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Mechanics' Liens: Creation, Perfection or Enforcement in the Face of a Stay

Robert H. Bowmar
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I. INTRODUCTION

The trustee in bankruptcy is the representative of the estate and, as such, has the principal duty of assuming control over all of the debtor's property and reducing it to money for distribution to the general unsecured creditors. In this capacity, the trustee will attempt to nullify various liens on the debtor's encumbered property through the exercise of certain statutory "avoiding powers."3

A mechanic's lienor is a person who, by expending labor, rendering services, or furnishing materials, improves a parcel of real property and, by complying with applicable state law, acquires a lien on the property as so improved.5 Under the definitions contained in the Bankruptcy Code, this type of lien is a "statutory lien," and

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4. State statutes vary considerably with respect to the conditions necessary for lien creation, perfection, continuation, or enforcement. Some of the variations are highlighted infra parts V-VII.
5. BLACK'S LAW DICTIONARY 981 (6th ed. 1990). For the most part, this article deals with "private" improvement liens, which encumber improved parcels of real property, as distinguished from "public" improvement liens, which encumber the public funds that have been allocated by a public entity for the improvement. See, e.g., N.Y. LIEN LAW § 5 (McKinney 1993) (lien is upon "the moneys of the state or of [a public] corporation applicable to the . . . improvement").
in general, if it is created and perfected\(^8\) prior to the bankruptcy of the owner of a parcel of real property\(^9\) and still valid at the time of such bankruptcy,\(^10\) it may not be avoided by the trustee.\(^11\)

For example, if a claim secured by a mechanic's lien exceeds the value of the real property and the claim is "allowed,"\(^12\) the trustee cannot use section 506(d) of the Code to avoid the lien to the extent it exceeds the fair market value of the property.\(^13\) The lien survives bankruptcy in its full amount and cannot be "stripped down" to a judicially determined value of the collateral.\(^14\) Nor can the trustee, standing in the shoes of either a hypothetical judicial lien creditor\(^15\) or a bona fide purchaser,\(^16\) avoid a mechanic's lien that

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7. 11 U.S.C. § 101(53) (Supp. IV 1992) defines "statutory lien" as a lien arising solely by force of a statute on specified circumstances or conditions . . . but does not include [a] security interest or judicial lien, whether or not such interest or lien is provided by or is dependent on a statute and whether or not such interest or lien is made fully effective by statute.

Id. This is in contrast to a "judicial lien" or a "security interest," defined at 11 U.S.C. § 101(36), (51) (Supp. IV 1992), respectively. The term "lien" is defined at 11 U.S.C. § 101(37) (Supp. IV 1992) as "[a] charge against or interest in property to secure payment of a debt or performance of an obligation."

8. Perfection is the act which serves to protect the lienor's interest in the property as against third parties. Black's Law Dictionary 1137 (6th ed. 1990). Lien creation and perfection are discussed infra part IV.

9. The issues dealt with herein can arise, and will be dealt with similarly, if it is the contractor or a subcontractor who is the debtor. See infra part III.

10. Lien duration and continuation are discussed infra part VI.


12. See 11 U.S.C. § 502 (1988) ("A claim or interest, proof of which is filed [by a creditor] . . . is deemed allowed, unless a party in interest . . . objects.").

13. Section 506(d) provides, in pertinent part: "To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void . . . ." 11 U.S.C. § 506(d) (1988).


15. Section 544 provides, in pertinent part:

(a) The trustee shall have, as of the commencement of the case . . . the rights and powers of, or may avoid any transfer of property of the debtor . . . that is voidable by —

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract

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was perfected prepetition.¹⁷

Moreover, the lien is not avoidable as a statutory lien under section 545,¹⁸ and is therefore not avoidable as a preference under section 547.¹⁹ It is also highly unlikely that a mechanic’s lien could be avoided by the trustee as a fraudulent conveyance.²⁰

could have obtained such a judicial lien, whether or not such a creditor exists


16. The trustee, as of the commencement of the case, attains the status of a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.


17. As a hypothetical judicial lien creditor, the trustee would be helpless because state law governs which lienors have priority over others. See, e.g., N.Y. LIEN LAW § 13(1) (McKinney 1993) (stating that “[a] [mechanic’s] lien . . . shall have priority over a . . . judgment . . . against such property not . . . docketed [so as to create a judgment lien] . . . at the time of the filing of the notice of such lien”).

Even as a hypothetical bona fide purchaser, the trustee would still be unable to avoid the mechanic’s lien under § 544(a)(3), because the wording of that subsection applies only to transfers not perfected at the time the case was commenced. Additionally,

[t]he trustee may avoid the fixing of a statutory lien on property of the debtor to the extent that such lien . . . (2) is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists . . . .


19. 11 U.S.C. § 547(c)(6) (1988) (“The trustee may not avoid under this section a transfer . . . (6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title . . . .”); see also Town of Colchester v. Hinesburg Sand and Gravel, Inc. (In re APC Constr., Inc.), 112 B.R. 89 (Bankr. D. Vt. 1990) [hereinafter APC Constr.-I], aff’d sub nom. Glinka v. Hinesburg Sand and Gravel, Inc. (In re APC Constr., Inc.), 132 B.R. 690 (D. Vt. 1991) [hereinafter APC Constr.-II]. “[T]he purpose of section 547(c)(6) was fairly clear . . . . [T]he draftsmen did not intend the liens to be subject to a second scrutiny under section 547.” 112 B.R. at 125-26. But see Klein v. Lionel Leisure, Inc. (In re Lionel Leisure, Inc.), 159 B.R. 410, 413 (S.D.N.Y. 1993) (holding that a mechanic’s lien, notice of which was not filed within the “relate-back period of [N.Y.] Lien Law section 13(5)” did not qualify as a statutory lien within the meaning of § 547(c)(6) and was thus voidable as a preference under § 547(b)).

