

1988

Grant Thornton & Co., as Liquidator/Receiver of Copper State Thrift & Loan Company v. Brighton Bank : Brief of Appellant

Utah Court of Appeals

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BRIEF

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IN THE STATE OF UTAH COURT OF APPEALS

GRANT THORNTON & CO., as
Liquidator/Receiver of
COPPER STATE THRIFT & LOAN
COMPANY,

Appellant,

v.

BRIGHTON BANK,

Respondent.

88-0381-CA

Case No. 880119

Priority No. 14(b)

APPELLANT'S BRIEF

APPEAL FROM THE FINAL ORDER OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY,
HONORABLE RICHARD H. MOFFAT

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COURT OF APPEALS

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JURISDICTION

This Court has jurisdiction over this action pursuant to the order of the Utah Supreme Court dated June 13, 1988, and Utah Code Ann., Section 78-2a-3(2)(h) (1987).

NATURE OF THE PROCEEDING

This is an appeal from a final order of the Third Judicial District Court of Salt Lake County, State of Utah, granting Respondent Brighton Bank's Motion for Relief from Stay of Proceedings under Utah Code Ann., Section 7-2-7 (1987).

STATEMENT OF THE ISSUES

1. Did the lower court err in granting Brighton Bank relief from the automatic stay of Section 7-2-7, of the Utah Code in order to proceed with its trust deed sale even through Brighton Bank's senior lien interest was adequately protected by a \$65,000 "equity cushion" in the real property at issue and in spite of the irreparable harm to Copper State's depositors through the extinguishment of Copper State's junior lien interest?

2. Did the lower court err in refusing to provide Copper State's depositors with the special protections afforded under Section 7-2-7 to depositors of failed thrift

institutions chartered in Utah, especially in view of the express legislative intent to preserve assets of a failed thrift in order to maximize the return to depositors?

3. Did the lower court err in refusing to consider federal bankruptcy law in interpreting and applying Section 7-2-7 in view of the analagous intent of the United States Bankruptcy Code, the well-developed body of law concerning the preservation and liquidation of assets provided by federal bankruptcy decisions, and even though the language of Section 7-2-7 is virtually identical to the automatic stay provision of the Bankruptcy Code?

DETERMINATIVE STATUTES

Utah Code Ann., Section 7-2-7 (1987):

(1) Except as otherwise specified in Subsection (2), a taking of an institution or other person by the Commissioner under this Chapter shall operate as a stay of the commencement or continuation of: (a) any judicial, administrative, or other proceeding against the institution, including service of process; (b) the enforcement of any judgment against the institution; (c) any act to obtain possession of property of or from the institution; (d) any act to create, perfect, or enforce any lien against property of the institution; (e) any act to collect, assess, or

recover a claim against the institution; and (f) the setoff of any debt owing to the institution against any claim against the institution. Upon application and after notice and hearing, the court may, for cause shown, terminate, annul, modify, or condition the stay.

Utah Code Ann., Section 7-1-102, (1987) (set forth in relevant part in brief, p. 21-22)

Utah Code Ann., Section 7-1-301, (1987) (set forth in relevant part in brief, p. 22)

Utah Code Ann., Section 7-20-1, (1987) (set forth in relevant part in brief, p. 22-23)

11 U.S.C., Section 362 (set forth in Addendum, p. A-10)

STATEMENT OF THE CASE

A. Nature of the Case.

This is an appeal from a final order of the Third Judicial District Court, State of Utah, the Honorable Richard H. Moffat, granting Respondent Brighton Bank's Motion for Relief from Stay of Proceedings under Utah Code Ann. Section 7-2-7, (1987), thereby allowing Brighton Bank to proceed with a non-judicial foreclosure of certain property against which Appellant Grant Thornton & Co. (hereinafter "Grant Thornton") as receiver/liquidator of Copper State Thrift & Loan (hereinafter "Copper State") holds a junior lien interest.

The Third Judicial District Court issued its final Order Modifying Stay of Section 7-2-7(1), Utah Code Annotated on March 8, 1988. The Notice of Appeal was filed on March 25, 1988.

B. Statement of Facts.

1. Copper State is the holder of a Promissory Note (hereinafter "Copper State Note") executed by Willis and Afton Wright (hereinafter "Wrights") on or about March 29, 1983. The Copper State Note was secured by a Deed of Trust (hereinafter "Copper State Trust Deed") executed by Wrights, as trustors, in favor of Copper State, as beneficiary, on or about March 29, 1983 describing real property located at 2500 Walker Lane, Salt Lake County, Utah (hereinafter "Property"). (Findings of Fact No. 1, Record at 1484.)

2. On or about September 12, 1983, Wrights executed, as trustors, a Trust Deed Note (hereinafter "Brighton Note") and Trust Deed (hereinafter "Brighton Trust Deed") in favor of Brighton Bank describing the Property. (Findings of Fact No. 2, Record at 1484.)

3. On or about October 11, 1983, Copper State agreed to subordinate the Copper State Trust Deed to the lien of the Brighton Trust Deed. (Findings of Fact No. 3, Record at 1484.)

4. In December, 1986, the Commissioner of the Department of Financial Institutions of the State of Utah

commenced a proceeding under Title 7, Chapter 2 of the Utah Code, and took possession of Copper State. Thereafter Grant Thornton was appointed receiver/liquidator of Copper State.

5. The Wrights defaulted on their obligations to Brighton Bank and Copper State and on or about May 30, 1986, Brighton Bank served on the Wrights and recorded a Notice of Default in preparation for a non-judicial foreclosure of the Property under the Brighton Trust Deed. (Findings of Fact No. 4, Record at 1484.)

6. On or about September 26, 1986, in response to Brighton Bank's foreclosure of the Property, the Wrights filed their petition for relief under Chapter 7 of the United States Bankruptcy Code. (Findings of Fact No. 5, Record at 1484.)

7. By Order dated September 7, 1987, Brighton Bank obtained relief from the automatic stay of 11 U.S.C. Section 362 in the Wright's bankruptcy proceeding to permit it to proceed with its non-judicial foreclosure under the Brighton Trust Deed. (Findings of Fact No. 6, Record at 1484.)

8. On or about September 22, 1987, the Bankruptcy Court granted relief from the Automatic Stay in Wrights' bankruptcy proceeding to permit Copper State to proceed with its foreclosure of the Property under the Copper State Trust Deed. (Findings of Fact No. 7, Record at 1485.)

9. On November 18, 1987, Copper State served on the Wrights and recorded in the office of the recorder of Salt Lake County, State of Utah, as part of its non-judicial foreclosure of the Property, a Notice of Default. (Findings of Fact No. 8, Record at 1485.)

10. The fair market value of the Property is Three Hundred Thousand Dollars (\$300,000.00) as established by Brighton Bank's appraisal dated June 11, 1987. (Findings of Fact No. 9, Record at 1485.)

11. As of February, 1988, Wright owed Brighton Bank approximately \$235,000 and Copper State approximately \$47,000. Together, the claims of Brighton Bank and Copper State against the Property total approximately \$282,000. (Findings of Fact No. 10, Record at 1485.)

12. The Property is declining in value because of its age, its lack of occupancy, a general decline in the real estate market, and other factors. (Findings of Fact No. 11, Record at 1485.)

13. The value of the Property is being consumed by ongoing interest accruing on the obligations of Copper State and Brighton Bank, and by other claims against the Property. (Findings of Fact No. 12, Record at 1485.)

14. There is no evidence that would suggest that interest will not continue to accrue and continue to erode

the "equity cushion." (Findings of Fact No. 13, Record at 1486.)

15. Considering only the claims of Brighton Bank and Copper State, which together total \$282,000.00, and the value of the Property at \$300,000.00, there is only an \$18,000.00 "equity cushion". (Findings of Fact No. 14, Record at 1486.)

16. This \$18,000.00 cushion will probably be more than absorbed by known but unascertained costs, attorney's fees and other claims. (Findings of Fact No. 15, Record at 1486.)

17. On or about December 3, 1987, Brighton Bank filed a Motion for Relief from Stay of Proceedings under Utah Code Ann., Section 7-2-7, (1987), which motion came on for hearing on December 18, 1987, before the Honorable Richard H. Moffat, Third Judicial District Court Judge. (Record at 1037-1083.)

