



0000071535

ORIGINAL

19

BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

WILLIAM A. MUNDELL
Chairman
JIM IRVIN
Commissioner
MARC SPITZER
Commissioner

2001 DEC 21 A 11: 23

AZ CORP COMMISSION
DOCUMENT CONTROL

In the matter of:)
RICHARD DEAN CARRINGTON)
a/k/a Richard Dean Frank)
d/b/a Carrington Estate Planning Services)
d/b/a Carrington Investment Services)
7600 East Doubletree Ranch Road, Ste. 130)
Scottsdale, AZ 85258)
ROBERT WITT)
a/k/a Harry Robert Witt)
7600 East Doubletree Ranch Road, Ste. 130)
Scottsdale, AZ 85258,)
Respondents.)

Docket No. S-03215A-01-0000

MOTION IN LIMINE

(ALJ Marc Stern)

Arizona Corporation Commission

DOCKETED

DEC 21 2001

DOCKETED BY [Signature]

The Securities Division of the Arizona Corporation Commission ("Division") respectfully requests that the administrative law judge determine that the automatic stay, effected upon filing of bankruptcy, is inapplicable in the present matter, as described further below. This motion is supported by the following memorandum of points and authorities.

Memorandum of Points and Authorities

I.

Background

On October 9, 2001, the Arizona Corporation Commission issued a Temporary Order to Cease and Desist against the above respondents, alleging fraud in the sale of unregistered securities. On October 12, 2001, the respondents duly requested a hearing. At a pre-hearing

1 conference on November 1, 2001, the parties agreed to set the hearing in February or March of
2 2002.

3 On November 19, 2001, respondent RICHARD DEAN CARRINGTON
4 (“CARRINGTON”) filed for bankruptcy in federal court in Phoenix under Chapter 13 of the U.S.
5 Bankruptcy Code. CARRINGTON also filed for bankruptcy on behalf of Carrington Estate
6 Planning Services (“CEPS”) in federal court in Phoenix under Chapter 11 of the U. S. Bankruptcy
7 Code¹.

8 II.

9 The stay is inapplicable to the present matter

10 The filing of a bankruptcy petition operates as a stay, applicable to all entities, of “the
11 commencement or continuation . . . of a judicial, administrative, or other action or proceeding
12 against the debtor. . .” § 362(a)(1). The general policy behind the automatic stay is to grant
13 complete and immediate, albeit temporary relief to the debtor from creditors, and to prevent
14 dissipation of the debtor’s assets before orderly distribution to all creditors can be effected. *S.E.C.*
15 *v. Brennan*, 230 F.3d 65, 71 (2nd Cir. 2000). A main purpose of the stay is to protect the priority of
16 payment to creditors. 3 COLLIER ON BANKRUPTCY § 362.05[5][b] at 362-61 (15th ed. 2000).
17

18 The Code provides certain exceptions to the automatic stay, which are the subject of this
19 Motion. Section 362(b)(4) provides an exception for certain governmental police and regulatory
20 actions. Section 362(b)(4) provides that the filing of a petition in bankruptcy does not stay
21

22 The commencement or continuation of an action or proceeding by a
23 governmental unit . . . to enforce such governmental unit’s . . . police and
24 regulatory power, including the enforcement of a judgment other than a
25 money judgment, obtained in an action or proceeding by the governmental
26 unit to enforce such governmental unit’s police or regulatory power.

11 U.S.C. § 362(b)(4) (1998).

¹ The Division now has reason to believe that CEPS is a separately incorporated entity, organized under the laws of Nevada. The Division will be filing appropriate pleadings to add CEPS to this action as a separate party.

1 This provision permits a governmental unit to “commence or continue any police or
2 regulatory action, including one seeking a money judgment, but it may enforce only those
3 judgments and orders that do not require payment or authorize the government to exercise control
4 over property of the estate.” COLLIER, *supra* at 362-60.