20. See 11 U.S.C. § 548 (1988 & Supp. IV 1992) (governing fraudulent conveyances and obligations). However, enforcement of a mechanic’s lien receives different treatment: a conveyance of real property following a sale in foreclosure of such a lien might be attacked as fraudulent, applying the rule of Durrett v. Washington Nat’l Ins. Co., 621 F.2d 201 (5th Cir. 1980) (holding a mortgage foreclosure sale to be a fraudulent conveyance, due to the lack of “reasonably equivalent value” under 11 U.S.C. § 548(a)(2)(A) (1988), where the price paid was less than 70% of the value of the property). This rule, however, has not been adopted by all of the Circuit Courts of Appeal, and will be resolved shortly by the Supreme Court. See BFP v. Imperial Sav. & Loan Ass’n (In re BFP), 974 F.2d 1144 (9th Cir. 1992), cert. granted
On the other hand, a mechanic’s lien that comes into existence or is perfected postpetition could be attacked by the trustee\textsuperscript{21} under either section 544 or 545 of the Code.\textsuperscript{22} Additionally, under section 549,\textsuperscript{23} "the trustee may avoid a transfer of property of the estate . . . that occurs after the commencement of the case."\textsuperscript{24}

In any event, the trustee’s avoiding powers under section 544, 545 or 549 of the Code may be ineffective against a mechanic’s lien where applicable state lien law permits the postpetition perfection of such a lien to relate back\textsuperscript{25} to a date prior to the commencement of the case.\textsuperscript{26} Generally, however, the trustee’s position is that this type of postpetition activity violates the automatic stay.\textsuperscript{27} For example, in


21. Or, possibly, the debtor in a case involving an exemption. 11 U.S.C. § 522(h) (1988); see, e.g., In re Saberman, 3 B.R. 316 (Bankr. N.D. Ill. 1980).

22. Cf. King Rd. Materials, Inc. v. Severson Acres Dev. Corp. (In re Severson Acres Dev. Corp.), 142 B.R. 59, 60 (Bankr. N.D.N.Y. 1992) (rejecting the trustee’s contention that a mechanic’s lien filed postpetition should be deemed to have been filed immediately before the date of the filing of the petition in bankruptcy, pursuant to section 547(e)(2)(C), and stating that “[s]ection 547(c)(6) provides . . . that . . . liens duly filed [postpetition] pursuant to state law are not avoidable under section 545”).


In an involuntary case, however, governed by 11 U.S.C. § 303 (1988), the trustee cannot avoid a mechanic’s lien that arises after the commencement of the case but prior to the order for relief “to the extent any . . . services [were] . . . given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.” 11 U.S.C. § 549(b).

25. See infra part IV for a discussion of some of the various state statutes that have been construed to effect a relation back of perfection.


In re APC Construction, Inc., the bankruptcy court, construing Vermont’s Contractor’s Lien Statutes, held that the postpetition perfection of such a lien would relate back to the date of “visible commencement of work.” As the lien involved in the case was based upon work commenced prior to the bankruptcy, the postpetition perfection related back to a prepetition date, rendering the lien immune to trustee attack under sections 544, 545 and 547 of the Code. The court held that such postpetition perfection did not violate the automatic stay. 

The balance of this article deals with the automatic stay, as it may affect the creation, perfection, continuation or enforcement of a mechanic’s lien. Additionally, in connection with lien continuation or enforcement activity, the “tolling” effect of section 108(c) is discussed.

II. CODE SECTIONS APPLICABLE TO POSTPETITION ACTIVITY

Section 362(a) provides that a petition filed under section 301 (voluntary case), 302 (joint case), or 303 (involuntary case) of the Code “operates as a stay, applicable to all entities, of . . . any act to create, perfect, or enforce any lien against property of the estate.” However, section 362(b) provides that “[t]he filing of a petition . . . does not operate as a stay . . . 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.”

29. VT. STAT. ANN. tit. 9, §§ 1921-24 (1984), reproduced by the court in APC Constr.-I, 112 B.R. at 100-01.
30. APC Constr.-I, 112 B.R. at 121.
31. Id. at 120-26.
32. Id. at 110-17. On appeal, the District Court affirmed the Bankruptcy Court’s decision insofar as it rejected the trustee’s contention that the lien could be avoided under § 544(a)(1) or § 547(b) as a preference. APC Constr.-II, 132 B.R. at 692, 694-96. However, the District Court did not reach the issues relating to the automatic stay. Id. at 692.
34. See infra parts VI-VII.
36. 11 U.S.C. § 362(b)(3) (1988 & Supp. IV 1992) (emphasis added). Subsection (b)(3) further provides that the stay is not effective “to the extent that such [perfection] is accomplished within the period provided under section 547(e)(2)(A) of this title.” 11 U.S.C. § 547(e)(2)(A) provides that “a transfer is [deemed to have been] made . . . at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time.”
Section 546(b), in turn, provides as follows:

The rights and powers of a trustee under sections 544, 545, and 549 of this title are subject to any generally applicable law that permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of such perfection. If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.\(^7\)

The purpose of section 546(b) “is to protect, in spite of the surprise intervention of [a] bankruptcy petition, those whom State law protects by allowing them to perfect their liens or interests as of an effective date that is earlier than the date of perfection.”\(^3\)

Consider the second sentence of section 546(b).\(^3\) The failure to comply with this provision has only infrequently been relied upon by bankruptcy trustees to defeat postpetition mechanics’ liens. Specifically, trustees have contended that applicable state lien laws require that an action to foreclose a lien be commenced as part of the process of perfecting the lien. Therefore, since the required notice of section 546(b) was not given as a substitute for the commencement of such an action, there was no perfection that could have related back to a prepetition time. In In re Coated Sales, Inc.,\(^4\) the lienor commenced a postpetition action to enforce a lien. The court concluded that under applicable Rhode Island law, an action to enforce

Presumably, § 362(b)(3), in conjunction with § 547(e)(2)(A), would preserve a mechanic’s lien that, under applicable state law, was created prepetition but perfected postpetition, with no more than 10 days separating the two events. A relation-back feature is thus built into § 547(e)(2)(A) itself; if the section is applicable, one need not look to state law for a relation-back of perfection.