18. After considering oral arguments and memoranda submitted by both Copper State and Brighton Bank, Judge Moffat filed his Minute Entry on January 27, 1988, and on March 8, 1988, the court issued its Findings of Fact, Conclusions of Law, and Final Order Modifying Stay of Section 7-2-7(1), Utah Code Annotated (1987), allowing Brighton Bank to proceed with its non-judicial foreclosure of the Property under the Brighton Trust Deed.

SUMMARY OF ARGUMENT

The lower court erred in finding as a matter of fact that the "equity cushion" protecting the Brighton Trust Deed was only \$18,000. Because Brighton Bank's lien is senior to all other liens, the value of the Property available to protect the Brighton Trust Deed is the difference between the amount due under the Brighton Note (\$235,000) and the value of the Property (\$300,000). Therefore, there is a \$65,000.00 equity cushion in the Property to protect Brighton Bank.

The \$65,000 equity cushion is sufficient to protect Brighton Bank's lien in the Property, including accruing interest and costs, for at least the next two (2) years. While the existence of junior liens impacts on the net equity of the Property, such liens can in no way impair or impinge upon the increasing value of Brighton Bank's senior lien. Brighton Bank would not be financially damaged by imposition of the Section 7-2-7 stay and would eventually realize the full benefit of its bargained-for senior lien interest.

The statements of the Utah Legislature and the express statutory purpose and intent of Title 7, Chapter 2 of the Utah Code, evidences a clear legislative intent to protect depositors of failed financial institutions, and Section 7-2-7 was enacted to preserve the assets of a failed institution for the benefit of its depositors. The lower court failed to recognize the special protections to be

afforded such depositors, thus emasculating the provisions of Title 7, Chapter 2 and specifically Section 7-2-7.

By granting the motion for relief from stay, Brighton Bank is now free to proceed with its foreclosure action which will ultimately result in the extinguishment of Copper State's junior lien interest. As a result, the depositors of Copper State will be denied a valuable asset that would otherwise be available to help satisfy their claims. In the absence of injury to Brighton Bank and in light of the Property's significant value, the interests of Brighton Bank and Copper State's depositors can be fully realized through a reinstatement of the Section 7-2-7 stay.

The stay of Section 7-2-7 is based almost verbatim on the language of 11 U.S.C. Section 362, the automatic stay provision of the United States Bankruptcy Code. Other sections of Title 7, Chapter 2 are likewise based on provisions of the U.S. Bankruptcy Code. In view of Section 7-2-7's obvious nexus with the U.S. Bankruptcy Code and in the absence of controlling state law, federal bankruptcy law, as a sophisticated and complete body of law dealing with the liquidation and distribution of an insolvency entity's assets, is of assistance in interpreting and applying the Section 7-2-7 stay. Federal bankruptcy law requires in granting relief from the stay that the interests of secured creditors be balanced against the interest of other creditors

who will benefit from an enforcement of the stay. In this case, Brighton Bank would not be financially damaged as a result of the stay and the depositors of Copper State would be denied the benefit of a valuable asset if the stay were not enforced.

ARGUMENT

I.

THE LOWER COURT ERRED IN FINDING THAT BRIGHTON BANK'S "EQUITY CUSHION" IS THE DIFFERENCE BETWEEN THE VALUE OF BRIGHTON BANK'S LIEN PLUS COPPER STATE'S JUNIOR LIEN AND THE FAIR MARKET VALUE OF THE PROPERTY.

On December 18, 1987, Brighton Bank's Motion for Relief From Stay of Proceeding Under Utah Code Ann., Section 7-2-7, (1987) came on for hearing in the lower court. The hearing was not reported and no transcript of the hearing is available. By its motion, Brighton Bank requested relief from the automatic stay imposed by Utah Code Ann., Section 7-2-7 (1987) (hereinafter "Section 7-2-7") in order to proceed under the Brighton Trust Deed with a non-judicial foreclosure of the Property, which was also encumbered by Copper State's junior lien interest represented by the Copper State Trust Deed. As more particularly described in the Statement of Facts above, Copper State is currently in receivership and liquidation proceedings pursuant to Utah Code Ann., Sections 7-2-1 et seq. (1987).

In support of its motion, Brighton Bank argued, inter alia, that since Brighton Bank had a lien interest in the Property superior to the lien of the Copper State Trust Deed, either Brighton Bank should be permitted to foreclose the Brighton Trust Deed or, in the alternative, Copper State should be required to make monthly payments to Brighton Bank

pursuant to the terms of the Brighton Note. Brighton Bank argued that it "should not be left in limbo for an indefinite period of time while its collateral continue[s] to depreciate in value." (See Reply Memorandum of Brighton Bank, page 6; Record at 1172).

In opposition to Brighton Bank's motion, Grant Thornton argued that the stay of Section 7-2-7 was intended to enjoin all actions affecting the Property in order to give Grant Thornton sufficient time to sell the Property at its fair market value and to prevent the expenditure of Copper State's meager assets to protect it's junior lien interest. Grant Thornton asserted that Brighton Bank would not be harmed by a continuation of the stay because Brighton Bank's equity cushion in the Property was more than adequate to cover the accruing interest and costs on the Brighton Note. On the other hand, if Brighton Bank was granted relief from the automatic stay of Section 7-2-7, Grant Thornton would be forced to pay the Brighton Note of approximately \$235,000, or Copper State's junior lien interest of approximately \$47,000 would be eliminated as a result of Brighton Bank's foreclosure sale, thus denying Copper State's depositors the benefit of Copper State's interest in the Property. Such an inequitable result, Grant Thornton argued, is not what the Utah Legislature intended in enacting Section 7-2-7 to effect a stay of proceedings against property of a failed depository

institution such as Copper State. (See Memorandum In Opposition To Motion For Relief From Stay, page 9; Record at 1118.)

The lower court rejected Grant Thornton's arguments and granted Brighton Bank's motion to lift the stay of Section 7-2-7. On March 8, 1988, the lower court made its Findings of Fact, Conclusions of Law, and entered its final Order Modifying Stay of Section 7-2-7(1), Utah Code Ann. In that Order, the court found as follows:

Considering only the claims of Brighton Bank and Copper State, which together total \$282,000.00, and the value of the Property at \$300,000.00, there is only an \$18,000.00 "equity cushion".

(Findings of Fact No. 14; Record at 1486.)

The lower court further determined that this \$18,000.00 "equity cushion" was all that protected Brighton Bank's interest in the Property. The lower court also found that "[t]his \$18,000.00 cushion will probably be more than absorbed by known but unascertained costs, attorney's fees, and other claims." (Findings of Fact No. 15, Record at 1486.)

Ordinarily, a lower court's finding of fact should not be disturbed if it is based on substantial and competent evidence. Smith v. Utah Central Credit Union, 727 P.2d 219, 220 (Utah 1986). In the present case, however, it is not a matter of whether there are facts which could be strung together to construct the challenged finding, but whether

sound reasoning, in light of commonly understood principles, supports the lower court's finding. The evidence as to the amounts owed Copper State and Brighton Bank and the value of the Property is not in dispute. At issue here is the definition of "equity cushion" as it applies to Brighton Bank's lien interest in the Property. It appears that the lower court arrived at its determination of equity cushion by subtracting the total indebtedness to Copper State and Brighton Bank (\$282,000.00) from the value of the Property (\$300,000.00). Such an approach presupposes that Copper State's junior lien somehow impacts upon or decreases either the value of Brighton Bank's lien or the amount of equity in the Property protecting Brighton Bank's lien. Neither supposition, however, is true.

Well-reasoned decisions from other courts would define Brighton Bank's equity cushion in the Property as the difference between the amount owed Brighton Bank under the Brighton Note and Brighton Trust Deed and the fair market value of the Property. Such a definition of an equity cushion and the protection it affords senior lienholders is described in a recent decision of the Ninth Circuit Court of Appeals. In the case of In re Mellor, 734 F.2d 1396 (9th Cir. 1984) the holder of a first trust deed in the amount of \$66,700.00 sought relief from the automatic stay of 11 U.S.C. Section 362 as to property having a fair market value of

\$105,000.00. The lower courts found that because the property at issue was encumbered by other junior liens in excess of the value of the property, the interest of the first trust deed holder was not being protected and relief from the stay was appropriate. In reversing the decision of the lower courts, the Ninth Circuit Court of Appeals held that the first lienholder was adequately protected from the stay through the existence of a \$38,300.00 equity cushion (the difference between the first lien of \$66,700.00 and the \$105,000.00 market value of the property). In making its ruling, the Ninth Circuit Court clarified the distinction between equity and equity cushion:

"Equity cushion" has been defined as the value of the property, above the amount owed to the creditor with a secured claim, that will shield that interest from loss due to any decrease in the value of the property during the time the automatic stay remains in effect. "Equity," as opposed to "equity cushion", is the value, above all secured claims against the property, that can be realized from the sale of the property for the benefit of the unsecured creditors.

