CHAPTER 13 PRACTICE AND PROCEDURE

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§ 15:12 Turnover of motor vehicle or other property repossessed prepetition

When a creditor with a security interest in personal property, usually a motor vehicle, takes possession of it (or seizes the property through legal process) before the debtor files a Chapter 13 case, the debtor often wants to obtain possession of it and pay the allowed amount of the secured claim under the plan pursuant to Code § 1325(a)(5)(B).[1] If the secured creditor has already disposed of the collateral at the time of filing, of course, the debtor cannot recover possession because the debtor no longer has an interest in it.[2]

If the creditor has not disposed of collateral in its possession, the general rule under the Supreme Court's decision in *U.S. v. Whiting Pools, Inc.*,[3] is it is property of the estate.[4] Code § 542(a) provides that an entity in "possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under [Code § 363] or that the debtor may exempt [under Code § 522] 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." In a Chapter 13 case, the debtor is entitled to possession of property of the estate[5] and has the rights of a trustee under § 363(b) to use property of the estate under Code § 363(b).[6] Accordingly, § 542(a) requires turnover to the debtor in a Chapter 13 case.[7]

This section discusses the creditor's obligation to turn over repossessed or seized property to the debtor and the debtor's remedies to obtain possession if the creditor refuses. Analysis includes consideration of the creditor's rights to adequate protec-

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[Section 15:12]

[1]See § 5:10.

[2]E.g., *In re Ratliff*, 260 B.R. 526 (Bankr. M.D. Fla. 2000); *Matter of Brown*, 210 B.R. 878, 881 (Bankr. S.D. Ga. 1997).

[3]*U.S. v. Whiting Pools, Inc.*, 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). See § 14:5.

[4]In some jurisdictions, courts have held that the debtor's interest in a motor vehicle repossessed prepetition property is limited to her right to redeem and that the repossessed collateral itself is not property of the estate. See § 14:5.

[5]11 U.S.C.A. § 1306(b). See § 16:2.

[6]11 U.S.C.A. § 1303. See §§ 16:3, 16:4.

[7]E.g., *In re Denby-Peterson*, 941 F.3d 115, 128 n.66, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019).

tion[8] of its interest in the collateral. The issue involves the extent to which adequate protection is an appropriate consideration in a turnover proceeding in view of the fact that Code § 542(a) does not condition turnover on the provision of adequate protection.

Turnover and the automatic stay

In its 2021 decision in *City of Chicago v. Fulton,*[9] the Supreme Court ruled that a creditor's retention of property in its possession at the time of the filing of a Chapter 13 case does not violate the provision of the automatic stay in Code § 362(a)(3) that prohibits "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."[10]

The Courts of Appeals for the Second, Seventh, Eighth, Ninth, and Eleventh Circuits had concluded that a creditor's retention of property was an act to exercise control over property of the estate in violation of Code § 362(a)(3) and that the creditor had an affirmative obligation to turn it over.[11] Agreeing with the contrary

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[8]See § 15:8.

[9]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[10]11 U.S.C.A. § 362(a)(3) (emphasis added).

[11]E.g., *In re Fulton*, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 83412 (7th Cir. 2019), cert. granted, 140 S. Ct. 680, 205 L. Ed. 2d 449 (2019) and vacated and remanded, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021); *In re Weber*, 719 F.3d 72, 69 Collier Bankr. Cas. 2d (MB) 1168, Bankr. L. Rep. (CCH) P 82484 (2d Cir. 2013) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); *In re Rozier*, 376 F.3d 1323, Bankr. L. Rep. (CCH) P 80137 (11th Cir. 2004); *In re Del Mission Ltd.*, 98 F.3d 1147, 1151-52, 29 Bankr. Ct. Dec. (CRR) 1155, 36 Collier Bankr. Cas. 2d (MB) 1658, Bankr. L. Rep. (CCH) P 77176, 36 Fed. R. Serv. 3d 512 (9th Cir. 1996) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *In re Knaus*, 889 F.2d 773, 19 Bankr. Ct. Dec. (CRR) 1691, Bankr. L. Rep. (CCH) P 73117 (8th Cir. 1989) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999).

The obligation to surrender possession of a motor vehicle included the obligation to disable any locking devices the creditor attached to the vehicle to prevent its operation if the debtor defaulted. *In re Horace*, 74 Collier Bankr. Cas. 2d (MB) 391, 2015 WL 5145576 (Bankr. N.D. Ohio 2015); *In re Dawson*, 2006 WL 2372821 (Bankr. N.D. Ohio 2006), aff'd, 2006 WL 3827459 (N.D. Ohio 2006); *In re Hampton*, 319 B.R. 163 (Bankr. E.D. Ark. 2005).

A creditor's failure to turn the vehicle over promptly subjected the creditor to damages for violation of the automatic stay, including the debtor's attorney's fees. Case law did not define a deadline. E.g., *In re Terry*, 2019 WL

rulings of the Third and Tenth Circuits,[12] the Supreme Court in *Fulton* concluded that the language of Code § 362(a)(3) "halts any affirmative act that would alter the status quo as of the time of the filing of a bankruptcy petition"[13] and therefore held that "mere retention of estate property after the filing of a bankruptcy petition does not violate § 362(a)(3) of the Bankruptcy Code."[14]

The *Fulton* Court declined to consider how the turnover obligation in Code § 542(a) operates or the meaning of other provisions of the automatic stay in paragraphs (4) and (6) of Code § 362(a).[15]

Paragraph (4) of Code § 362(a) prohibits "any act to create, perfect, or enforce any lien against property of the estate," and paragraph (6) prohibits "any act to collect, assess, or recover a claim against the debtor" that arose prepetition. *Fulton* involved the City of Chicago's enforcement of parking fines by impounding motor vehicles and its assertion of a possessory lien under Illinois law. In one of the four cases consolidated on appeal in Fulton,[16] the bankruptcy court had concluded that the City violated Code § 362(a)(6) by demanding payment of the debt and

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7169095 (Bankr. N.D. Tex. 2019) (Withholding property for over a month was "unquestionably egregious," warranting punitive damages.); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999) (nine days an unreasonable delay); *In re Smith*, 2016 WL 3765839 (Bankr. N.D. Ohio 2016) (making the vehicle available three days postpetition not unreasonable).