37. 11 U.S.C. § 546(b) (emphasis added).
39. The second sentence of 11 U.S.C. § 546(b) reads as follows:
   If such law requires seizure of such property or commencement of an action to accomplish such perfection, and such property has not been seized or such action has not been commenced before the date of the filing of the petition, such interest in such property shall be perfected by notice within the time fixed by such law for such seizure or commencement.

Section 362(b)(3), as applied in conjunction with the first sentence of section 546(b), will be considered infra part IV.

the lien was a necessary predicate to perfection.\textsuperscript{41} Thus, for a postpetition perfection to relate back, notice was required by the second sentence of section 546(b) as a substitute for the enforcement action. The court found such notice to be present, however, when the lienor filed a secured claim with the bankruptcy court within the time limit for perfection prescribed by state law.\textsuperscript{42} Therefore, although the commencement of a lien enforcement action was technically a violation of the automatic stay, the court refused to read section 546(b) as precluding perfection due to such a violation.\textsuperscript{43}

III. A Threshold Question Relating to "Property of the Estate"

The automatic stay operates against "any act to create, perfect, or enforce any lien against the property of the estate."\textsuperscript{44} Thus, absent a showing of unusual circumstances,\textsuperscript{45} the automatic stay does not apply to protect non-debtors or their property.\textsuperscript{46} For example,

\begin{enumerate}
\item[] 41. Id. at 844.
\item[] 42. Id. at 846. \textit{But see In re Birdview Satellite Communications, Inc.,} 90 B.R. 465 (Bankr. D. Kan. 1988) (holding that an action to enforce a lien was a necessary step for perfection; however, because no substitute notice was given pursuant to the second sentence of § 546(b), the lien lapsed and was avoidable by the trustee).
\item[] 43. \textit{In re Coated Sales, Inc.,} 147 B.R. at 847; \textit{cf.} H.T. Bowling, Inc. v. Bain (\textit{In re Bain}), 64 B.R. 581 (W.D. Va. 1986) (filing a postpetition complaint in action to foreclose a mechanic's lien related to enforcement and thus violated the automatic stay; however, the postpetition filing of a memorandum of lien served, nevertheless, to perfect such lien, and such perfection related back, thereby defeating the trustee).
\item[] However, some courts have held against the trustee, finding that under applicable state law the commencement of an action related only to enforcement and would therefore be subject to the automatic stay. Thus, if the lienor had taken all other steps necessary for perfection, such perfection would not be lost due to the failure to commence an action to foreclose the lien (or to give the substitute notice of section 546(b)) within the applicable state statutory period. \textit{See Schiffer v. Arvada Steel Fabricating Co. (In re Cantrup),} 38 B.R. 148 (Bankr. D. Colo. 1984); First Am. Title Co. v. Design Builders, Inc. (\textit{In re Design Builders, Inc.}), 18 B.R. 392 (Bankr. D. Idaho 1981).
\item[] 45. \textit{See, e.g.,} Chase Manhattan Bank v. Third Eighty-Ninth Assocs. (\textit{In re Third Eighty-Ninth Assocs.}), 138 B.R. 144 (S.D.N.Y. 1992) (extending automatic stay to cover a non-debtor guarantor because, due to the relationship between the guarantor and the debtor, allowing an action to proceed against said guarantor would burden the Chapter 11 estate); \textit{cf.} Credit Alliance Corp. v. Williams, 851 F.2d 119 (4th Cir. 1988) (holding nothing "unusual" about a guaranty arrangement to allow guarantor to invoke the protections of the automatic stay); Hudgins v. Life Sav. Bank (\textit{In re Hudgins}), 153 B.R. 441 (Bankr. E.D. Va. 1993).
\item[] 46. "The automatic stay of section 362(a) protects only the debtor, property of the debtor or property of the estate." \textit{Advanced Ribbons and Office Prods., Inc. v. U.S. Interstate Distrib. Co. (In re Advanced Ribbons and Office Prods., Inc.),} 125 B.R. 259, 263 (Bankr. 9th Cir. 1991) (holding the automatic stay inapplicable to foreclosure sale of stock of a debtor-
When the maker of a note files for bankruptcy, the automatic stay will not preclude an action against a guarantor, the foreclosure of a mortgage, or the enforcement of a U.C.C. security interest on non-debtor property given to secure such a note. So, if a mechanic's lien exists, and the debtor is the owner of real property improved by the labor or materials supplied by the lienor, the lien will be asserted directly against the debtor-owner's real property, which is property of the estate, and will therefore be subject to the automatic stay. But, what if the debtor is a contractor of the owner of the real property, and a subcontractor or materialman of such contractor seeks to create, perfect or enforce a lien against the real property of the non-debtor owner? Should this act be subject to the stay?