Id. at 1400 n.2 (citations omitted).

In other words, the amount of an equity cushion is calculated by taking the difference between the amount of the lien at issue, together with all other senior liens, and the fair market value of the property securing such liens.

Turning to the facts of this case, the lower court found, based on the stipulation of the parties, that the value of the Property was \$300,000.00. (Findings of Fact No.

9, Record at 1485.) The lower court additionally found that Brighton Bank was owed \$235,000.00 under the Brighton Note. (Findings of Fact No. 11, Record at 1485.) The lower court made no finding regarding the existence of any liens superior to the Brighton Trust Deed. Therefore, Brighton Bank's equity cushion in the Property is the difference between Brighton Bank's senior lien (\$235,000.00) and the appraised fair market value of the Property (\$300,000.00) or \$65,000.00. Accordingly, the interest of Brighton Bank in the Property is protected by a \$65,000.00 equity cushion rather than an \$18,000.00 equity cushion as found by the lower court.

II.

THE EXISTENCE OF A \$65,000.00 EQUITY CUSHION IS
SUFFICIENT TO ADEQUATELY PROTECT BRIGHTON BANK'S LIEN
INTEREST AND A REINSTATEMENT OF THE SECTION 7-2-7 STAY
WILL NOT DEPRIVE BRIGHTON BANK OF THE VALUE
FOR WHICH IT BARGAINED.

Having established that the Brighton Trust Deed is protected by a \$65,000.00 equity cushion, Grant Thornton asserts that the existence of this equity cushion is sufficient to adequately protect Brighton Bank's lien for a substantial period of time and that a reinstatement of the Section 7-2-7 stay will not financially harm Brighton Bank nor deprive Brighton Bank of the value of its bargain.

It is beyond question that under Utah law the interest of a senior lienholder takes precedence over and, indeed, may

even impinge upon the interests of junior lienholders. See, Utah Code Ann. Sections 57-3-2, 57-1-29, 78-37-4 (1953); State v. Johnson, 268 P. 561 (Utah 1928); and Utah Farm Prod. Credit v. Wasatch Bank, 734 P.2d 904 (Utah 1987). Thus, the existence of junior liens upon the Property, including the Copper State Trust Deed, can in no way impinge upon or impair Brighton Bank's \$65,000.00 equity cushion. Because of these facts, the reinstatement of the stay of Section 7-2-7 will not result in any financial injury to Brighton Bank.

The existence of the \$65,000.00 equity cushion allows the obligation represented by the Brighton Note to increase in value through the continual accrual of interest, costs, attorney fees and such other amounts as provided for therein. As a result, Brighton Bank is entitled to eventually receive every penny it would otherwise receive if monthly payments were presently made on the Brighton Note or if the Brighton Note were paid in full. While the Section 7-2-7 stay clearly precludes Brighton Bank from exercising its foreclosure remedies under the Brighton Trust Deed, the equity cushion fully protects the value of Brighton Bank's lien, including accruing interest and costs. Thus, Brighton Bank will eventually realize the full benefit of its bargain.

In contrast, the lower court concluded as a basis for its ruling that "the value of the property is being consumed by the ongoing interest charges of all the security holders,

but in primary part by that of Brighton Bank." (Minute Entry, page 1; Record at 1302.) In actuality, the interest accruing under the Brighton Note is accruing at the rate of approximately \$1,780.00 per month. Accordingly, it will take well over two (2) years before accruing interest will deplete Brighton Bank's equity cushion, even taking into account some \$20,000.00 in presently accrued costs and attorney's fees. Grant Thornton asserts that if the Section 7-2-7 stay is reinstated, it will take substantially less time for Grant Thornton to market and sell the Property and pay Brighton Bank's lien in full.

III.

THE LOWER COURT ERRED IN ITS INTERPRETATION
AND APPLICATION OF SECTION 7-2-7 IN THAT THE UTAH
LEGISLATURE EXPRESSLY INTENDED TO GRANT SPECIAL
PROTECTION TO THE DEPOSITORS OF A FAILED
FINANCIAL INSTITUTION.

In opposition to Brighton Bank's motion for relief from stay, Grant Thornton argued before the lower court that the stay should remain in effect in order to facilitate the orderly liquidation of Copper State's assets so as to maximize the return to depositors, and that the stay of Section 7-2-7 was enacted for the primary purpose of protecting the assets of a failed depository institution for the benefit of its depositors. (See Memorandum In Opposition to Motion For Relief From Stay, page 6, Record at 1115.) However, in its Minute Entry dated January 27, 1988, the

lower court was more persuaded by "the historical concerns of priority [that] would indicate that Brighton Bank's rights should not be interfered with by a junior lein-holder [sic] even if that lein-holder [sic] is in a position of having come under the protection of a proceeding by the Commissioner of Financial Institutions." (Minute Entry, pages 2-3, Record at 1303-4.)

On March 8, 1988, Grant Thornton brought before the lower court, inter alia, its Motion for Execution and Entry of Proposed Order, which order was the final Order Modifying Stay of Section 7-2-7(1), Utah Code Annotated, and from which Grant Thornton appeals. That hearing was reported and the resulting transcript makes available for this Court's review further arguments by the parties relative to the application of Section 7-2-7 as well as additional statements of the lower court that will assist this Court in more fully understanding the lower court's perspective of the appliciton of Section 7-2-7.

In response to Grant Thornton's argument that Section 7-2-7 was intended to afford depositors special protection, the lower court stated:

What you are dealing with are simply stockholders in a failed corporation, a for-profit corporation, and while I have sympathy with those people, I don't think I have the right, and I don't think their rights should be any better than anyone else's rights.

(Transcript of Hearing on Grant Thornton's Motion for Execution and Entry of Proposed Order, March 8, 1988 [hereinafter "Transcript"], page 40, Record at 1802.)

The court further stated:

I don't think that the Legislature has said to the Court that we've got to protect the interests of the stockholders in these failed thrifts at the cost of the stockholders or other creditors in other institutions whose legal position was primary to start with. I just don't think that's what the statute says. I don't think the Legislature intended to give special rights to the shareholders in the Thrifts, and I think in this case that's all I'm saying. Frankly, I don't think equitably, it's fair; if they did, I think it's very unfair [sic].

(Transcript, pages 32-33.)

In addition, the court opined:

I am just not of the view that simply because you have a receiver for a bunch of people who had money in a financial institution, that that financial institution's agreement should, all of the sudden, become not binding upon its receiver, and that steps into a better position than anyone else would be if it were not in the hands of receiver. I can't see the logical reason, the rightness of it, nor the equity in allowing that to occur, simply because the financial institution has failed and has been taken over by a receiver; and yet, that's what you would have urged me to do, which I denied.

(Transcript, page 18.)

In view of the above statements, it is clear that the lower court viewed the rights and interests of depositors in a failed financial institution to be no greater than those of a common shareholder or creditor of a failed private corporation. Thus, the lower court concluded that depositors of a failed financial institution are not entitled to any special consideration or protection.

However, the express provisions of Title 7 of the Utah Code make it clear that the legislature indeed intended to provide special protections to the depositors of a failed financial institution and to empower the receiver of a failed institution with the necessary statutory tools to maximize the return to depositors through the orderly liquidation of the failed institution's assets. The legislative findings and intent regarding the enactment of Title 7 are set forth in Section 7-1-102, which states, in relevant part:

Accordingly, it is the further purpose of this title to grant powers, privileges, and immunities to state chartered institutions at least equal to those possessed by federally chartered or insured institutions of the same class furnishing financial services to the people of this State in order to promote competitive equality in the financial services industry in this State to protect the interests of shareholders, members, depositors, and other customers of state chartered institutions.

(b) The legislature further finds that the Commissioner of Financial Institution . . . has recommended, in order to protect the depositors, customers, and shareholders of depository institutions . . ., that the Department of Financial Institutions be empowered to regulate the establishment in this State . . . and to restrict and regulate the acquisition of the assets or control of depository institutions doing business in this State.