[12]*In re Denby-Peterson*, 941 F.3d 115, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Cowen*, 849 F.3d 943, 63 Bankr. Ct. Dec. (CRR) 211, 77 Collier Bankr. Cas. 2d (MB) 438 (10th Cir. 2017).

[13]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 590, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[14]*City of Chicago, Illinois*, 141 S. Ct. 585, 592.

[15]*City of Chicago, Illinois*, 141 S. Ct. 585, 592. The Supreme Court noted that the Seventh Circuit had not addressed the issues, either. 141 S.Ct. at 592, n. 2. The Court vacated the judgment of the Seventh Circuit and remanded "for further proceedings consistent with this opinion." 141 S.Ct. at 592.

On remand, the Seventh Circuit determined that two of the four debtors in the consolidated appeal had presented arguments in the bankruptcy courts that the City had violated 11 U.S.C.A. § 362(a)(4) and (6) and remanded them to the bankruptcy courts that decided them "for further proceedings consistent with the Supreme Court's decision." *In re Fulton*, 2021 WL 1345416 at *2 (7th Cir. 2021). In the other two cases in which the debtors argued only a violation of § 362(a)(3), the Seventh Circuit remanded with instructions to the bankruptcy courts to vacate the judgments. 2021 WL 1345416 at *2.

The two cases the Seventh Circuit remanded for determination of the § 362(a)(4) and (6) issues were *In re Shannon*, 590 B.R. 467 (Bankr. N.D. Ill. 2018), and *In re Fulton*, 2018 WL 2392854 (Bankr. N.D. Ill. 2018), opinion *amended and superseded*, 2018 WL 2570109 (Bankr. N.D. Ill. 2018). The bankruptcy court opinion in *Fulton* did not address § 362(a)(4) and (6).

[16]*Fulton* involved four separate bankruptcy court rulings that the Seventh Circuit considered in a consolidated appeal. The cases were: *In re Shannon*, 590 B.R. 467 (Bankr. N.D. Ill. 2018); *In re Peake*, 588 B.R. 811 (Bankr. N.D. Ill.

that continued possession of the vehicle, combined with the demand for payment, was a violation of Code § 362(a)(4) as an act to enforce its lien under Illinois law.[17]

Although the Supreme Court in *Fulton* did not address the (a)(4) and (a)(6) issues, the bankruptcy court's rulings seem inconsistent with *Fulton*'s reasoning that the automatic stay preserves the status quo and that a violation of it requires an affirmative act.[18] Moreover, in noting that the phrase, "to exercise control over property of the estate" was added to the original 1978 statute in 1984, the *Fulton* Court observed that the debtors did not dispute that § 362(a)(3) had imposed no turnover obligation before the amendment.[19] A possible implication is that nothing else in § 362(a) imposed such an obligation either.

In any event, it is difficult to conclude that a creditor's continued possession of collateral violates either (a)(4) or (a)(6) if the creditor holds a consensual security interest whose validity and perfection does not depend on possession.

Possession is not an act to "create, perfect, or enforce" a lien that violates Code § 362(a)(4), and it is not an act to collect a prepetition claim that violates Code § 362(a)(6) unless, perhaps, it is accompanied by a demand for payment. A well-advised creditor can avoid operation of § 362(a)(6) by declining a turnover request without demanding payment simply by giving no reason for its decision.

Turnover under Code § 542(a)

The fact that the automatic stay may not require a creditor to surrender possession of collateral does not mean that the creditor need not turn it over to the debtor. Code § 542(a) provides that a creditor must turn over property of the debtor unless it is of inconsequential value or benefit to the estate.

Code § 542(a) applies to property "that the trustee may use, sell, or lease under [Code § 363] or that the debtor may exempt [under Code § 522]." In a Chapter 13 case, the debtor is entitled

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2018); *In re Fulton*, 2018 WL 2392854 (Bankr. N.D. Ill. 2018), *amended and superseded*, 2018 WL 2570109 (Bankr. N.D. Ill. 2018); *In re Howard*, 2018 WL 1830910 (Bankr. N.D. Ill. 2018).

[17]*In re Shannon*, 590 B.R. 467, 477 (Bankr. N.D. Ill. 2018), aff'd on other grounds, 926 F.3d 916, 67 Bankr. Ct. Dec. (CRR) 100, Bankr. L. Rep. (CCH) P 83412 (7th Cir. 2019), cert. granted, 140 S. Ct. 680, 205 L. Ed. 2d 449 (2019) and vacated and remanded on other grounds, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[18]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 590, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

[19]*City of Chicago, Illinois,* 141 S. Ct. at 591.

to possession of property of the estate,[20] has the rights of a trustee to use property of the estate under Code § 363(b),[21] and may claim an exemption.[22] If the creditor has possession of property that the debtor owns, Code § 542(a) applies.

Code § 542(a) does not, however, require turnover of property that is of "inconsequential value or benefit to the estate." If the encumbered property is worth less than the amount of the debt, it has "inconsequential value" to the estate in the sense that its sale will produce nothing for the benefit of creditors.

But the property itself may have significant value or be important to the estate. For example, a debtor typically requires a motor vehicle for transportation, among other things, to and from work to earn income to make plan payments. Indeed, Justice Sotomayor in her concurring opinion in *Fulton*[23] recognized the critical importance of a motor vehicle to debtors and their creditors.[24] Furthermore, the debtor has the right to retain encumbered property under a Chapter 13 plan by paying the creditor the allowed amount of its secured claim,[25] a primary purpose of Chapter 13 and often an important objective of the debtor.[26] Thus, even fully encumbered property may have consequential value or be of benefit to the estate.

In the usual situation, therefore, Code § 542(a) requires the secured creditor to deliver repossessed or seized property to the Chapter 13 debtor. The result could be different if, for example, a repossessed motor vehicle is one that the debtor does not need, such as a recreational vehicle, that has no equity.