Consider the following proposition: if subcontractor (SC) of debtor-contractor (C) were to enforce a lien against the property of the owner (O), the amount owed by O to C should be discounted to the extent of the lien. Arguably, therefore, since C's estate would be diminished in an amount equal to the value of the lien, the stay should preclude enforcement of the lien. As one court concluded, under Vermont law, a subcontractor is entitled to a contractor's lien [on an owner's real property] only to the extent any monies are owed from the owner to the general contractor. To the extent the owner's property is used to satisfy the enforcement of a subcontractor's lien foreclosure judgment, the non-debtor owner, in turn, is entitled to an offset of whatever amount remains due to the debtor general contractor. The bankruptcy estate (of the corporation, which was pledged by a non-debtor shareholder as security for the corporate debt); Alcom Am. Corp. v. Arab Banking Corp. (In re Alcom Am. Corp.), 154 B.R. 97 (Bankr. D.D.C. 1993) (discussing and following Advanced Ribbons). But cf. Valley Transit Mix of Ruidoso, Inc. v. Miller, 928 F.2d 354 (10th Cir. 1991) (holding that the enforcement of a mechanic's lien was subject to the automatic stay where allowing such enforcement against the owners of real property would adversely affect the leasehold of the debtor-lessee, as the leasehold was property of the estate).

47. See, e.g., Credit Alliance Corp., 851 F.2d 119; cf. In re Third Eighty-Ninth Assocs., 138 B.R. 144.


49. See In re Advanced Ribbons and Office Prods., Inc., 125 B.R. 259.

50. See 11 U.S.C. § 541(a)(1) (1988) ("The commencement of a case . . . creates an estate . . . comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case.").

51. Ostensibly, the mechanic's lien situation parallels that in which a mortgagee forecloses on property of a mortgagor who is not the debtor. However, in the mortgage context, the debtor has no claim against the mortgagor-owner so the foreclosure of the mortgage does not affect the bankruptcy estate.
contractor] is thereby diminished by any offset. It would seem, however, that to the extent SC's claim against C is also satisfied in connection with SC's lien enforcement, there would be a "wash," with no net diminution of C's estate: for example, if SC's claim against C were $100 and SC enforced his lien against O's property at a time when the balance on the O-C contract were $150, the balance of the contract, and hence C's estate, would be reduced by $100. In addition, C's estate would be relieved of the $100 obligation owed to SC.

Against this "wash" view, it could be argued that foreclosing a lien against the property of the non-debtor O would enable SC to recover more than if the claim were asserted directly in C's bankruptcy proceeding, where such claim would be unsecured and most likely result in SC recovering less than the full amount of its claim. Although this argument would also apply in third-party mortgage situations, courts have not relied on it as a basis for enjoining actions to foreclose such mortgages.

There may be another basis for applying the stay to SC's action to enforce a mechanic's lien against a non-debtor O. If the SC foreclosure action were to bypass C, C's possible defenses and/or counterclaims which might serve to offset all or part of SC's claim would not be heard. C might, therefore, be deemed a necessary party in the SC foreclosure action, in which case the stay should apply. In a case where a sub-subcontractor (SSC) attempts to enforce a lien against O in satisfaction of a claim against debtor-SC, an analysis similar to the one above would apply. If O, whose property

52. APC Constr.-I, 112 B.R. 89, 100 (Bankr. D. Vt. 1990); see also N.Y. LIEN LAW § 4(1) (McKinney 1993) ("[T]he lien [of a subcontractor] shall not be for a sum greater than the sum earned and unpaid on the contract at the time of filing of the notice of lien, and any sum subsequently earned thereon."); Middleton & Dugger Plumbing & Heating, Inc. v. Richardson Builders, Inc. (In re Richardson Builders, Inc.), 123 B.R. 736, 740 (Bankr. W.D. Va. 1990); cf. Bricklayers Local Union No. 92 v. Makoroff, 562 N.Y.S.2d 599 (Sup. Ct. 1990) (lifting the automatic stay in C's bankruptcy proceeding to permit SC's foreclosure action to proceed against O; implicitly acknowledging that the stay applied to such action).

53. "The net, or the sum of the claims, offsets and setoffs, as the case may be, affects the totality of the [contractor's bankruptcy] estate that may be distributed to claimants." APC Constr.-I, 112 B.R. at 100; see also In re Richardson Builders, Inc., 123 B.R. 736; cf. Diamond Hill Inv. Co. v. Shelden, 767 P.2d 1005 (Wyo. 1989) (staying a lienor from amending a complaint). But see Weaver v. Jock, 717 S.W.2d 654 (Tex. Ct. App. 1986) (declining to extend an automatic stay to O).

is sold to satisfy SSC's claim, has an offset against C on the O-C contract balance, C should have an offset against SC on the C-SC contract balance, as SC's obligation to SSC has been satisfied.

Some jurisdictions, however, provide a "trust fund" remedy to construction claimants. In this situation, the amount owed by O to C would constitute an asset of the trust for which C is trustee and SC the beneficiary. If, instead of attempting to resort to the lien remedy, SC resorts to the trust remedy, the stay in C's bankruptcy should not apply—C's right to payment from O, which is an asset of the C trust, is not property of the estate.

IV. POSTPETITION CREATION OR PERFECTION OF A LIEN

Reading section 362(b)(3) in conjunction with the first sentence of section 546(b) leads to the conclusion that postpetition acts to perfect an "inchoate" prepetition lien do not violate the automatic stay. Such postpetition acts must be performed in accordance with, and within the time limitations established under, "any generally applicable law," which is usually state lien law, so long