(c) The Legislature further finds that the interest of the public will be served by especially authorizing the acquisition of control of, the merger or consolidation with, the acquisition of all or a portion of the assets of, or the assumption of all or a portion of the deposit and other liabilities of a failing or failed Utah depository institution . . . approved by the Commissioner or any receiver or liquidator appointed by him.

(d) It is the intent of the Legislature that the provisions of this title be interpreted and implemented to promote those purposes. (Emphasis added.)

Clearly, Title 7 was enacted with the specific and express purpose of protecting depositors of state-chartered financial institutions.

In regard to the powers and duties of the Commissioner of Financial Institutions, Section 7-1-301 states, in relevant part:

In addition to the powers, duties and responsibilities specified in this title, the Commissioner has all the functions, powers and duties, and responsibilities which respect to institutions, persons or businesses subject to the jurisdiction of the department contained within this article. The Commissioner may adopt and issue rules consistent with the purposes and provisions of this title . . . [which are]:

(4) To safeguard the interest of shareholders, members, depositors, and other customers of institutions and other persons subject to the jurisdiction of the department; (Emphasis added.)

Subsequent to the Commissioner's takeover of the various failed thrifts in 1986, the Utah Legislature, in special session, enacted U.C.A. 7-20-1 entitled "Thrift Institutions in Possession of Commissioner" and in connection therewith amended a number of provisions to Title 7. Section 7-20-1 states the legislative findings and declarations:

(1) The Legislature finds and declares that:

(a) The economic well-being of the citizens and communities of the state of Utah depends on the stability and reliability of the financial institutions in the state;

(b) Thrift institutions currently in the possession of the commissioner are inadequately capitalized to fully protect their depositors' funds;

(c) The industrial loan guaranty corporation is in the possession of the commissioner and is inadequately funded to insure the deposits in member thrift institutions;

(d) The public trust in financial institutions generally would be undermined if the commissioner were unable to maximize the return of depositors from funds in the thrift institutions in the possession of the commissioner; and

(e) Commerce in the state of Utah would be adversely affected by the insolvencies of individual depositors that may result from their inability to maximize the return of their deposits from the thrift institutions in the possession of the commissioner.

(2) It is, therefore, the purpose of this act to facilitate the reorganization, liquidation, or disposition of the assets of the thrift institutions in possession of the commissioner in order to maximize the return of funds to depositors. (Emphasis added.)

The above statutory language expresses the clear legislative intent to provide special protections to the depositors of a failed financial institution, to preserve assets of a failed financial institution for the benefit of depositors, and to provide for the orderly and timely liquidation of such assets in furtherance of the prime directive to maximize the return of funds to depositors.

It is equally evident from the legislative history to Chapter 2 of Title 7 that this legislation seeks first and foremost to protect depositors. During the 1983 legislative session, the Utah Legislature made substantial amendments to Title 7, including the enactment of the stay of Section

7-2-7. Recorded statements from the Senate Floor Debate make it clear that the amendments to Title 7 were made in order to strengthen the Commissioner's ability to deal with financially-troubled institutions and to increase the rights of depositors. In the introductory remarks regarding the proposed amendments to Title 7, Senator Karl Snow made the following comments:

It is particularly important in my view that the Department and the Commissioner particularly be empowered to take supervisory action to protect depositors and other creditors of troubled financial institutions. . . . Now, if I could emphasize and point out to the members of the Body that under current statutes depositors are treated as unsecured creditors entitled to absolutely no preferences or priority over any other creditor. Now I think all of you would agree with me that this is not sound public policy to allow depositors to assume a risk that they are no equipped to assess independently. If the public is to have confidence in the soundness and safety of Utah's financial institutions, depositors must, in my view, be given priority over other creditors. The current law provides that the only remedy available to the Commissioner is a take-over of problem institutions, and again I emphasize that depositors have no priority of position. The supervisory powers or responsibilities of the Commissioner must be expanded and of course that is the intent of this legislation, to prevent losses to the public in any takeover. . . . This bill seeks first and foremost to protect depositors.

(Senate Floor Debate on Senate Bill 238 of The Financial Institution's Act Amendment, February 28, 1983 (emphasis added) [hereinafter "Senate Floor Debate"] [Statement of Senator Karl Snow].)

Elaine Weiss, then the Commissioner of Financial Institutions, stated the following regarding the need for enacting Senate Bill 238:

I think another needed change was to give depositors priority. We found out in the very first thrift case that depositors were treated as unsecured creditors. I don't feel this is sound public policy and after discussing with a number of the legislators, it was my opinion that it was not the legislative intent. What we have done is to give the depositors priority so even in a possession case depositors can have access to at least part of his funds. The hardship that was worked on the public, the depositors of the very first thrift case, was very great and should there be another situation where the State is forced to take possession, we do not think that the depositors should be the victims, the depositors should pay the price, and they paid the price in Murray.

Representative Jepson added:

I would surely support this bill. . . . It will protect the consumer and their banking deposits also relating to checking accounts, putting them in line of assets, distribution of assets, and they would be a preference depositor.

Representative Hillyard also made the following comment regarding the priority to be given depositors:

For example, this bill would give the depositor the first lien on those assets. Now it's not the case. And you know, the State of Utah is one of the principal depositors in our local institutions. If our doors were to go bankruptcy [sic] or into receivership without some change in the law, we would be an unsecured creditors for whatever may be left of the assets. . . .

Finally, in mustering support for the passage of Senate Bill 238, Representative Hillyard summarized the bill as follows:

I urge your support for this Senate bill. I realize it's a complicated piece of legislation and it has been in an area that is very complicated for many people to understand . . . it is one that is designated to give the Commissioner greater power to implement the authority intent of Senate Bill 138 [Financial Institutions Act of 1981] and it is one that is the best for the interest of the State of Utah for all people who

have deposits in our financial institutions to give them the protection they really need . . .

When read in light of the legislative findings, intent and history, it becomes clear that Title 7, Chapter 2 was enacted to both provide depositors with greater protections than those afforded ordinary creditors and to maximize the return from the liquidation of a failed financial institution's assets. In order to effectuate these goals, the Utah Legislature enacted the stay of Section 7-2-7 to preserve all assets of a failed institution for the benefit of depositors by precluding third-party creditors from dissipating such assets. Accordingly, Grant Thornton respectfully requests that this Court reverse the lower court's Order Modifying Stay of Utah Code Ann., Section 7-2-7(1) (1987) and reinstate the automatic stay of Section 7-2-7 in order to promote the intent of the legislature by protecting the assets of Copper State for the ultimate benefit of its depositors.

IV.
THE DECISION OF THE LOWER COURT TO GRANT
BRIGHTON BANK'S MOTION FOR RELIEF FROM
THE SECTION 7-2-7 STAY WILL INJURE
COPPER STATE'S DEPOSITORS.

Prior to Brighton Bank's motion for relief, Grant Thornton had commenced to market the Property through a real estate agent and multiple listing service. With the benefit of the stay of Section 7-2-7, Grant Thornton had the

opportunity to market the Property within a commercially reasonable amount of time and thus maximize the ultimate sale price of the Property. The stay also precluded Brighton Bank from forcing Grant Thornton to use Copper State's meager cash assets to make monthly payments under the Brighton Note. Once the Property was sold, Grant Thornton would pay Brighton Bank in full and retain Copper State's share of the sale proceeds for later distribution to depositors. Such a disposal of the Property under the aegis of the Section 7-2-7 stay insured that Brighton Bank would not lose the benefit of its bargain at the time of the sale (Brighton Bank would recover the unpaid principal balance due under the Brighton Note together with all accrued interest and costs) and the depositors of Copper State could reap the benefit of one of the few viable assets belonging to the thrift.

As a result of the lower court's order granting relief from the stay, the optimum outcome as explained above is no longer possible and Grant Thornton is faced with only two unacceptable scenarios. First, Grant Thornton can expend cash assets of Copper State to buy or pay-off the Brighton Note. In other words, Grant Thornton can spend \$235,000.00 of Copper State's meager assets to protect its \$47,000.00 junior interest. If this were an isolated case, this may be an acceptable alternative. However, given the fact that a significant portion of Copper State's assets consist of

junior lien interests, Grant Thornton believes that this could become a financially impossible option. Second, Grant Thornton can allow Brighton Bank to proceed with its foreclosure of the Property under the Brighton Trust Deed in hopes of a bid in excess of the amount owed Brighton Bank.