The creditor's turnover obligation

The question is how a debtor enforces her right to possession under Code § 542(a) if a creditor declines to turn over repossessed or seized property. The initial issue is whether Code § 542(a) is self-operative and requires turnover without a court order, an issue that *Fulton* did not address.[27]

As Justice Sotomayor noted in her concurring opinion in *Ful-*

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[20]11 U.S.C.A. § 1306(b). See § 16:2.

[21]See §§ 16:3, 16:4.

[22]See § 14:22.

[23]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 593, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[24]*City of Chicago, Illinois,* 141 S. Ct. at 593-94.

[25]See § 5:10.

[26]See § 2:3.

[27]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

ton,[28] the court in *In re Larimer*[29] held that the turnover obligation under Code § 542(a) is automatic. In *Larimer,* the court entered a declaratory judgment that the Internal Revenue Service had an obligation to deliver the estate's share of a tax refund to the Chapter 7 trustee, reasoning that Code § 542(a) does not require a demand, a court order, or any other action.[30] The *Larimer* court further observed that failure of an entity to comply with Code § 542(a) is "probably contumacious."[31] Several courts have similarly stated that Code § 542(a) is self-operative and mandatory.[32]

Most courts, however, conclude that Code § 542(a) does not require turnover of repossessed or seized property without a court order.[33] These courts reason that enactment of Code § 542(a) as part of the Bankruptcy Code in 1978 did not change the pre-Code practice that conditioned turnover on entry of a court order for it and that it does not deprive a creditor of its rights to assert that the statute does not require turnover or to obtain adequate protection of its interest in connection with turnover.[34] Some note

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[28]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 594, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[29]*Matter of Larimer*, 27 B.R. 514, 516, 10 Bankr. Ct. Dec. (CRR) 105 (Bankr. D. Idaho 1983).

[30]*Matter of Larimer*, 27 B.R. at 516.

[31]*Matter of Larimer,* 27 B.R. at 516.

[32]*In re McKeever*, 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017); *In re Spence*, 2009 WL 3756621, *5 (Bankr. W.D. Tex. 2009); *In re Drew*, 2007 WL 4879278 (Bankr. N.D. Ind. 2007); *In re Calvin*, 329 B.R. 589, 54 Collier Bankr. Cas. 2d (MB) 1443 (Bankr. S.D. Tex. 2005); *In re U.S.A. Diversified Products, Inc.*, 196 B.R. 801 (N.D. Ind. 1996), aff'd, 100 F.3d 53, 30 Bankr. Ct. Dec. (CRR) 91 (7th Cir. 1996); *In re Lucas*, 100 B.R. 969, 972 (Bankr. M.D. Tenn. 1989), aff'd and adopted, 110 B.R. 335 (M.D. Tenn. 1989), rev'd on other grounds, 924 F.2d 597, 21 Bankr. Ct. Dec. (CRR) 408, 24 Collier Bankr. Cas. 2d (MB) 804, 13 Employee Benefits Cas. (BNA) 1445, Bankr. L. Rep. (CCH) P 73790 (6th Cir. 1991); *In re McCary*, 60 B.R. 152, 154, 14 Bankr. Ct. Dec. (CRR) 505 (Bankr. N.D. Ill. 1986). These cases generally state the principle in the context of turnover disputes that involve issues distinct from the turnover of repossessed or seized property.

[33]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129-31, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Dillard*, 2001 WL 1700026 (Bankr. M.D. N.C. 2001); *In re Barringer*, 244 B.R. 402, 43 Collier Bankr. Cas. 2d (MB) 1615 (Bankr. E.D. Mich. 1999); *In re Nash*, 228 B.R. 669 (Bankr. N.D. Ill. 1999) (abrogated by, Thompson v. General Motors Acceptance Corp., LLC, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009)); *In re Fitch*, 217 B.R. 286, 32 Bankr. Ct. Dec. (CRR) 152 (Bankr. S.D. Cal. 1998); *Matter of Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Massey*, 210 B.R. 693 (Bankr. D. Md. 1997); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996).

[34]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129-31 n.72, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Young*, 193 B.R.

that in *U.S. v. Whiting Pools, Inc.*,[35] the bankruptcy court conditioned turnover of property in the creditor's possession on the provision of adequate protection and that none of the courts deciding the issue in *Whiting Pools* had intimated that the turnover obligation was self-operative.[36]

Whether or not Code § 542(a) is self-operative, the debtor must seek an order from the court to enforce turnover if the creditor refuses to surrender the property. Later text discusses why the self-operative issue matters in the analysis of two questions: (1) whether a creditor is entitled to adequate protection in connection with turnover; and (2) whether a debtor may recover attorney's fees and damages due to a creditor's failure to turn over property.

Procedure to compel turnover

The threshold issue regarding a turnover proceeding is whether a debtor may seek turnover by filing a motion, which initiates a contested matter under Bankruptcy Rule 9014, or whether she must file a complaint, which initiates an adversary proceeding. Section 23:4 discusses the two types of proceedings, section 23:5 discusses procedures in adversary proceedings, and section 23:6 discusses how procedures in contested matters differ from those in adversary proceedings. For the most part, the same procedures applicable in adversary proceedings are available to the parties in a contested matter, except that an adversary proceeding requires the issuance of summons.[37] In particular, a creditor must be served with a complaint in an adversary proceeding (together with summons) or with a motion in a contested matter in the same way under Bankruptcy Rule 7004.[38]

Procedures in a contested matter tend to be less formal and more expeditious (and, therefore, less expensive) than those in an adversary proceeding. The primary impact on the debtor of requiring an adversary proceeding is the additional fees required

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620 (Bankr. D. D.C. 1996). See generally *James L. Buchwalter*, Contempt and Arrest Proceedings Resulting from Statutory Turnover Obligations in Bankruptcy—21st Century Cases, 38 A.L.R. Fed. 3d Art. 10, § 2 (2019); Brubaker, Turnover, Adequate Protection, and the Automatic Stay (Part II): Who is "Exercising Control" Over What?, 33 No. 9 Bankr. L. Letter NL 1 (Sept. 2013).