55. See, e.g., N.Y. LIEN LAW §§ 70-71 (McKinney 1993).
60. See Lincoln Sav. Bank v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n), 880 F.2d 1540 (2d Cir. 1989), cert. denied, 493 U.S. 1058 (1990); Watervliet Paper Co. v. City of Watervliet (In re Shoreham Paper Co.), 117 B.R. 274 (Bankr. W.D. Mich. 1990) (noting that if a creditor has a prepetition interest in property and state law provides for perfection of a lien based on that interest, as long as it is perfected within the time provided by state law, the lien will not lose its preferred status); In re PDQ Copy Center, Inc., 27 B.R. 123 (Bankr. S.D.N.Y. 1983) (finding that postpetition receipt of funds by an attorney related back to the prepetition time that the attorney commenced action in favor of his client, at which time the attorney's statutory charging lien arose). Contra Makoroff v. City of Lockport, 916 F.2d 890 (3d Cir. 1990) (holding that liens created after bankruptcy petition did not relate back to a prepetition interest in the debtor's property; the court applied New York law but declined to adopt the view of the Second Circuit).
62. 11 U.S.C. § 546(b); see, e.g., In re Willax, 93 F.2d 293 (2d Cir. 1937); LoPriore v. Imperia Bros. Inc. (In re LoPriore), 115 B.R. 462 (Bankr. S.D.N.Y. 1990) (assuming relation-
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as such law is applicable "both in bankruptcy cases and outside of bankruptcy cases." The state law must operate in a manner such that the postpetition perfection "relates back" to a prepetition date.

However, state lien laws vary considerably: "[t]o be sure, an examination of the peculiarities of each State's law on mechanics' . . . liens is required to determine if applicable State law will permit the application of the relation back rule." Typically, though, under those state laws which provide for it, lien perfection relates back to either the time that work commenced or the materials were furnished. Thus, under such laws, the prepetition commencement of work may justify the postpetition perfection of a lien.

Consider, for instance, In re APC Construction, Inc., in which the Vermont lien statutes were in dispute. In pertinent part, such statutes provided as follows: (1) when an improvement contract is made with an owner of real property, "the person proceeding in pursuance of such contract . . . shall have a lien upon such [improvements];" (2) when a contract is made with a contractor or subcontractor, the person who performs labor or furnishes materials shall have a lien by giving notice in writing to the owner that he shall

back, but the lien lost by failure of the lienor to serve a copy of the notice of lien upon the owner within the 30-day period required by § 11 of the New York Lien Law).


64. The term "relation back" is not found in the statute itself, but is used in the Senate and House Reports and is uniformly used by the courts in their interpretations of section 546(b) of the Code. See, e.g., In re Neylon, 18 B.R. 765, 767 (Bankr. S.D. Ala. 1982); see also infra notes 66-67 and accompanying text. It should also be noted that most courts have not required the "generally applicable law," for purposes of § 546(b), to expressly provide that perfection be effective. In most of the cases cited herein, the law in question was, on its face, a pure priority statute.

65. APC Constr.-I, 112 B.R. at 112.


69. VT. STAT. ANN. tit. 9, § 1921(a) (1984).
claim a lien; a lien shall not continue in force for more than sixty days from the time when payment became due for the last of such labor or materials, unless a notice of such lien is filed in the office of the town clerk; a person claiming a lien shall file in the office of the town clerk a written memorandum “which shall charge such real estate with such lien as of the visible commencement of work or delivery of material;” within three months from the time of filing such memorandum, “such person may commence his action for the same, and cause such real estate to be attached thereon;” within five months after the date of the judgment in such action, the plaintiff in such action may record a copy of the judgment in the office of the town clerk. Thereupon the real property shall be holden for the amount due upon such judgment as if it had been mortgaged for the payment thereof, from the time of the visible commencement of work or delivery of materials and the plaintiff may obtain possession and foreclose the defendant’s equity of redemption as in case of a mortgage.

The lienor in *APC Construction* had sold materials to the debtor in November and December of 1988, and recorded a timely notice of lien on January 24, 1989. However, a pre-judgment writ of attachment against the debtor’s property was not obtained until March 28, eighteen days after the debtor’s bankruptcy petition was filed. The court determined “the attachment process [to be] an indispensible element toward obtaining pre-judgment perfection of a contractor’s lien.” Although perfection was achieved postpetition, it had still occurred within the time limitation set by Vermont law. The “timely perfected contractor’s lien [under Vermont state law] will relate back to the time of recording of a notice of lien or ‘visible commencement’ of work.” Thus, the court held that postpetition perfection was permissible pursuant to section 546(b) of the Code.

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70. *Id.* § 1921(b).
71. *Id.* § 1921(e).
72. *Id.* § 1923 (emphasis added).
73. *Id.* § 1924.
74. *Id.* § 1925 (emphasis added).
75. *APC Constr.-I*, 112 B.R. at 92-93.
76. *Id.* at 101.
77. The time limit was three months. *VT. STAT. ANN.* tit. 9, § 1924.
78. *APC Constr.-I*, 112 B.R. at 117.
79. 11 U.S.C § 546(b). The court also determined that the postpetition perfection related back to a prepetition date so as to defeat the trustee’s alternative contentions that the lien could be avoided pursuant to section 544, 545 or 547 of the Code. *APC Constr.-I*, 112
and not subject to the automatic stay.\textsuperscript{80}

Arguably, the court could have found the lien to be perfected at the time the notice of lien was filed with the town clerk,\textsuperscript{81} which appears to be the critical time for determining the lienor’s status as against the trustee’s avoiding powers under sections 544 and 545 of the Code. This is because under Vermont law the trustee, standing in the shoes of a bona fide purchaser at the time of the bankruptcy filing, may avoid a lien that was filed postpetition, but not one filed prepetition.\textsuperscript{82} Whether or not the writ of attachment was obtained seems to be immaterial. Therefore, in \textit{APC Construction}, since the filing was effected prepetition, the court did not have to reach the section 546(b) relation-back question, which would have been necessary had both the filing and the writ of attachment been effected postpetition.

If a lien does not relate back under applicable state law, however, sections 362(b)(3) and 546(b) of the Code have no application, and the automatic stay will be violated by a lienor’s attempt at postpetition perfection.