As a practical matter, excess proceeds are unlikely for at least the following reasons: (1) interested purchasers almost never pay fair market value for a property at a trustee's deed sale; (2) Brighton Bank's interests are parochial in that it has no motivation to maximize the sales price of the Property; and (3) the nature of the Property is such that it is unlikely that active bidding will be made on the Property. The most likely outcome is that Brighton Bank will purchase the Property at trustee's sale through a credit bid of its lien. This will extinguish Copper State's junior lien interest and result in no return to depositors.

Grant Thornton asserts that the Utah Legislature specifically intended to preclude the occurrence of either scenario described above through the enactment of Section 7-2-7, and that Grant Thornton's marketing of the Property within a commercially reasonable time is in complete harmony with the overall purpose and intent of Title 7, Chapter 2. By reversing the lower court and reenacting the Section 7-2-7 stay, this Court will protect the interests of all Copper State's depositors and cause no injury to Brighton Bank. The

equity cushion protects Brighton Bank when Grant Thornton sells the Property.

Even if Grant Thornton cannot sell the Property for its current value of \$300,000.00 or if interest under the Brighton Note continues to erode the equity cushion, every dollar above Brighton Bank's lien that can be realized from Grant Thornton's sale of the Property will be one more dollar for the benefit of Copper State's depositors; whereas, based on the decision of the lower court, the depositors now will realize nothing from Copper State's lien on the Property.

V.

CONTRARY TO THE LOWER COURT'S CONCLUSION OF LAW,
SECTION 7-2-7 SHOULD BE INTERPRETED AND APPLIED
IN LIGHT OF FEDERAL BANKRUPTCY LAW.

In opposition to Brighton Bank's motion for relief, Grant Thornton argued that in the absence of Utah Supreme Court decisions interpreting the provisions of Title 7, Chapter 2, the lower court should look to bankruptcy court decisions interpreting the analogous automatic stay provision of the United States Bankruptcy Code. (See Memorandum in Opposition to Motion For Relief From Stay of Proceedings, pages 5-10; Record at 1114-20.) Grant Thornton argued that reliance upon bankruptcy law is appropriate since the most well-developed body of law concerning the protection and liquidation of assets is found in the decisions of federal bankruptcy courts. Grant Thornton also noted that the

language of Section 7-2-7 is virtually identical to the Bankruptcy Code's automatic stay provision, 11 U.S.C. Section 362. Grant Thornton reasoned that the Utah Legislature adopted language from the Bankruptcy Code with the intent of providing depositors with the same protections afforded creditors in a bankruptcy case; namely, the preservation of assets for the benefit of depositors. In addition, Grant Thornton also asserts that the logic and policy arguments behind federal bankruptcy law supports Grant Thornton's prior arguments that (1) Brighton Bank's lien is protected by a \$65,000.00 equity cushion; (2) Brighton Bank was not and will not be financially damaged as a result of the stay; and (3) the termination of the stay was not in the best interests of Copper State's depositors, and, indeed, will result in an injury to such depositors.

In ruling against Grant Thornton, the lower court determined that:

The Utah Legislature, in enacting the provisions of Title 7, Chapter 2, did not intend to adopt federal bankruptcy law, nor the cases thereunder, as governing law for the courts of the State of Utah.

(Conclusions of Law No. 1, Record at 1486.)

The court additionally ruled that:

The apparent minority rule, adopted by the Bankruptcy Court for the State of Utah, which would allow a junior lienholder under the protection of a proceeding by the Commissioner of Financial Institutions to interfere with a prior lienholder's immediate rights to seek foreclosure, should not govern herein.

(Conclusions of Law No. 2, Record at 1486.)

In the hearing on March 8, 1988, the court went so far as to state:

. . . [Y]ou've got to convince me that the Supreme Court of the State of Utah is going to say that what I think to be a minority rule in the bankruptcy area, as adopted by the Utah Bankruptcy Court, and frankly, a rule, which in part I think turns on what I regard to be a very flawed piece of Federal law, that's the whole Bankruptcy Act, should become the law of this State in relation to these issues.

(Transcript, page 18.)

While Grant Thornton cannot cite, for the benefit of the Court, express references to bankruptcy law in the legislative history to Section 7-2-7, Grant Thornton nonetheless urges this Court to interpret and apply Section 7-2-7 in a manner consistent with federal decisions interpreting the automatic stay provision of the Bankruptcy Code.

1. The Utah Legislature Patterned Many Of The Sections Of Title 7 Chapter 2, Including Section 7-2-7, After Provisions Contained In The United States Bankruptcy Code.

The clearest example of the Utah Legislature's adoption of statutory language from the United States Bankruptcy Code is found in Section 7-2-7(1), which is taken almost verbatim from 11 U.S.C., Section 362(a), the automatic stay provision of the United States Bankruptcy Code. Section 362 states in relevant part:

(a) Except as provided in subsection b of this section, a petition filed under . . . this title . . . operates as a stay . . . of --

(1) The commencement of . . ., including the issuance or employment of process, of a judicial, administrative, or other action of proceeding against the debtor . . .;

(2) The enforcement . . . of a judgment obtained before the commencement of a case under this title;

(3) Any act to obtain possession of property of the estate or of property from the estate . . .;

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

(6) Any act to collect, assess, or recover a claim against the debtor . . .;

(7) The setoff of any debt owing to the debtor . . . against any claim against the debtor.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . such as by terminating, annulling, modifying, or conditioning such stay . . . for cause . . .

In comparison, the statutory language of Section 7-2-7 is as follows:

(1) Except as otherwise specified in subsection (2), the taking of an institution or other person by the Commissioner under this Chapter shall operate as a stay of the commencement or continuation of:

(a) A judicial, administrative, or other proceeding against the institution, including service of process;

(b) Enforcement of any judgment against the institution;

(c) Any act to obtain possession of property of or from the institution;

(d) Any act to create, perfect, or enforce any lien against property of the institution;

(e) Any act to collect, assess, or recover a claim against the institution; and

(f) The setoff of any debt owing to the institution against any crime against the institution. Upon application and after notice and hearing, the court may for cause shown, terminate, annul, modify, or condition the stay.

This comparison of Section 7-2-7 to 11 U.S.C. Section 362 evidences a clear intent by the Utah Legislature to pattern Section 7-2-7 after the automatic stay provision of the United States Bankruptcy Code. Under 11 U.S.C. Section 109(b)(2), a financial institution is not eligible to be a debtor under the United States Bankruptcy Code. Section 7-2-7 therefore provides state-chartered financial institutions with similar protection available to other insolvent entities under the United States Bankruptcy Code.

It should be noted that the language of 11 U.S.C., Section 362(d) states that the court shall grant relief from the stay if good cause exists, while Section 7-2-7 states that the court may grant relief from the stay if good cause is shown. The granting of full judicial discretion under Section 7-2-7 again evidences a clear intent by the Utah Legislature to protect assets of a failed financial institution for the benefit of depositors by allowing the court to determine whether the stay should be terminated, annulled, modified, or conditioned, even if good cause does exist for granting such relief.

It must be further noted that 11 U.S.C. Section 362(d) allows the bankruptcy court to grant relief from the automatic stay for cause, including lack of adequate protection or lack of equity in the property if the property is not necessary to the debtor's effective reorganization.

In comparison, Section 7-2-7 contains no specific grounds for relief. Grant Thornton asserts that the stay of Section 7-2-7 is a sword to protect the assets of a failed thrift for the benefit of depositors; however, Section 7-2-7 provides no shield for creditors, and no specific grounds for relief from the stay. Therefore, based on the absence of language mandating relief from the stay and in the absence of specific grounds constituting good cause for relief from the stay, Grant Thornton asserts that the Utah Legislature intended the stay of Section 7-2-7 to be weighted in favor of depositors by providing an even broader grant of protection than that contained in 11 U.S.C. Section 362 and that the state court may even allow the stay to remain in place where a senior lienholder is not adequately protected, where there is no equity in the property, and where the property is not necessary for a reorganization of the thrift.