5 The legislative history of this section indicates that when a debtor is sued by a
6 governmental unit in order “to prevent or stop violation of *fraud*, environmental protection,
7 *consumer protection*, safety or *similar police or regulatory laws*, or *attempting to fix damages for*
8 *violation of such law*, the action or proceeding is not stayed by Section 362.” H.R.Rep. No. 595,
9 95th Cong., 1st Sess. 343 (1977), reprinted in 1978 U.S.C.C.A.N. 5838, 6299; S.Rep. No. 989, 95th
10 Cong., 2d Sess. 52 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5838 (emphasis added). By
11 allowing such actions to proceed, this exception prevents the bankruptcy court from becoming a
12 “haven for wrongdoers.” *In re Berg*, 230 F. #d 1165, 1167 (9th Cir. 2000).

13
14
15 **III.**

16 **The exception allows the state to impose an injunction and to liquidate its claims**

17 The Division seeks a permanent Order to Cease and Desist against CARRINGTON and
18 CEPS to prevent these debtors and their agents, officers, employees and all other persons acting in
19 concert or participation with them, from engaging in securities fraud. Where a state agency is
20 attempting to prevent future occurrences of fraud through injunctive relief, the action comes within
21 the scope of § 362(b)(4). *In re Poule*, 91 B.R. at 86 (9th Cir. BAP 1988). Here, the Order sought is
22 to effectuate public policy, prevent fraud and protect the citizenry from fraudulent courses of
23 business. The entry of a final Order to Cease and Desist is not stayed by the bankruptcy.

24 Further, a final *entry* of a monetary judgment is not prohibited by the automatic stay under
25 § 362(b)(4). The Ninth Circuit makes a key distinction between “entry” of a money judgment and
26 “enforcement” of a money judgment. *National Labor Relations Board v. Continental Hagen*

1 Corp., 932 F.2d at 834 (9th Cir. 1991). “As the legislative history explicitly notes, the mere entry
2 of a money judgment by a governmental unit is not affected by the automatic stay, provided of
3 course that such proceedings are related to that government’s police powers.” *Id.* At 834. The
4 Ninth Circuit recognized, in *Universal Life Church*, that the “[d]etection of fraud ha[s] been
5 sustained as a valid basis for invoking the exception even when there is an additional pecuniary
6 interest at stake.” *In re Universal Life Church, Inc.*, 128 F. 3d 1294, 1298 (9th Cir. 1997) It further
7 stated that “[i]ndeed, most government actions which fall under this exemption have some
8 pecuniary component, particularly those associated with fraud detection.” *Id.* At 1299. “It is th[e]
9 seizure of a defendant-debtor’s property, to satisfy the judgment obtained by a plaintiff-creditor,
10 which is proscribed by subsection 362(b)(4).” *Id.* “Anything beyond the mere entry of a money
11 judgment against a debtor is prohibited by the automatic stay.” *S.E.C. v. Brennan, supra*, at 71.
12

13 III.

14 **The exception allows the state to establish a penalty for violations of the securities laws**

15 The same analysis applied to the discussion on restitution above can be applied to the entry
16 of a penalty in the present matter. The amount of penalty may be established by this court,
17 however, any collection efforts would be stayed until completion of the bankruptcy. In *Berg*,
18 *supra*, at 1168, the Ninth Circuit held that the purpose of pursuing litigation sanctions was to
19 effectuate public policy, even though the monetary penalty would enure to the benefit of a private
20 party. The court stated, “although private parties may benefit financially from sanctions, the
21 deterrent effect of monetary penalties can be essential for the government to protect its regulatory
22 interests.” *Id.*
23

24 ///

25 ///

26 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IV.