[35]*U.S. v. Whiting Pools, Inc.*, 1983-2 C.B. 239, 462 U.S. 198, 103 S. Ct. 2309, 76 L. Ed. 2d 515, 10 Bankr. Ct. Dec. (CRR) 705, 8 Collier Bankr. Cas. 2d (MB) 710, Bankr. L. Rep. (CCH) P 69207, 83-1 U.S. Tax Cas. (CCH) P 9394, 52 A.F.T.R.2d 83-5121 (1983). See § 14:5.

[36]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129-31 n.72, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996).

[37]See §§ 23:4, 23:6.

[38]See § 23:7.

for the attorney to prepare the additional paperwork that an adversary proceeding involves (e.g., summons and civil cover sheet) and additional pleadings necessary for emergency relief. A Chapter 13 debtor does not have to pay a fee to file an adversary proceeding.

Bankruptcy Rule 7001(1) defines an adversary proceeding as "a proceeding to recover money or property," with certain exceptions.[39] The prevailing view is that Rule 7001(1) requires a debtor to commence an adversary proceeding to require turnover of repossessed property under Code § 542(a).[40]

A requirement of an adversary proceeding for turnover is a departure from practice in jurisdictions that had permitted a debtor to seek turnover on the ground that the creditor's retention of property violated the automatic stay. Because a party may seek to enforce the automatic stay and obtain remedies for its violation in a contested matter, a debtor could file a motion for turnover as a remedy for the stay violation.[41] *City of Chicago v. Fulton*[42] removes this basis for permitting a debtor to seek turnover by motion.

As a practical matter, neither the debtor's nor the creditor's interests are served by litigating a turnover matter in an adversary proceeding rather than in a contested matter initiated by a simple motion for turnover. As later text discusses, the only issue in a turnover proceeding in most Chapter 13 situations is adequate protection. Bankruptcy Rule 4001(a)(1) provides for determination of adequate protection by motion.

The parties to a turnover proceeding do not need to deal with the more formal and in some ways cumbersome procedures that an adversary proceeding requires. Other than the fact that an adversary proceeding requires the issuance of summons, the procedures for determination of a contested matter are the same

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[39]The exceptions are proceedings to compel a debtor to deliver property to the trustee or a proceeding under 11 U.S.C.A. § 554(b) (request for order for trustee to abandon property); 11 U.S.C.A. § 725 (disposition by Chapter 7 trustee of property in which entity other than the estate has an interest); Bankruptcy Rule 2017 (examination of debtor's attorney's fees); and Bankruptcy Rule 6002 (accounting by prior custodian of property of the estate).

[40]E.g., *In re Denby-Peterson*, 941 F.3d 115, 129, 67 Bankr. Ct. Dec. (CRR) 236, Bankr. L. Rep. (CCH) P 83459 (3d Cir. 2019); *Matter of Perkins*, 902 F.2d 1254, 1258, 60 Ed. Law Rep. 447, Bankr. L. Rep. (CCH) P 73385 (7th Cir. 1990) (collecting cases); *Matter of Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996); *In re Estes*, 185 B.R. 745 (Bankr. W.D. Ky. 1995).

[41]See § 5:16.

[42]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021).

as those for an adversary proceeding.[43] Both the debtor and the creditor can save time and money by proceeding by motion.

If a debtor seeks turnover by motion, the court can rule on the motion in the absence of an objection that an adversary proceeding is required because a party may waive that right.[44] Moreover, courts have held that determination of an issue raised by motion in a contested matter rather than by a complaint in an adversary proceeding is harmless error.[45] Finally, a court may convert a contested matter to an adversary proceeding or, at worst, dismiss the motion without prejudice so that the debtor can file an adversary proceeding.[46] In any event, if the court enters an order in a contested matter when an adversary proceeding is required, the order is nevertheless effective, provided that constitutional due process requirements of notice and an opportunity to be heard have been met, under the Supreme Court's ruling in *United Student Aids Funds, Inc., v. Espinosa*.[47]

Because the litigation of a turnover proceeding as a contested matter rather than an adversary proceeding is simpler, more expeditious, and less expensive, parties and courts may seek creative ways to avoid the application of Bankruptcy Rule 7001(1). It is arguable that a proceeding to "recover" property within the meaning of Rule 7001(1) does not include a proceeding to "require turnover," which is limited to the issue of possession under Code § 542(a).[48] A debtor might seek an order under Code

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[43]See § 23:4.

[44]E.g., *Matter of Village Mobile Homes, Inc.*, 947 F.2d 1282, 22 Bankr. Ct. Dec. (CRR) 529, Bankr. L. Rep. (CCH) P 74347 (5th Cir. 1991). See § 23:4.

[45]E.g., *In re Cannonsburg Environmental Associates, Ltd.*, 72 F.3d 1260, 28 Bankr. Ct. Dec. (CRR) 465, Bankr. L. Rep. (CCH) P 76754, 1996 FED App. 0009P (6th Cir. 1996); *In re Munoz*, 287 B.R. 546, 68 Cal. Comp. Cas. (MB) 421, 40 Bankr. Ct. Dec. (CRR) 196 (B.A.P. 9th Cir. 2002). See also *In re Copper King Inn, Inc.*, 918 F.2d 1404, 23 Collier Bankr. Cas. 2d (MB) 1547, 12 U.C.C. Rep. Serv. 2d 1155 (9th Cir. 1990) (holding contested matter was essentially an adversary proceeding because motion and objection were filed and an evidentiary hearing was held).

[46]See § 23:4.

[47]*United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 130 S. Ct. 1367, 176 L. Ed. 2d 158, 52 Bankr. Ct. Dec. (CRR) 254, 63 Collier Bankr. Cas. 2d (MB) 428, Bankr. L. Rep. (CCH) P 81716, 76 Fed. R. Serv. 3d 364 (2010) (discussed in § 10:4). See § 23:4.