In addition to Section 7-2-7, Chapter 2 is replete with provisions which were adopted either directly or by way of concept from sections of the Bankruptcy Code. A comparison of similar Bankruptcy Code provisions contained in Chapter 2 are as follows:

<u>Title 7, Chapter 2</u>	<u>United States Bankruptcy Code</u>
Section 7-2-12(4)	11 U.S.C. Section 365(g)
Section 7-2-12(6)(b)	11 U.S.C. Section 544(a)(3)
Section 7-2-12(6)(c)	11 U.S.C. Section 544(a)(1)

Section 7-2-12(6)(d)	11 U.S.C. Section 544(a)
Section 7-2-12(6)(e)	11 U.S.C. Section 101(50)
Section 7-2-12(6)(f)	11 U.S.C. Section 547(b)
Section 7-2-12(6)(f)(i)	11 U.S.C. Section 547(f)
Section 7-2-12(6)(f)(ii)	11 U.S.C. Section 547(e)(1)(A)
Section 7-2-12(6)(f)(iii)	11 U.S.C. Section 547(e)(1)(B)
Section 7-2-15(1)(b)	11 U.S.C. Section 507(a)(1)
Section 7-2-15(1)(c)	11 U.S.C. Section 507(a)(3)
Section 7-2-15(1)(e)	11 U.S.C. Section 506(c)
Section 7-2-15(1)(e)	11 U.S.C. Section 502(b)(6)
Section 7-2-18(3)	11 U.S.C. Section 1141(a)
Section 7-2-18(4)	Bankruptcy Rule 8002(a)

Based on the substantial incorporation in Title 7, Chapter 2 of Bankruptcy Code provisions, it is clear that the drafters of Chapter 2 intended to employ the procedures and protections of the Bankruptcy Code in dealing with failed financial institutions and in maximizing the return to depositors through the preservation and ultimate liquidation of financial institution assets. Therefore, in the absence of other controlling case law, Grant Thornton asserts that judicial reference to federal bankruptcy law interpreting the substantially similar automatic stay provision of the Bankruptcy Code is appropriate in this case.

2. The Express Legislative Intent Underlying The Automatic Stay Provision Of The United States

Bankruptcy Code Is Directly Analogous To The Stay
Of Section 7-2-7.

The express Legislative purpose in enacting Section 7-2-7, is directly analogous to the purpose underlying the Bankruptcy Code's automatic stay provision. Therefore, an understanding of the underlying policy of the automatic stay provision of the Bankruptcy Code aids in the interpretation and application of Section 7-2-7.

A review of the legislative history to Section 362 of the United States Bankruptcy Code is helpful in understanding the scope and purpose of the stay.

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy law. . . .

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are to be treated equally. A race of diligence by creditors for the debtor's assets prevents that. . . .

The purpose of this provision is to prevent dismemberment of the estate. Liquidation must proceed in an orderly fashion.

The paragraph in (7) stays setoffs of mutual debts and credits between the debtor and creditor. As with all other paragraphs of subsection (a), this paragraph does not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditor's rights.

(House Report No. 95-595, 95th Cong., 1st Sess. 340-2 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 49-51 (1978).)

Since the assets of the debtor are in the possession and control of the bankruptcy court, and since they

constitute a fund out of which all creditors are entitled to share, enforcement by a governmental unit [or other creditor] of a money judgment would give it preferential treatment to the detriment of all other creditors.

(House Report No. 95-595, 95th Cong., 1st Sess. 342-3 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 51-2 (1978).)

In addition, one of the most respected commentaries on the Bankruptcy Code has made the following statement regarding the scope of the stay.

The stay of Section 362 is extremely broad in scope and . . . should apply to almost any type of formal or informal action against the debtor or the property of the estate. It should be observed that one of the benefits of the stay is creditor protection in a manner consistent with the promotion in the bankruptcy goal of equality of distribution.

Collier on Bankruptcy, paragraph 362.04 at 362-31 (15th ed. 1988).

Based on the above legislative history and comments, the purpose of the automatic stay of the Bankruptcy Code may be summarized as follows: (1) To provide the debtor with a breathing spell from creditors in order to analyze the extent of assets and the validity of claims; (2) to promote an equality of distribution of assets among creditors; and (3) to promote an orderly administration and, if necessary, liquidation of estate assets.

Grant Thornton asserts that the only reasonable conclusion resulting from the comparison of the policy and purpose underlying the automatic stay provision of the Bankruptcy Code, the express legislative intent supporting

Title 7, Chapter 2 and the language of Section 7-2-7, is that the purpose of Section 7-2-7 and 11 U.S.S. Section 362 is identical.

VI.

IN VIEW OF SECTION 7-2-7'S NEXIS WITH THE UNITED STATE'S BANKRUPTCY CODE, IT IS APPROPRIATE THAT IT BE INTERPRETED EITHER DIRECTLY OR BY REFERENCE TO FEDERAL BANKRUPTCY CASE LAW.

In its argument in opposition to Brighton Bank's motion for relief from the stay of Section 7-2-7, Grant Thornton argued that federal bankruptcy law, either by direct reference or by analogy, should be considered in determining the scope of the stay and the grounds for granting relief from the stay.

In its Reply Memorandum, Brighton Bank argued that federal bankruptcy law was of minimal precedential value and that the absence of enumerated factors justifying cause for relief from the Section 7-2-7 evidences an intent by the Utah Legislature to provide the state courts with greater discretion than that possessed by bankruptcy courts in deciding whether good cause exists for granting relief from the stay.

Grant Thornton asserts that reference to federal bankruptcy law is appropriate for the following reasons. First, the decisions of the federal bankruptcy courts provide a complete, sophisticated and carefully reasoned body of law

concerning the protection and liquidation of assets of an insolvent entity and the maximization of payment to creditors of such an entity. Inasmuch as the interpretation and application of Section 7-2-7 is an issue of first impression, this Court should avail itself of the well-established principals, policy and procedures employed by the federal bankruptcy courts in interpreting and applying the analagous automatic stay provision of the Bankruptcy Code.

In addition, Grant Thornton has not taken the position that federal bankruptcy law should be controlling in this instance but has rather asserted that in the absence of controlling state case law, the well-reasoned decisions of federal bankruptcy law are helpful in interpreting Section 7-2-7, especially in light of the similar balancing of interests employed in the relief from stay decisions of the federal bankruptcy courts.

Grant Thornton asserts that its application of Section 7-2-7 is in harmony with current federal bankruptcy law. In determining whether relief from stay should be granted, the Bankruptcy Code mandates that the court balance the interests to be protected -- the interest in preserving assets for the benefit of all creditors balanced against the right of a secured creditor to execute on the collateral securing its debt.

In balancing these interests, federal bankruptcy law employs the concept of "adequate protection" which, in essence, requires that while a secured creditor may not be able to immediately execute on its lien, adequate protection of the lien is required in order to ensure that the secured creditor receives the value for which it bargained. As stated in Collier:

The most important message of the Code with respect to the treatment of entities with an interest in property of the estate is that their remedies may be suspended, even abrogated, their right of recourse to collateral may be terminated as it is consumed in the business, but the value of their secured position as it existed at the commencement of the case is to be protected throughout the case [by means of adequate protection]. . . .

Collier on Bankruptcy, paragraph 361.01 at 361-7 (15th ed. 1988).

In this case, the secured interest of Brighton Bank is being adequately protected through the existence of an equity cushion of approximately \$65,000.00. Because of this equity cushion, Brighton Bank's secured lien continues to increase in amount through the accrual of interest, costs, and attorneys' fees. While it is true that the accrual of interest under the Brighton Note will eventually erode the net equity of the Property and will thereafter begin to erode the value of Copper State's lien, it will be a substantial period of time before Brighton Bank experiences any damage as a result of being stayed from exercising its foreclosure

rights under the Brighton Trust Deed. In other words, the stay of Section 7-2-7 would impair Brighton Bank's ability to exercise its foreclosure remedies; however, Brighton Bank is not being financially damaged by the stay because there is sufficient equity cushion in the Property to cover its accruing interest, costs, or attorneys' fees.

