts receivable and such other property as he may locate belonging to J.L. Henss, C.P.A., P.C., John L. Henss, C.P.A., P.C., and Oden, Henss, and Thielking. He argues that the garnishment of the professional corporations is not subject to the automatic stay provisions of § 362 as the Debtor has no ownership interest in the professional corporations or the assets. He also contends that the imposition of the constructive trust granted Garland a distinct, equitable, and beneficial interest in the assets of the corporation. Alternatively, Kemler requests that if the Court finds the garnishments are subject to the automatic stay that relief from stay be granted.

The Debtor objects to this motion and moves to cite Kemler, Garland and Attorney Hanson with contempt of court for willful violation of the automatic stay provisions of 11 U.S.C

§ 362.

Initially, the Chapter 7 trustee, Anita Shodeen, also objected to this motion on the grounds that the assets that the receiver was attempting to reach may be property of the estate and subject to administration by the trustee. However, a Stipulated Order resolving the trustee's objection was entered on November 26, 1993 and agreed that "the movant may continue its efforts related to the contested motion" provided that "any proceeds from the sale of assets received . . . will be held in escrow and will not be applied to any obligation owing prior to the time the trustee determines that the estate has no interest in the assets".

#### Motion For Relief From Stay

Section 362(a) prohibits in relevant part:

(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;

(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.

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

(emphasis added).

Section 541(a)(1) provides that property of the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case" and pursuant to § 541(a)(3) the property of the estate includes "any interest in property that the trustee recovers" under specified provisions which include § 550 which authorizes the trustee to recover fraudulently transferred property. Including property that has been fraudulently transferred in the § 541(a)(1) definition of property of the estate would render § 541(a)(3) meaningless. See In re Colonial Realty Co., 980 F.2d 125, 131 (2nd Cir. 1992) (citing In re Saunders, 101 B.R. 303, 305 (Bankr.N.D.Fla 1989)). But cf. In re MortgageAmerica Corp., 714 F.2d 1266, 1275 (5th Cir. 1983). Consequently, such property should not be considered property of the estate until a judicial determination is made that a fraudulent transfer has occurred and the trustee has recovered the property.

The property in this case has not yet been recovered by the trustee. The Debtor admits he has no interest in this property. The Court, therefore, finds that such property is not, at this time, property of the bankruptcy estate. The action by the receiver is not stayed by § 362(a)(3).

However, § 362(a)(1) and(6) prohibit actions to "recover a claim against the debtor." Fraudulent transfer actions, although against third parties, have been found to be "actions

to recover a claim against the debtor" as the claim against the third party derives from a claim against the debtor, absent which there would be no independent basis for the claim. Colonial Realty, 980 F.2d at 131. Therefore, § 362(a)(1) and (6) operate to stay parties from recovering a claim from property fraudulently transferred to a third party.

In this case, the state court imposed a constructive trust in favor of Garland upon a finding that certain transfers were constructively fraudulent. Under Iowa law, a constructive trust is an equitable remedy "by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to a beneficial interest". Loschen v. Clark, 256 Iowa 413, 419, 127 N.W. 2d 600, 603 (Iowa 1964). While the Court recognizes that the creditor holds an interest in the property by virtue of the imposition of the constructive trust, this interest is still subject to the jurisdiction of this Court and to bankruptcy law. Such an interest derives from Garland's claim against the Debtor and Garland is only entitled to recover the value of his original claim against the Debtor. Accordingly, the Court finds that attempts by Kemler to proceed against assets of the professional corporations are actions to "recover a claim against the debtor" and are, thus, prohibited by the automatic stay pursuant to § 362)(a)(1) and (6).

Having concluded that the automatic stay applies in this

case, the Court must now consider Kemler's request for relief from stay. Section 362(d)(1) provides that the court shall grant relief from stay "for cause." Debtor admits to having no interest in the professional corporations or the assets in question. The Court has already made a finding that the property does not, at this time, qualify as property of the estate. Therefore, the Court finds that sufficient "cause" exists under § 362(d)(1). However, the possibility exists that the trustee may be entitled to recover the property in question as fraudulently transferred property pursuant to § 550. This possible bankruptcy estate interest must be protected on behalf of the estate and the other creditors. Accordingly, the Court finds that the stay should be modified only in accordance with the stipulated order entered by this Court on November 26, 1993 and signed by the trustee and counsel for Kemler. Pursuant to the stipulation, the Court finds that the stay shall be modified to allow Kemler to continue to proceed with his duties as the appointed receiver including the garnishment of bank accounts, accounts receivable and such other property as he may locate belonging to J.L. Henss, C.P.A., P.C., John L. Henss, C.P.A., P.C., and Oden, Henss, and Thielking provided that any proceeds from the sale of assets received will be held in escrow and will not be applied to any obligation owing prior to the time that a determination is made that the estate has no interest in the

assets.

Motion to Cite Creditors and Agents With Contempt

Debtor moves this Court to cite Kemler, Garland, and Attorney

Hanson with contempt of court for willful violation of the automatic stay. Section 362(h) provides as follows:

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

The Eighth Circuit has found that a "willful violation of the automatic stay occurs when the creditor acts with knowledge of the bankruptcy petition." In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989).

Clearly, Kemler, Garland, and Hanson had knowledge of the bankruptcy filing. Under § 362(h), a willful violation does not require a specific intent to violate the stay. A good faith belief by the party that it is not in violation of the stay or a legitimate dispute as to the applicable law is irrelevant.

The Court concludes that the action to proceed against the property of the professional corporation was in violation of the automatic stay provisions of § 362(a)(1) and (6). Accordingly, it has been shown that Kemler, Garland, and Hanson were in violation of § 362, but under the circumstances



of this case the Court finds that an admonishment is a sufficient sanction. Such court action is necessary to protect bankruptcy estates from incurring potentially unnecessary legal expense.

Debtor prays that he be awarded damages as a result of the violation. In order for damages to be awarded Debtor, § 362(h) requires that an injury be proven. The Court finds that Debtor has failed to prove the required element of injury. The property in question was not property of the estate and Debtor admits that he does not hold an ownership interest in the professional corporations or the property currently subject to garnishment. No evidence was presented to support Debtor's allegation of injury. Accordingly, the Court must deny Debtor's prayer for damages.

**ORDER**

IT IS THEREFORE ORDERED that the Motion For Relief From Stay  
be granted.

IT IS FURTHER ORDERED that the stay shall be modified to allow Kemler to continue to proceed with his duties as the appointed receiver including the garnishment of bank accounts, accounts receivable and such other property as he may locate belonging to J.L. Henss, C.P.A., P.C., John L. Henss, C.P.A., P.C., and Oden, Henss, and Thielking provided that any

proceeds from the sale of assets received will be held in escrow and will not be applied to any obligation owing prior to the time the trustee determines that the estate has no interest in the assets.

IT IS FURTHER ORDERED that the Motion to Cite Creditors and Agents with Contempt is sustained to the extent that Robert B. Hanson, Richard W. Kemler and G. Dean Garland are admonished for proceeding independently without obtaining a declaratory ruling regarding the scope of the automatic stay. Said motion is denied to the extent that John L. Henss prays for damages.

Dated this 9th day of February, 1994.

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RUSSELL J. HILL  
U.S. Bankruptcy Judge