[48]The distinction is based on the concept that turnover is appropriate when the property is indisputably property of the estate but not when the debtor's interest is subject to dispute. *See In re McKeever*, 567 B.R. 652, 663 (Bankr. N.D. Ga. 2017) ("[T]urnover proceedings are strictly limited to actions to recover property that is indisputably part of the estate; in other words, a turnover action is not the appropriate tool for acquiring the right to use or possess property if the debtor's right to use or possess the property is subject to dispute."). Put

§ 105(a)[49] for the court to require the creditor to show cause why it should not turn over the property in compliance with its § 542(a) obligations, or assert that the motion is to enforce the provisions of Code § 542(a) under Code § 105(a) and not to "recover property." Another possibility is to present the matter as a motion to determine adequate protection necessary for turnover. The difficulty with all of these theories is that, as noted earlier, the prevailing view in the case law is that a turnover request is a proceeding to recover property under Rule 7001(1), although the cases do not address these arguments.

In deciding whether to proceed by motion, a debtor must consider whether she will seek damages and attorney's fees because of the creditor's failure to comply with its turnover obligations.

A debtor seeking turnover by motion to enforce the automatic stay could combine a request for damages and attorney's fees with the request for turnover because Code § 362(k) authorizes their recovery for a willful violation of the stay and courts permitted debtors to seek them by motion.[50] As later text discusses, Code § 542(a) contains no remedies for its enforcement. Accordingly, a request for damages and attorney's fees appears to be a proceeding to recover money for which Bankruptcy Rule 7001(1) requires an adversary proceeding.

Expedited consideration of debtor's request for turnover

As Justice Sotomayor observed in her concurring opinion in *City of Chicago v. Fulton,*[51] the average time an adversary proceeding for turnover under § 542 filed after July 2019 and concluding before June 2020 was pending was over 100 days, a long time for a debtor to wait for return of a motor vehicle.[52] Justice Sotomayor noted that some courts may permit debtors to seek turnover through a motion where the creditor has received adequate notice or may expedite proceedings or order preliminary relief requiring temporary turnover.

Delay of at least 30 days is inherent in an adversary proceeding, because the defendant has that long from the date of issu-

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another way, a motion in a contested matter is an appropriate way for a debtor to require *turnover* of property that she indisputably owns, but an adversary proceeding is necessary to *recover* it if her ownership is subject to dispute.

[49]11 U.S.C.A. § 105(a) authorizes the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]."

[50]See § 15:6.

[51]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[52]*City of Chicago, Illinois*, 141 S. Ct. 585.

ance of summons to answer the complaint.[53] Moreover, trial on the merits does not occur until the parties complete discovery. A debtor in urgent need of property such as a vehicle, therefore, must find a way to expedite the process.

The adversary rules provide for a party to obtain preliminary relief on an expedited basis. A complaint for turnover under § 542(a) requests an order requiring the creditor to turn over the property in its possession. A turnover order is in the nature of an injunction,[54] and Federal Rule of Civil Procedure 65, applicable in an adversary proceeding under Bankruptcy Rule 7065, governs a request for an injunction.[55]

Federal Rule 65(a) permits a debtor to seek emergency relief by filing a motion for a preliminary injunction[56] pending final determination of the adversary proceeding on the merits.[57] The court may advance the trial on the merits and consolidate it with the hearing on the motion for a preliminary injunction.[58] Bankruptcy Rule 7065 permits the issuance of a preliminary injunction requested by a debtor without compliance with Federal Rule 65(c), which requires the moving party to provide security to pay costs and damages sustained by any party found to have been wrongfully enjoined or restrained.

Alternatively, and perhaps more simply, a debtor might file a motion in the adversary proceeding contemporaneously with the complaint that seeks emergency relief based on the circumstances and requests an expedited hearing. Although the adversary rules do not contemplate such motions, Code § 105(a) provides a basis for the court to hear and determine the right to possession on an interim basis.

If the debtor elects to proceed by motion in a contested matter instead of filing an adversary proceeding, the debtor should request an expedited hearing and state the need for emergency relief. A separate motion to schedule an emergency hearing will assist in bringing it to the attention of the court.

Depending on local practice, a debtor may need to contact the

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[53]Fed. R. Bankr. P. 7012(a).

[54]See *In re Van Vleet*, 461 B.R. 62 (D. Colo. 2010); *In re Wildlife Center, Inc.*, 102 B.R. 321, 323, 23 Collier Bankr. Cas. 2d (MB) 251 (Bankr. E.D. N.Y. 1989).

[55]The court may make Federal Rule 65 applicable in a contested matter. Fed. R. Bankr. P. 9014(c).

[56]A debtor may also seek a temporary restraining order under Fed. R. Civ. P. 65(b), which the court may issue without notice to the creditor. It is unlikely in most circumstances that a bankruptcy court will issue a turnover order without notice.

[57]See, e.g., *In re Reid*, 423 B.R. 726, 70 U.C.C. Rep. Serv. 2d 755 (Bankr. E.D. Pa. 2010).

[58]Fed. R. Civ. P. 65(a)(2).

court's staff about the scheduling of an emergency hearing regardless of the type of proceeding the debtor files.

Issues in a turnover proceeding; adequate protection

Whether the debtor files a contested matter or an adversary proceeding, the issues are the same. Earlier text explains that in most situations it is undisputed that the debtor owns the property and that it is not of inconsequential value or benefit. Unless the creditor contends that it no longer has the property (perhaps because it disposed of it) or raises other defenses to turnover, the only issue before the court, absent unusual circumstances, is adequate protection.[59]

A secured creditor's right to adequate protection of its interest in encumbered property arises from Code § 363(e). It provides that, upon request of the creditor, the court "shall prohibit or condition" the use of property in the case as is necessary to provide adequate protection.[60]

The Bankruptcy Code requires adequate protection to protect a secured creditor from the diminution of value that may occur during the case. In the Chapter 13 context, adequate protection typically consists of periodic payments equal to the estimated depreciation that will occur.[61] When the collateral is a motor vehicle, an additional component of adequate protection is insurance on it to protect the creditor from damage or destruction due to a collision.[62]

Code § 542(a) does not condition turnover on the provision of adequate protection to the creditor. Under the view that the turnover obligation under Code § 542(a) is self-operative, a creditor cannot properly refuse to turn over property based on a lack of adequate protection. Instead, it must request adequate protection in accordance with Code § 363(e). To enforce the self-operative nature of § 542(a), a court must decline to consider adequate protection in connection with a turnover request. Otherwise, the court by addressing adequate protection issues effectively authorizes the creditor to retain the property until that issue is

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[59]For example, if a creditor's repossession efforts have been thwarted by the debtor's concealment of the collateral or by multiple bankruptcy filings that call the debtor's good faith into question, the creditor might resist turnover on the ground that the court should lift the stay or dismiss the case for those reasons, which would permit the creditor to retain possession. In such circumstances, a sympathetic court might defer a ruling on turnover and permit the creditor to retain possession pending determination of a motion for stay relief or for dismissal of the case due to bad faith so that the creditor does not bear the burden and expense of a second repossession.