The Ninth Circuit Court of Appeals recognized the absence of injury to a senior lienholder as a result of the automatic stay where there is sufficient value in the property to cover accruing interest and costs. In the case of In re Mellor, supra, the Ninth Circuit Court of Appeals held:

Although the existence of a junior lien may be relevant in determining "equity" under section 362(d)(2), it cannot be considered in determining whether the interest of a senior lienholder is adequately protected. In re La Jolla Mortgage Fund, 18 B.R. at 289. The claim of a junior lienholder cannot affect the claim of a holder of a perfected senior interest. See In re Wolford Enterprises, Inc., 11 B.R. 571, 574 (B.Ct.S.D.W.Virg. 1981) [rejecting contention that defendant lacked equity due to second deed of trust; creditor failed to acknowledge that first deed has priority and that value of property was sufficient to satisfy that lien]; In re Breuer, 4 B.R. 499 (B.Ct.S.D.N.Y. 1980) [holding there was a sufficient equity cushion for creditor holding first mortgage despite existence of four junior mortgages totalling more than market value of property]. Thus, in determining that adequate protection was not available . . . , the bankruptcy court failed to recognize that the [senior lien] interest has priority over [the junior lien] interest. It also has priority over all of the judgment liens.

Id. at 1400-01.

In addition, the Ninth Circuit Court held that the superior lienholder was attempting to acquire property worth substantially more than its senior lien: "The purpose of adequate protection under section 361 is to ensure that the secured creditor receives in value essentially what he bargained for, not a windfall." Id. at 1401 (citation omitted).

The Bankruptcy Court for the District of Utah has likewise recognized that senior lienholders are not damaged by the stay of 11 U.S.C. Section 362 where there is sufficient collateral to protect their lien. In the case of In re Alyucan Interstate Corp., 12 B.R. 803 (Bkcty. Utah 1981), Judge Mabey ruled that a senior lienholder's request for relief from stay was not warranted for the following reasons:

It is a first lien with ample collateral to protect Banker's Life. The collateral and therefore the lien are not declining or subject to sudden depreciation in value. Banker's Life is suffering no pain cognizable under section 362 as a result of the stay, and relief from the stay is therefore, at this juncture, unnecessary.

Id. at 809.

Judge Mabey further recognized that relief from the stay under such circumstances would not be in the best interest of creditors:

Foreclosure and liquidation of the property would run counter to [the debtor's reorganization] and would deprive debtor and other creditors of its going-concern value. If liquidation is allowed, it

should occur under the aegis of the Court and in the interests of all. Banker's Life is no better qualified to handle this liquidation than the debtor or the trustee. Indeed, Banker's Life may be ill-equipped to undertake this task, both because its interests are parochial and because, for regulatory or other reasons, it may be a reluctant caretaker.

Id.

Judge Mabey concluded that the interests of all creditors are better served if property is sold in an orderly fashion rather than in a forced sale due to the fact that the commercial marketing of real property almost always results in a higher sale price than if the real property is disposed of through a trust deed or foreclosure sale.

For these reasons, the stay of Section 7-2-7 should preclude Brighton Bank from exercising the foreclosure remedies under the Brighton Trust Deed because its superior lien interest is adequately protected by a significant equity cushion to cover continually-accruing interest, costs and attorneys' fees. In support of Grant Thornton's argument, and in the absence of controlling state case law, Grant Thornton has cited federal bankruptcy law which likewise recognizes that the interests of all creditors, or in this case the interests of depositors, must be weighed against the interests of secured creditors; however, where a superior lienholder is not being financially damaged as a result of the stay of Section 7-2-7, the stay should remain in effect

in order to preserve and maximize the value of assets for the benefit of depositors.

CONCLUSION

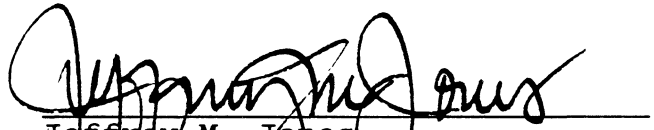
In view of the express provisions of Title 7, Chapter 2 as well as its supporting legislative findings and history, it is clear that the Utah Legislature intended to provide special protections to the depositors of a failed financial institution chartered in Utah. Specifically, the Utah Legislature intended to preserve the assets of a failed institution for the benefit of depositors and to provide for the orderly and timely liquidation of such assets in order to maximize the return to such depositors. The lower court's decision, however, frustrates the purpose of this legislation and deprives the depositors of Copper State of the statutory protections to which they are entitled.

Moreover, the competing interests of Brighton Bank as a senior lienholder in the Property are not threatened by enforcement of the stay under Section 7-2-7 in light of the \$65,000 equity cushion adequately protecting its interest.

For the foregoing reasons, Grant Thornton respectfully requests this Court to reverse the lower court's Order Modifying Stay of Section 7-2-7(1), Utah Code Annotated.

DATED this 15 day of June, 1988.

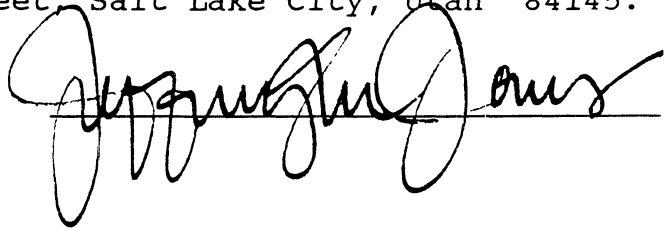
RESPECTFULLY SUBMITTED:



Jeffrey M. Jones
Kevin R. Anderson
Craig H. Christensen
ALLEN NELSON HARDY & EVANS
Attorneys for Appellant

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 15 day of June, 1988, four copies of the foregoing document were hand-delivered to Steve R. Gunn, Esq., RAY, QUINNEY & NEBEKER, 400 Deseret Building, 79 South Main Street, Salt Lake City, Utah 84145.

A handwritten signature in black ink, appearing to read "Joseph R. Jones", is written over a horizontal line.

FILED IN CLERK'S OFFICE
Salt Lake County Utah

MAR 8 1988

H Dixon Hingray, Clerk 3rd Dist. Court
By K. Anderson
Deputy Clerk

Jeffrey M. Jones, Esq. (1741)
Laura M. Harris, Esq. (4332)
ALLEN NELSON HARDY & EVANS
Attorneys for Grant Thornton & Co,
Liquidator/Receiver
215 South State Street, Suite 900
Salt Lake City, Utah 84111
Telephone: (801) 531-8400

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE POSSESSION	:	
BY THE COMMISSIONER OF FINANCIAL	:	Case No. C-87-58
INSTITUTIONS OF COPPER STATE	:	
THRIFT & LOAN COMPANY	:	

ORDER MODIFYING STAY OF SECTION 7-2-7(1),
UTAH CODE ANNOTATED

The Motion for Relief from the Stay of Proceedings filed by Brighton Bank came on for hearing before the Honorable Richard H. Moffatt on December 18, 1987 at the hour of 9:00 a.m. Grant Thornton, the Receiver/Liquidator of Copper State Thrift & Loan was represented by its counsel, Jeffrey M. Jones of Allen Nelson Hardy & Evans. Brighton Bank was represented by its counsel, Steven H. Gunn of Ray, Quinney & Nebeker. The Court heard the oral argument of the parties, reviewed the memoranda of the parties concerning the motion, and took the matter under advisement. As a result of said oral arguments and memoranda, the Court filed its Minute Entry on January 27, 1988 and now desires to enter its findings of fact, conclusions of law and order as follows:

FINDINGS OF FACT

1. Copper State is the holder of a Promissory Note executed by Willis and Afton Wright (hereinafter "Wrights") on or about March 29, 1983. This Note was secured by a Deed of Trust dated March 29, 1983 describing real property located at 2500 Walker Lane, Salt Lake County, Utah (hereinafter the "Property").

2. On or about September 12, 1983, Wrights executed a Trust Deed Note and Trust Deed in favor of Brighton Bank for the Property.

3. On or about October 11, 1983, Copper State agreed to subordinate the Copper State Deed of Trust to the Deed of Trust executed by the Wrights in favor of Brighton Bank.

4. The Wrights defaulted on their obligations to Brighton Bank and Copper State and on or about May 30, 1986, Brighton Bank served on the Wrights and recorded a Notice of Default in preparation for a non-judicial foreclosure of the Property.

5. On or about September 26, 1986, in response to Brighton Bank's foreclosure of the Property, the Wrights filed a petition in bankruptcy under Chapter 7 of the Bankruptcy Code.

6. By Order dated September 7, 1987, Brighton Bank obtained relief from the Automatic Stay in the Wright's

bankruptcy proceeding to permit it to proceed with its non-judicial foreclosure.