No mention is made [in the legislative history of section 546(b)] of liens which do not relate back for presumably the drafters of the Bankruptcy Code intended that, absent language within the state statute giving rise to a purported lien, it must be assumed that such liens are susceptible to the trustee’s avoiding power.\textsuperscript{83}

For instance, in New Jersey, if a contract between the general contractor and the owner has been filed, a subcontractor may not obtain a lien on the owner’s real property. Instead, by filing a “stop notice,” the subcontractor may acquire a lien on the amounts owed to the contractor by the owner—a form of garnishment.\textsuperscript{84} Until the stop notice is filed, a claimant’s interest in the owner’s funds is merely an “inchoate property right,” an “equitable interest,” or “an inchoate lien.”\textsuperscript{85} It is, however, an interest sufficient to be treated as property of a debtor-claimant’s estate.

\textsuperscript{80} B.R. at 121-26. On appeal, the district court affirmed the judgment of the bankruptcy court. \textit{APC Constr.-II}, 132 B.R. 690; see supra note 32 and accompanying text.

\textsuperscript{81} \textit{APC Constr.-I}, 112 B.R. at 126.

\textsuperscript{82} See \textit{VT. STAT. ANN. tit. 9, §§ 1921(c), 1923.}

\textsuperscript{83} Id. § 1921(d).

\textsuperscript{84} See id. at 293-94.

For example, it has been held that the filing of a stop notice by a debtor-subcontractor’s materialman violated the automatic stay.86 Both the subcontractor and the materialman had “identical, equitable interests in the funds in the owners’ hands in the nature of inchoate liens.”87 As to the debtor-subcontractor, the interest was property of the estate. As to the materialman, allowing the filing of a stop notice, and hence the acquisition of a postpetition lien, would be an improvement of the materialman’s position to the detriment of the debtor-subcontractor’s estate.88 Moreover, the materialman is not protected from the effects of the stay by section 546(b) of the Code because “the [postpetition] filing of a Stop Notice does not relate back to the [prepetition] time of supplying of materials or rendering of services, but is effective as of the date of filing with the Owner.”89

Another example is Pennsylvania, where a lien shall take effect and have priority:

(a) In the case of the erection or construction of an improvement, as of the date of the visible commencement upon the ground of the work of erecting or constructing the improvement; and

(b) In the case of the alteration or repair of an improvement, as of the date of filing of the claim.90

In In re Poloron Products of Bloomsburg, Inc.,91 the claimant had visually commenced work on November 14, 1986, which included replacing three steel overhead sectional doors and one steel roll-up door, repairing the tracks of other doors, and replacing panels in certain doors.92 The lien claim was not filed until January 30, 1987, after the owner’s filing of a bankruptcy petition on December 22, 1986.93 The court found that the claimant’s work constituted an “alteration or repair,” rather than an “erection or construction.”94 The postpetition perfection of the lien on January 30, therefore, did not relate back to November 14, thus subjecting the claimant to the automatic stay.95

86. See id.
87. Id.
88. Id. at 647.
89. In re Valairco, Inc., 9 B.R. at 293 (emphasis added).
92. Id. at 384.
93. Id.
94. Id. at 385.
95. Id. Compare Yobe Elec., Inc. v. Graybar Elec. Co. (In re Yobe Elec., Inc.), 728
V. POSTPETITION PERFECTION IN NEW YORK: A UNIQUE APPROACH

In New York, a mechanic’s lien is created by the filing of a notice of lien with the clerk of the county wherein the real property is located.\(^9\) Perfection issues aside, however, it would appear as though a postpetition lien filing violates the automatic stay as an “act to create . . . [a] lien against property of the estate”\(^9\) of a debtor-owner. This is because the relation-back provided for by sections 362(b)(3) and 546(b) of the Code only apply to an act to perfect or the actual perfection of a lien. So far, though, no New York court has directly addressed the “creation” aspect of a lien filing;\(^9\) instead, the focus has been on the filing as an act of perfection only.\(^9\)

Under section 3 of the New York Lien Law, a lien arises simultaneously with its own perfection; that is, the act of filing serves to both create and perfect the lien.\(^10\) Thus, there is no preexisting lien to which the perfection can relate back, as that expression is used in the Senate Report,\(^10\) or in those cases which have construed state

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\(^9\) F.2d 207 (3d Cir. 1984) (holding a postpetition filing to have related back to the prepetition date when materials were furnished and therefore, no violation of the automatic stay).

\(^9\) See N.Y. LIEN LAW § 3 (McKinney 1993) (“A contractor, subcontractor, laborer, [or] materialman . . . who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner . . . shall have a lien . . . upon the real property improved . . . from the time of filing a notice of lien . . .”).

\(^9\) 11 U.S.C. § 362(a)(4) (1988) (emphasis added). For the case of a lien asserted by a subcontractor in the bankruptcy proceeding of a contractor as affecting property of the contractor’s estate, see supra part III.

\(^9\) Contra Makoroff v. City of Lockport, 916 F.2d 890, 895-96 (3d Cir. 1990) (holding that postpetition acts to perfect a lien violated the automatic stay because no perfectible interest in the property had attached prepetition), cert. denied, 499 U.S. 983 (1991); cf. Lincoln Sav. Bank v. Suffolk County Treasurer, (In re Parr Meadows Racing Ass’n), 880 F.2d 1540, 1548 (2d Cir. 1989) (speaking to the creation issue indirectly, the court held that a real estate tax lien, created postpetition, related back under § 546(b) so as to fall within the § 362(b)(3) exception to the automatic stay), cert. denied, 493 U.S. 1058 (1990).

