Will filing bankruptcy stop a criminal charge that is based on the allegation of non-payment of a debt?

2 June 2011

In a prior post, the subject of what the automatic stay was and how it generally worked was addressed. Here we go into some detail about the automatic stay's effect on criminal charges.

To clarify, the types of criminal charges we are discussing is typically named or described as: larceny (by trick), something involving fraud, "hot check" charges, and the like. These types of charges sometimes have a prerequisite of a failure of the accused to pay the amount at issue after the initial event, or generally can be solved by payment of the debt. *E.g.* Mass. Gen. Laws. ch. 266 § 37. Some times after the charge is issued the prosecution offers to dismiss the case or a concession for payment of the alleged debt to the victim. These types of charges/prosecutions are sometimes criticized for turning the criminal justice system into a debt collection scheme.

The answer to the question is: probably not, but under limited circumstances, possibly. Assuming you have read the prior post for some background on the automatic stay, we will address the exception for criminal charges found in 11 U.S.C. § 362(b)(1). Is states the stay does not apply to "the commencement or continuation of a criminal action or proceeding against the debtor." This is pretty straight forward language.

Nonetheless, some courts have found some exceptions to this exception, like when the criminal prosecution is made in bad faith or its primary purpose is the collection of a pre-petition debt. *In re* Byrd, 256 B.R. 246, 251-52 (Bankr. E.D.N.C. 2000)(discussing cases). But the majority approach is that even if the motive is bad or to collect a debt, the stay does not apply. *In re* Bartel, 404 B.R. 584, 590 (B.A.P. 1st Cir. 2009)(collecting cases).

There is another potential and significant hurdle to applying the automatic stay to state criminal proceedings that has become known as the Younger doctrine. It stems from a United States Supreme Court case stating that federal courts should abstain from enjoining state court criminal proceedings absent very compelling and narrow circumstances. Younger v. Harris, 401 U.S. 37, 46 (1971). It has been followed and adhered to since it was issued.

In analyzing this subject, there is also a distinction between State acts, and the acts of private persons (creditors). It appears it is one could make a stronger argument that the automatic stay might apply in some circumstances to the latter. *In re* Byrd, 256 B.R. at 252; *In re* Bartel, 404 B.R. at 590 (noting distinction). This should be of interest to the creditor seeking to pursue criminal charges against a debtor or soon-to-be-debtor in bankruptcy.

If a debtor seeks to establish the position that the automatic stay does apply to a criminal process, they have a difficult road to hoe and an analysis is necessary. If a creditor is concerned whether its participation in the criminal process may run afoul of the automatic stay, a similar analysis is also necessary. For either of these parties, much is at stake. If you have either of these questions, or have a different but related concern, feel free to give us a call.

Contact: George E. Bourguignon, Jr.

Phone: (413) 746-8008

Website: www.bourguignonlaw.com

Email: gbourguignon@bourguignonlaw.com

Automatic stay in bankruptcy/application of automatic stay/what is automatic stay/does bankruptcy stop a criminal charge/criminal application and bankruptcy/automatic stay's application to criminal charge/bankruptcy attorney Ludlow Massachusetts/bankruptcy attorney Chicopee Massachusetts/bankruptcy attorney Worcester Massachusetts/bankruptcy lawyer Worcester massachusetts