This Court may decide issues related to interpretation of the automatic stay provisions

The court in which litigation is pending has jurisdiction to determine whether the proceeding is subject to the automatic stay. *NLRB v. Sawulksi*, 158 B.R. 971, 975 (E.D. Mich. 1993). Bankruptcy courts do not have exclusive jurisdiction in determining the applicability of the automatic stay. *In re: Montana*, 185 B.R. 650, 652 (Bankr. S.D. Fla. 1995). Further, the Arizona Attorney General provides expertise and advice on interpretation of federal laws in relation to state agencies. The bankruptcy and collections section of the Attorney General's office has a long history of advising agencies on applicability of the automatic stay. A memo stating the Attorney General's position on the stay as it applies to Carrington, is attached as Exhibit "A".

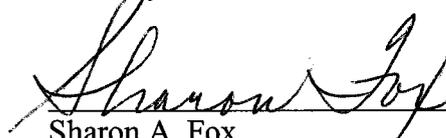
V.

Conclusion

For the above reasons, the Division requests that the administrative law judge make a determination that the present matter is exempted from the automatic stay provisions of the bankruptcy code, that the hearing will proceed as scheduled, and that a final judgment will be rendered, which, for purposes of collection, will be subject to the applicable laws of the bankruptcy court related to liquidated claims.

RESPECTFULLY submitted this 21st day of December, 2001.

JANET NAPOLITANO
Attorney General



Sharon A. Fox
Special Assistant Attorney General
Moira McCarthy
Assistant Attorney General

///

///

1 Copy mailed/faxed this
2 2/25 day of December, 2001
3 to:

4 Michael Salcido
5 Gust Rosenfeld
6 201 N. Central, Ste. 3300
7 Phoenix, AZ 85008-1727

8 Attorney for respondent/debtor Richard Carrington
9 and respondent Carrington Estate Planning Services
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**ARIZONA ATTORNEY GENERAL
AGENCY COUNSEL DIVISION
M E M O R A N D U M**

TO: The Honorable Marc Stern, Administrative Law Judge
FROM: Robert R. Hall, Assistant Attorney General, Bankruptcy and
Enforcement Collection Section
RE: Application of the Automatic Stay of 11 U.S.C. 362(a)
to administrative hearings
DATE: DECEMBER 19, 2001

This memorandum concerns whether an administrative hearing can proceed against a party who has filed a bankruptcy petition. It is the opinion of this office that the hearing can proceed provided that there is no attempt to enforce a monetary award against property of the bankruptcy estate. In reaching this conclusion, the following factors have been considered:

Carrington Estate Planning Services (it is our understanding that this is not a corporation) filed a chapter 11 petition on November 20, 2001. Richard Carrington filed a chapter 13 petition on that same date. Both the business and the individual are continuing their operations while in bankruptcy.

When a bankruptcy petition is filed, two significant events occur which alter the rights of both the Debtor (Carrington) and creditors. The first is the creation of the bankruptcy estate under 11 U.S.C. §541. The estate consists of virtually all property rights of the Debtor. The second is the imposition of the automatic stay under 11 U.S.C. 362(a). This provision, with important exceptions, prohibits acts, which seek to collect debts against property of the bankruptcy estate.

11 U.S.C. 362(a) is modified by 362(b). The latter section states specific situations in which the automatic stay does not apply. The significance of this section is that the party seeking to enforce its non-bankruptcy rights does not need to seek approval from the bankruptcy court because the stay does not apply to the action the party is taking.

There are 18 separate provisions in 362(b). Of significance to this memorandum is 362(b)(4). This provision permits a governmental unit to commence litigation for police or regulatory purposes against a debtor and to enforce a nonmonetary judgement against the Debtor. The bankruptcy code and supporting case law differentiate the government's police power from its ability to collect on a debt (pecuniary power). Provided that the court's relief relates to the police power (injunction against future acts

and the liquidation of damages) and does not involve an attempt to collect the damages (pecuniary action), the automatic stay does not apply to this proceeding. Since the automatic stay does not apply to this administrative hearing, it is appropriate for this court to continue its function.

#354889 v1 - MEMO -CARRINGTON