\(^9\) The courts applying New York law have accepted the general proposition that the creation aspect of an act that also has a perfection aspect should be disregarded if the perfection aspect relates back under section 546(b). Arguably, however, because only the perfection aspect is covered by section 546(b), the creation aspect should remain subject to the stay. For a recent non-New York case explicitly accepting the above proposition, see In re Microfab, Inc., 105 B.R. 152, 160 (Bankr. D. Mass. 1989). The second sentence of § 546(b) of the Code covers an act that has both perfection and enforcement aspects, and provides a way for the lienor to avoid the stay with respect to enforcement. However, the situation where an act has both a creation and a perfection aspect is not expressly covered by section 546(b).

\(^10\) N.Y. LIEN LAW § 3 (“A . . . materialman . . . shall have a lien . . . from the time of filing a notice of such lien . . . ”).

\(^10\) See supra note 63 and accompanying text.
lien laws under which a lien arises upon the commencement of the lienor's work. Therefore, under the New York statute, it would seem that a postpetition filing cannot be saved from the stay by relation back to a prepetition date of commencement of work. The cases hereinafter considered, however, suggest the contrary and would preserve a lien created and perfected by a postpetition filing.

A. Section 544(a)(1) of the Code

There is a line of New York cases, antedating the present Bankruptcy Code, in which the courts have held that the trustee could not avoid a mechanic's lien filed after the debtor's adjudication in bankruptcy. In *Crane Co. v. Smythe*, a case decided before the trustee was accorded hypothetical judicial lienor status, the court held that the bankruptcy of an owner did not affect the right of a materialman to file a notice of lien thereafter. The court purported to follow the prior nonbankruptcy case of *John P. Kane Co. v. Kinney*, in which the New York Court of Appeals held that an assignee for the benefit of creditors took subject to later-filed mechanics' liens. The court in *Crane Co.* assumed that voluntary proceedings in bankruptcy would have the same effect as a general assignment for the benefit of creditors, and held that the post-adjudication lien was good as against the trustee. The court rejected the contention that bankruptcy proceedings were broader and more effective than general assignments. Under the then-applicable bankruptcy statute, the Bankruptcy Act of 1898, the trustee was vested with no greater or broader rights than the bankrupt. This view was adopted by later courts, even after the bankruptcy statute had been amended in 1910 to give the trustee the rights of a creditor holding a lien; **"[t]he**
amendment of the Bankruptcy Law was not intended to enlarge the rights of a trustee as against lienors under our statute, but to enable the trustee to avoid secret and unsecured liens created by act of the bankrupt."\(^{111}\)

Under section 544(a)(1) of the Bankruptcy Code, the trustee may avoid a transfer that is voidable by a creditor with a judicial lien.\(^ {112}\) The "transfer" may take the form of a mechanic's lien, created or perfected by filing a notice of lien. What are the rights of a judicial lien creditor, as against a mechanic's lienor, under New York law? A judicial lien, assumed to be present at the time of bankruptcy filing, would be subordinate to a subsequent mechanic's lien if the claim upon which the judicial lien was based was unrelated to the improvement for which the mechanic's lien was asserted.\(^ {113}\) By implication, a judicial lien based upon a claim related to the improvement would have priority over a subsequent mechanic's lien.\(^ {114}\) If the trustee may assume the status of a judicial lien creditor whose claim relates to the improvement, he or she should be able to avoid a postpetition mechanic's lien. If, however, the trustee must assume the status of a judicial lien creditor whose claim is not related to the improvement, the mechanic's lien may not be avoided. This result is consistent with the pre-Code cases and, F.2d 913 (2d Cir. 1934).


113. See N.Y. LIEN LAW § 13(1) (McKinney 1993) which provides that [a mechanic's] lien . . . shall have priority over . . . a money judgment hereafter recovered upon a claim, which, in whole or in part, was not for materials furnished, labor performed or moneys advanced for the improvement of such real property; and over any claim or lien acquired in any proceedings upon such judgment.


ostensibly, finds support in section 546(b); the trustee’s avoiding power under section 544(a)(1) is “subject to any generally applicable law [(e.g., N.Y. Lien Law)] that permits perfection, [albeit creation, as well, by filing pursuant to N.Y. Lien Law § 3], . . . to be effective against an entity [(e.g., a judicial lien creditor with a claim unrelated to the improvement)] that acquires rights in such property before the date of such perfection.”  

However, how does one choose the type of judicial lien creditor whose status the trustee is to assume for the purpose of testing the validity of the lienor’s postpetition perfection? May the trustee choose, or the lienor? The trustee argues that it is immaterial that there may be, hypothetically, a judicial lien creditor who might not prevail against the subsequent mechanic’s lienor; it should be sufficient that the trustee can point to a lien creditor who would prevail against the mechanic’s lienor. Thus, the trustee should be able to assume the status of that creditor and avoid the lien under section 544(a)(1).

The lienor counters that in order to prevail under the limitation of section 546(b) on the avoiding power of the trustee under section 544(a)(1), all that needs to be shown is that the postpetition perfection of the lien was effective against “an entity”—a hypothetical judicial lien creditor—whose claim was not related to the improvement.

B. Section 544(a)(3) of the Code

Here, the question is whether a trustee, assumed to have the status of a bona fide purchaser at the time of bankruptcy filing, can prevail against a subsequent mechanic’s lienor. Under New York Lien Law Section 13(5), a mechanic’s lienor would prevail against

117. Id. § 544(a)(1).
118. The trustee’s status is that of “a creditor on a simple contract [who has] . . . obtained such a judicial lien.” Id. (emphasis added). Thus, priority vel non for the trustee turns on whether a claim related to the specific improvement is treated as a claim arising from a simple contract.
119. Id. § 544(a)(3). This inartfully drafted section probably stands for the proposition that the trustee may assume the status of, and avoid any transfer that is voidable by, a bona fide purchaser from the debtor, against whom applicable law permits such transfer (i.e., the referenced voidable transfer) to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.
120. N.Y. LIEN LAW § 13(5) (McKinney 1993) provides:

No instrument of conveyance recorded subsequent to the commencement of the improvement, and before expiration of the period specified in section 10 of this chapter for filing of notice of lien after the completion of the improvement, shall be valid as
the grantee of a prior conveyance (to wit, the trustee as bona fide purchaser) only if (1) the lien was filed within eight months after the recording of the deed to such grantee and (2) such deed did not contain a special trust fund covenant. The grantee would take free of the subsequent lien if either of the two conditions were not met.