7. On or about September 22, 1987, the Bankruptcy Court granted relief from the Automatic Stay in Wrights' bankruptcy to permit Copper State to proceed with foreclosure on its lien on the Property.

8. On November 18, 1987, Copper State served on the Wrights and recorded in the office of the recorder of Salt Lake County, State of Utah, as part of a non-judicial foreclosure of the Property, a Notice of Default.

9. The value of the Property is Three Hundred Thousand Dollars (\$300,000.00) as shown by Brighton Bank's appraisal dated June 11, 1987.

10. Brighton Bank is currently owed approximately Two Hundred Thirty Five Thousand Dollars (\$235,000.00) and Copper State is owed approximately Forty Seven Thousand (\$47,000.00). Together, the claims of Brighton Bank and Copper State total approximately Two Hundred Eighty Two Thousand Dollars (\$287,000.00).

11. The Property is declining in value because of its age, its lack of occupancy, a general decline in the real estate market, and other factors.

12. The value of the Property is being consumed by ongoing interest accruing on the obligations of Copper State and Brighton Bank, and by other claims against the Property.

13. There is no evidence that would suggest that interest will not continue to accrue and continue to erode the equity cushion.

14. Considering only the claims of Brighton Bank and Copper State, which together total \$282,000.00, and the value of the Property at \$300,000.00, there is only a \$18,000.00 "equity cushion".

15. This \$18,000.00 cushion will probably be more than absorbed by known but unascertained costs, attorney's fees and other claims.

CONCLUSIONS OF LAW

1. The Utah Legislature, in enacting the provisions of Title 7, Chapter 2, did not intend to adopt federal bankruptcy law nor the cases thereunder as governing law for the courts of the State of Utah.

2. The apparent minority rule, adopted by the Bankruptcy Court for the State of Utah, which would allow a junior lienholder under the protection of a proceeding by the Commissioner of Financial Institutions to interfere with a prior lienholder's immediate rights to seek foreclosure, should not govern herein.

3. Because of the decline in the value of the Property and the accruing interest of Brighton Bank, even applying federal bankruptcy law, there is sufficient "cause" to allow

Brighton Bank to exercise its rights to foreclosure against the Property.

Therefore, having now entered its findings of facts and conclusions of law, the Court hereby orders that the stay imposed by Section 7-2-7 of the Utah Code Annotated be and is hereby lifted so that Brighton Bank and all other lien claimants may proceed against the Property.

The Court further certifies that this Order is a final order under Rule 54(b) of the Utah Rules of Civil Procedure.

DATED this 7 day of March, 1988.

BY THE COURT:

The Honorable Richard Moffatt
District Court Judge

ATTEST
H. DIXON HINDLEY
CLERK
K. Grogan
Deputy Clerk

CERTIFICATE OF HAND-DELIVERY

I hereby certify that on the 25 day of February, 1988, a true and correct copy of the foregoing document was hand-delivered to Steven Gunn of Ray, Quinney & Nebeker, 79 South Main, #400, Salt Lake City, Utah 84111.

ROXANNE NEBEKER

p-1-198

FILED IN CLERK'S OFFICE
Salt Lake County Utah

JAN 27 1988

H. Dixon Hindley, Clerk 3rd Dist. Court
By R. Motepaw
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

IN THE MATTER OF THE POSSESSION	:	
BY THE COMMISSIONER OF FINANCIAL	:	
INSTITUTIONS OF COPPER STATE	:	MINUTE ENTRY
THRIFT AND LOAN COMPANY	:	
	:	CASE NO. C-87-58

The Motion for Relief from the Stay of Proceedings filed by Brighton Bank having been heard on oral argument and multiple memoranda having been submitted and considered, the Court now decides as follows. The Court is of the opinion that the Stay as to the action of Brighton Bank in foreclosing its Trust Deed Lien should be lifted. This decision is based upon the fact that there is a declining value in the property by reason of its age, its not being occupied, and other factors including a general decline in the real estate market. That is demonstrated by a comparison of the two appraisals heretofore made on the property. In addition, the value of the property is being consumed by the ongoing interest charges of all of the security holders but in primary part by that of Brighton Bank. Brighton Bank's interest in the property now is in the magnitude of \$235,000 and increasing daily because of the large amount of the principle debt due to that institution. The other claims against the property are likewise increasing with the passage of time. There is no evidence before the Court that situation is likely to end in the near future under the present status of affairs.

At this point, considering only the claims of Brighton Bank and Copper State, the claims total \$282,000 and as against a value of \$300,000 that only leaves \$18,000 for a "cushion." When other known, although not yet ascertained, costs, attorney's fees, and other claims some of which are probably unknown at this time are all added in, the \$18,000 above described will probably be more than absorbed. Thus, it appears to the Court that the interests of equity are served by allowing Brighton Bank to go forward with its foreclosure or non-judicial sale at this time and, if necessary, to determine the order of priorities and have this matter resolved.

While the Court is not unmindful of the position taken by the counsel for Copper State, even if the Court were convinced, which it is not, that the cases in the federal bankruptcy system should have some governing precedence in this state court matter, it would appear that the interests of the prior lien-holder, Brighton, are such now by reason of the passage of a substantial period of time with the property in the hands of the liquidator that to allow the matter to continue would be to infringe upon a perfectly valid prior claim.

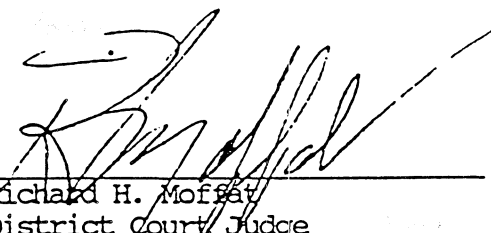
The Court does not feel that the Utah Legislature in enacting the provisions of Title 7, Chapter 2 meant to adopt the federal bankruptcy law nor the cases thereunder as the governing law for the purpose of the state courts of Utah. Nor does this Court feel that what appears to be of a minority rule in the bankruptcy courts as espoused by the bankruptcy of Utah should govern herein where the historical concerns of priority would

indicate that Brighton Bank's rights should not be interfered with by a junior lein-holder even if that lein-holder is in a position of having come under the protection of a proceeding by the Commissioner of Financial Institutions. The argument that is espoused regarding the creditors not being required to expend a substantially larger amount of money to protect a smaller interest may make some sense if the assets had more "cushion," but as noted above that cushion has disappeared in this case.

The Court feels that even using the view of the bankruptcy court the time has come to allow Brighton Bank to exercise its interest. To not do so would be to allow their interest in the property to be diminished by the decrease in the value of the asset and the increased claim for interest by Brighton. It's this Court's opinion that not even the bankruptcy courts in Utah would allow that at this point. It is further the Court's opinion that the approaching point where the above scenario will start to occur to the detriment to all of the parties who have claims against the property constitute "cause" as required in Section 7-2-7 of the Utah Code.

It is therefore ordered that the Stay be and is hereby lifted. Brighton Bank and all other lein claimants may proceed as against the property.

Dated this 27 day of January, 1988.


Richard H. Moffet
District Court Judge

ATTEST
H. DIXON HINDLEY
CLERK

By 
Deputy Clerk

MAILING CERTIFICATE

I certify that a true and correct, postage prepaid copy of the foregoing
Minute Decision was sent to the following:

Steven H. Gunn
400 Cassiot Building
79 South Main Street
P.O. Box 45385
Salt Lake City, UT 84145-0385

Jeffrey M. Jones
215 South State, Suite 900
Salt Lake City, UT 84111

Laura M. Harris
215 South State, Suite 900
Salt Lake City, UT 84111

12 Gnotepas

SECTION 362 (11 U.S.C. § 362)

§ 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 (15 U.S.C. 78eee(a)(3)), operates as a stay,

(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 the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (c)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or settle repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [sic]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of fi-

* [Ed. Note: Paragraphs (12) and (13) were added to 11 U.S.C. § 362(b) by § 5001 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 (1986). Section 5001(b) of Pub. L. No. 99-509 provides:

“the amendments made by subsection (a) of this section shall apply only to petitions filed under section 362 of this title 11, United States Code, which are made after August 1, 1986.”

This is inaccurate. “Petitions” are not made under § 362. The proper reference probably should be to “requests” made pursuant to § 362(d). If “petitions” were intended, then the reference should be to “cases commenced.”

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.

nal judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing facility held by the the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the es-

tate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) 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.

Legislative History

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.