[60]See § 15:8.

[61]See §§ 5:15, 5:18.

[62]See §§ 5:15, 15:8.

addressed, the effect of which is that § 542(a) is not self-operative.

The prevailing view, however, is that Code § 542(a) is not self-operative and that a creditor is entitled to adequate protection in connection with the turnover of property, as earlier text discusses. The issue is what type of adequate protection is appropriate in the context of a turnover request in a Chapter 13 case.

Most Chapter 13 turnover requests involve a motor vehicle and occur early in the case when the debtor has an urgent and compelling need for it, as Justice Sotomayor's concurring opinion in *City of Chicago v. Fulton* demonstrates.[63] It is, therefore, important that the court consider the two adequate protection issues in turnover matters—periodic payments and insurance—in ways that permit their prompt determination and encourage consensual resolution in a manner consistent with the adequate protection rights of creditors under the statutory scheme of Chapter 13.

With regard to insurance, most courts under pre-*Fulton* practice ruled that a creditor violated Code § 362(a)(3) by conditioning turnover on the debtor's provision of proof of insurance,[64] while some courts permitted a creditor to do so.[65] After *Fulton,* a creditor's retention of a motor vehicle alone does not violate Code § 362(a)(3), and its insistence on insurance is an act to protect its collateral, not to collect a prepetition debt in violation of Code § 362(a)(6) or to create, perfect, or enforce its lien in violation of Code § 362(a)(4). It is unlikely that a court will permit a debtor to take possession of a vehicle that is not insured, and a

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[63]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[64]E.g., *In re Weber*, 719 F.3d 72, 69 Collier Bankr. Cas. 2d (MB) 1168, Bankr. L. Rep. (CCH) P 82484 (2d Cir. 2013) (abrogated by, City of Chicago, Illinois v. Fulton, 141 S. Ct. 585, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021)); *Thompson v. General Motors Acceptance Corp., LLC*, 566 F.3d 699, 61 Collier Bankr. Cas. 2d (MB) 1611, Bankr. L. Rep. (CCH) P 81490 (7th Cir. 2009); *In re Sharon*, 234 B.R. 676, 1999 FED App. 0009P (B.A.P. 6th Cir. 1999); see *In re Yates*, 332 B.R. 1, 7, 54 Collier Bankr. Cas. 2d (MB) 1901, 8 A.L.R. Fed. 2d 837 (B.A.P. 10th Cir. 2005) (abrogated by, In re Cowen, 849 F.3d 943, 63 Bankr. Ct. Dec. (CRR) 211, 77 Collier Bankr. Cas. 2d (MB) 438 (10th Cir. 2017)); *In re Stephens*, 495 B.R. 608, 614 (Bankr. N.D. Ga. 2013); *In re Rutherford*, 329 B.R. 886 (Bankr. N.D. Ga. 2005); *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484 (N.D. Tex. 1999).

[65]E.g., *In re Massey*, 210 B.R. 693 (Bankr. D. Md. 1997); *Matter of Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997); *In re Kolberg*, 199 B.R. 929 (W.D. Mich. 1996); *In re Young*, 193 B.R. 620 (Bankr. D. D.C. 1996); see *Mitchell v. BankIllinois*, 316 B.R. 891 (S.D. Tex. 2004) (failure to turn over vehicle to Chapter 13 debtor after debtor has made demand and has provided proof of insurance is violation of the automatic stay); *In re House*, 2017 WL 2579026 (Bankr. S.D. Miss. 2017) (Willful stay violation after lender failed to turn over vehicle when "good faith negotiation" broke down).

debtor should not have a different expectation.

A court can promptly determine whether insurance exists, and existence of the insurance requirement makes proof of it an expected and routine part of consensual resolution of a turnover request. Accordingly, a court properly conditions turnover on its existence.

Consideration of the amount and timing of adequate protection payments in a turnover context at the outset of a Chapter 13 case, on the other hand, is inconsistent with Chapter 13's provisions for adequate protection for creditors secured by personal property. In addition, factual issues relevant to determination of the amount of the payments, such as the value of the collateral and its expected depreciation, may not be capable of prompt determination.[66] Addressing adequate protection payments in connection with a turnover matter introduces an additional subject for negotiation and therefore makes consensual resolution more difficult.

A court's consideration of adequate protection payments on an expedited basis at the outset of the case in connection with an emergency turnover request is inconsistent with what might be called Chapter 13's "default rules" for dealing with adequate protection for a security interest in personal property. In general, the default rules provide for the debtor to propose adequate protection payments, for a dissatisfied creditor to request an increase, and for the court to determine the dispute at a hearing in accordance with the court's usual practice for hearing such matters. This is, of course, consistent with Code § 363(e), which conditions adequate protection on a creditor's request for it.

One default provision is Code § 1325(a)(5)(B)(iii). It requires that a Chapter 13 plan provide for monthly payments to a secured creditor with a security interest in personal property that are sufficient to provide adequate protection to the creditor.[67] If the amount of the payment is not satisfactory, the creditor can either object to confirmation, file a motion for the court to determine adequate protection pursuant to Code § 363(e), or both.

The second default provision addresses adequate protection payments when the creditor's security interest is a purchase money security interest. Code § 1326(a)(1)(C) requires that adequate protection payments to such a creditor begin not later than 30 days after the filing of the case, unless the court orders

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[66]Valuation and related depreciation issues may require expert testimony. See § 5:6.

[67]11 U.S.C.A. § 1325(a)(5)(B)(iii). See § 5:15.

otherwise.[68] Code § 1326(a)(1)(C) permits the debtor to establish the amount of the adequate protection payments in the plan, unless the court, after notice and hearing, modifies, increases, or reduces the payments pursuant to Code § 1326(a)(3). A dissatisfied creditor may either file a motion requesting an increase in adequate protection payments under Code § 1326(a)(3), request an increase under § 363(e), or both.

The court will hear requests for adequate protection under Code § 363(e) or objections to a plan's proposal for adequate payments under Code § 1326(a)(3) in accordance with its usual procedures for such matters, which may include expedited consideration of them.

Because Code § 1325(a)(5)(B)(iii) and Code § 1326(a)(1)(C) specifically address adequate protection payments and permit the debtor to set their amount in the first instance, subject to later review by the court at the creditor's request, addressing the amount of adequate protection payments at the outset of the case in the context of a turnover request seems inappropriate. In view of the fact that Code § 542(a) does not condition turnover on the provision of adequate protection, a court absent unusual circumstances properly addresses adequate protection payments at a later time in accordance with Code § 363(e) and the default rules just discussed.

Arguably, consideration of adequate protection payments and turnover at the same time promotes judicial economy because another hearing will not be necessary. But a procedure that defers the issue makes it more likely that the more urgent issue of turnover is resolved consensually upon proof of insurance so that only a hearing on the adequate protection payments is required. Moreover, whereas a debtor's need for a motor vehicle involves an emergency measured in days, the amount of adequate protection payments involves no such urgency.

On balance, postponement of the payment issue promotes prompt turnover and consensual resolution without unduly impairing the creditor's interest. Determination of adequate protection payments under the two default rules under the court's ordinary procedures puts a creditor who has possession of collateral in the same position as any other creditor secured by personal property with regard to adequate protection payments at the outset of the case.

Under this approach, a creditor can insist on proof of insurance before turning the property over to the debtor but cannot refuse turnover because of a dispute over adequate protection payments. In a jurisdiction that adopts the self-operative view of Code

[68]See § 5:16.

§ 542(a), however, a creditor may need to promptly bring the insurance matter to the attention of the court in a motion requesting that the court require insurance in connection with turnover.

Bankruptcy judges have discretion under the Bankruptcy Code and Bankruptcy Rules to determine how to address adequate protection payments in connection with a turnover request. Section 363(e) permits a court to require adequate protection without a hearing. The Bankruptcy Rules do not specify how much notice is required for a hearing on adequate protection, and Bankruptcy Rule 9006(c)(1) generally permits the court to reduce the time for notices.[69] Thus, courts have flexibility in deciding how to balance Justice Sotomayor's concerns in *Fulton*[70] about a debtor's need for the prompt return of a motor vehicle with a creditor's right to adequate protection.

Enforcement of turnover order and sanctions

If the court issues an order for turnover and the creditor fails to comply, the bankruptcy court may enforce its order through its civil contempt powers.[71] Bankruptcy Rule 9020 provides that

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[69]Fed. R. Bankr R. P. 9006(c)(2) states certain time periods that the court cannot reduce, but notice with regard to a hearing on adequate protection is not one of them.

[70]*City of Chicago, Illinois v. Fulton*, 141 S. Ct. 585, 592, 69 Bankr. Ct. Dec. (CRR) 160, Bankr. L. Rep. (CCH) P 83578 (2021) (Sotomayor, J., concurring).

[71]E.g., *In re Hercules Enterprises, Inc.*, 387 F.3d 1024, 43 Bankr. Ct. Dec. (CRR) 228, Bankr. L. Rep. (CCH) P 80183 (9th Cir. 2004); *In re Van Vleet*, 461 B.R. 62 (D. Colo. 2010); *In re Wildlife Center, Inc.*, 102 B.R. 321, 323, 23 Collier Bankr. Cas. 2d (MB) 251 (Bankr. E.D. N.Y. 1989); see *In re Lawrence*, 279 F.3d 1294 (11th Cir. 2002) (debtor may be found in contempt for failure to turn over assets to trustee).

The bankruptcy court's civil contempt powers arise primarily from 11 U.S.C.A. § 105(a); some courts also conclude that bankruptcy courts have inherent civil contempt power. E.g., *Law Solutions of Chicago LLC v. Corbett*, 971 F.3d 1299, 69 Bankr. Ct. Dec. (CRR) 60 (11th Cir. 2020); *In re Kalikow*, 602 F.3d 82, 52 Bankr. Ct. Dec. (CRR) 276, Bankr. L. Rep. (CCH) P 81728 (2d Cir. 2010); *In re White-Robinson*, 777 F.3d 792, 60 Bankr. Ct. Dec. (CRR) 156 (5th Cir. 2015); *Matter of Terrebonne Fuel and Lube, Inc.*, 108 F.3d 609, 613, 37 Collier Bankr. Cas. 2d (MB) 1166, Bankr. L. Rep. (CCH) P 77327 (5th Cir. 1997); *In re McLean*, 794 F.3d 1313, 61 Bankr. Ct. Dec. (CRR) 95, Bankr. L. Rep. (CCH) P 82853 (11th Cir. 2015); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 284, 28 Bankr. Ct. Dec. (CRR) 871, 35 Collier Bankr. Cas. 2d (MB) 620, Bankr. L. Rep. (CCH) P 76830 (9th Cir. 1996); *In re Ragar*, 3 F.3d 1174, 1179, 24 Bankr. Ct. Dec. (CRR) 1036, 29 Collier Bankr. Cas. 2d (MB) 1005, Bankr. L. Rep. (CCH) P 75417 (8th Cir. 1993); *In re Skinner*, 917 F.2d 444, 447, 21 Bankr. Ct. Dec. (CRR) 49, 23 Collier Bankr. Cas. 2d (MB) 1559, Bankr. L. Rep. (CCH) P 73664 (10th Cir. 1990); *In re Walters*, 868 F.2d 665, 18 Bankr. Ct. Dec. (CRR) 1484, 22 Collier Bankr. Cas. 2d (MB) 263, Bankr. L. Rep. (CCH) P 72693 (4th Cir. 1989). See also Norton Bankruptcy Law and Practice 3d § 13:5; Drake & Visser, Bankruptcy Practice for the General Practitioner § 4:9.

Bankruptcy Rule 9014,[72] which states procedures for contested matters, governs a motion for contempt. Remedies for civil contempt include sanctions in the form of attorney's fees and damages, as well as coercive penalties designed to compel compliance with the order.

Most courts conclude that a bankruptcy court does not have criminal contempt powers.[73] A court imposes noncompensatory punitive damages pursuant to its criminal contempt powers. Thus, courts have ruled that a bankruptcy court may not impose punitive damages,[74] although some have noted that a bankruptcy court might be able to award relatively mild or nonserious punitive damages.[75]

If Code § 542(a) is mandatory and self-operative, a creditor who refuses to turn over property until ordered to do so has violated Code § 542(a) regardless of whether it complies with the court's order when issued. The question is whether the debtor may recover attorney's fees incurred in obtaining the turnover order and damages resulting from the delay in obtaining possession.

Even if Code § 542(a) is not self-operative, the question arises when a recalcitrant creditor refuses to turn over property until the court orders it but did not oppose the motion or produced no legitimate basis for its refusal.

Under the principles discussed above, a Chapter 13 debtor is ordinarily entitled to possession of repossessed or seized personal property under Code § 542(a); in the case of a motor vehicle, the debtor may need to provide proof of insurance. The argument is that it is an abuse of the bankruptcy process for a creditor to require litigation to resolve an issue that requires immediate attention and is not complicated. Sanctions in the form of attorney's fees and damages may be appropriate to compensate a debtor harmed by a creditor's unwarranted refusal to comply with Code § 542(a) and to deter others from engaging in the same type of behavior.

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[72]See § 23:6.

[73]E.g., *In re John Richards Homes Bldg. Co.*, 552 Fed. Appx. 401, 415 (6th Cir. 2013); *Matter of Hipp, Inc.*, 895 F.2d 1503, 20 Bankr. Ct. Dec. (CRR) 418, 22 Collier Bankr. Cas. 2d (MB) 876, Bankr. L. Rep. (CCH) P 73293 (5th Cir. 1990). Contra, e.g., *In re Ragar*, 3 F.3d 1174, 24 Bankr. Ct. Dec. (CRR) 1036, 29 Collier Bankr. Cas. 2d (MB) 1005, Bankr. L. Rep. (CCH) P 75417 (8th Cir. 1993); see *In re McLean*, 794 F.3d 1313, 61 Bankr. Ct. Dec. (CRR) 95, Bankr. L. Rep. (CCH) P 82853 (11th Cir. 2015) (Remanding issue of punitive damages to bankruptcy court.).

[74]E.g., *In re Dyer*, 322 F.3d 1178, 1193, 41 Bankr. Ct. Dec. (CRR) 64, Bankr. L. Rep. (CCH) P 78816 (9th Cir. 2003).

[75]E.g., *In re John Richards Homes Bldg. Co.*, 552 Fed. Appx. 401, 415 (6th Cir. 2013); *In re Dyer*, 322 F.3d 1178, 41 Bankr. Ct. Dec. (CRR) 64, Bankr. L. Rep. (CCH) P 78816 (9th Cir. 2003).

Under pre-*Fulton* practice, bankruptcy courts awarded attorney's fees and damages, including punitive damages when appropriate, to debtors when they concluded that the creditor had violated Code § 362(a)(3) by refusing to turn over property. Code § 362(k) specifically authorizes such relief as a remedy for individuals for a creditor's violation of the automatic stay.[76] The remedy under § 362(k) is no longer available after *Fulton.*

Unlike Code § 362, Code § 542(a) contains no remedies for a creditor's violation of its turnover obligation. And under the view that § 542(a) is not self-operative, a creditor has no turnover obligation until the court orders it.

A possible source for remedies is Code § 105(a). It provides, "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]." In explaining that bankruptcy courts do not need the automatic stay to enforce turnover under Code § 542(a), one court observed that bankruptcy courts have "broad equitable powers under [Code § 105(a)] and can provide equitable relief as necessary or appropriate to carry out the provisions of § 542(a). Moreover, § 105(a) grants bankruptcy courts the power to sanction conduct abusive of the judicial process."[77]

The Supreme Court stated in *Marrama v. Citizens Bank of Massachusetts*[78] that Code § 105(a) gives a bankruptcy court "broad authority" to "take any action that is necessary or appropriate to prevent an abuse of process." The Court qualified this statement in *Law v. Siegel,*[79] stating that, in exercising its statutory and inherent powers, "a bankruptcy court may not contravene specific statutory provisions." Courts will have to determine whether, based on a conclusion that a creditor's response to a debtor's turnover request violated Code § 542(a) or abused the bankruptcy process, Code § 105(a) permits an award of attorney's fees and damages or whether doing so contravenes other provisions of the Bankruptcy Code.

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[76]See § 15:6.

[77]*In re Cowen*, 849 F.3d 943, 950, 63 Bankr. Ct. Dec. (CRR) 211, 77 Collier Bankr. Cas. 2d (MB) 438 (10th Cir. 2017) (citations and interior quotations omitted), quoting *In re Scrivner*, 535 F.3d 1258, 1263, Bankr. L. Rep. (CCH) P 81332, 47 A.L.R. Fed. 2d 571 (10th Cir. 2008).

[78]*Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 375, 127 S. Ct. 1105, 166 L. Ed. 2d 956, 47 Bankr. Ct. Dec. (CRR) 221, 57 Collier Bankr. Cas. 2d (MB) 1, Bankr. L. Rep. (CCH) P 80850 (2007) (quoting 11 U.S.C.A. § 105(a)).

[79]*Law v. Siegel*, 571 U.S. 415, 420–21, 134 S. Ct. 1188, 188 L. Ed. 2d 146, 59 Bankr. Ct. Dec. (CRR) 43, Bankr. L. Rep. (CCH) P 82592 (2014).