Assume that a mechanic's lien that is based upon a postpetition filing made more than eight months after the bankruptcy filing will not be valid in any event. The critical inquiry, then, for a lien filing made within eight months after the bankruptcy filing, will relate to the trust fund covenant: for the purpose of section 546(b), is the trustee (as "an entity") to be considered a bona fide purchaser (grantee) whose deed contains the trust fund covenant or one whose deed does not contain such covenant? If the former, the trustee may avoid the lien. If the latter, the lien perfection is "effective against an entity [(i.e., the grantee whose deed does not contain the covenant)] that acquires rights in such property before the date of such perfection," and the lien is saved. Again, the question is: who chooses the trustee's status? The trustee or the lienor?

C. Section 545(2) of the Code

In In re C. H. Stuart, Inc., a contractor filed a notice of

against liens filed within a corresponding period of time measured from the recording of such conveyance, unless the instrument contains a covenant by the grantor that he will receive the consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement.

N.Y. Lien Law § 10(1) (McKinney 1993) states that a notice of lien may be filed at any time during the progress of the work and the furnishing of the materials, or, within eight months [(four months in the case of an improvement relating to a single-family dwelling)] after the completion of the contract, or the final performance of the work, or the final furnishing of the materials, dating from the last item of work performed or materials furnished.

121. The period is four months if the improvement is related to real property improved or to be improved with a single family dwelling. See N.Y. Lien Law § 10(1).

122. See N.Y. Lien Law § 13(5).

123. For a definition of the term "bona fide purchaser" that favors the trustee as against the New York mechanic's lienor, see Saghi v. Walsh (In re Gurs), 27 B.R. 163, 165 (Bankr. 9th Cir. 1983) (such a purchaser takes "by an instrument that adheres to all formal requisites usually and regularly followed in the relevant jurisdiction"). Deeds of conveyance in New York "usually and regularly" contain the trust fund covenant required by Lien Law section 13(5).


125. Cf. In re Chesterfield Developers, Inc., 285 F. Supp. 689, 691 (S.D.N.Y. 1968) (holding that the choice is not made by either the trustee or the lienor, but by the wording of the N.Y. Lien Law).

mechanic's lien five days after the debtor filed for bankruptcy. The trustee sought, under section 545(2) of the Code, to avoid the statutory lien. The court noted the limitation placed on the trustee's avoiding power by section 546(b) and determined that section 13(5) of the New York Lien Law\textsuperscript{127} was a "generally applicable law," as that term is used in section 546(b).\textsuperscript{128} Recall that under section 13(5) of the New York Lien Law, a bona fide purchaser would take subject to a subsequently filed mechanic's lien, if the lien was filed within eight months after the recording of the deed to the purchaser and if the deed failed to contain a special trust fund covenant.\textsuperscript{129} If, however, the deed contained the covenant, the grantee would prevail. The court in \textit{Stuart} held for the lienor, without referring to the presence or absence of a trust fund covenant:

The date of "conveyance" [within Lien Law § 13(5)] to the hypothetical [bona fide purchaser] was March 6, 1981 [(the date of filing of the petition in bankruptcy)] which was before the expiration of four months [(i.e., the then-applicable period for lien filing)] after the completion of the project. RSJ [(the lienor)] filed its lien on March 11, 1981 which was within four months of the "conveyance." Therefore, the debtor-in-possession cannot avoid the lien under § 545.\textsuperscript{130}

Previously, in \textit{In re Chesterfield Developers, Inc.},\textsuperscript{131} the court construed the predecessor to section 545(2) of the Code,\textsuperscript{132} pursuant to which the trustee had attacked a postpetition lien in his status as bona fide purchaser. The court correctly acknowledged that the lienor's position, as against a prior purchaser, ordinarily turned upon the presence or absence of the trust fund covenant required by New York Lien Law section 13(5).\textsuperscript{133} The debtor-in-possession argued that a trustee (or one in the position of trustee) should be "considered to be \textit{any kind of bona fide purchaser} that local law would make superior to the statutory lienor,"\textsuperscript{134} and therefore prevail in the

\textsuperscript{127} See supra note 120.
\textsuperscript{128} \textit{In re C.H. Stuart, Inc.}, 17 B.R at 405.
\textsuperscript{129} See supra note 120.
\textsuperscript{130} \textit{In re C.H. Stuart, Inc.}, 17 B.R. at 405.
\textsuperscript{133} \textit{Chesterfield Developers,} 285 F. Supp. at 691-92.
\textsuperscript{134} \textit{Id.} at 691 (emphasis added).
status of a hypothetical grantee of a deed of conveyance assumed to contain the trust fund covenant.

The court noted that if the covenant was not contained in the deed of conveyance, the lienor who timely filed should prevail.\(^{135}\) It then stated:

But assuming, now, the presence of the covenant, has not the hypothetical bona fide purchaser recognized the superiority of the lien to his purchase? It is true that [section] 13(5) also provides that a grantee shall not be responsible for the grantor’s compliance with the trust fund covenant. However, where the grantor and the grantee are one and the same or alter-egos of each other, it would be highly inequitable to allow the fiction of the hypothetical bona fide purchaser to be used to defeat liens such as the instant one.\(^{136}\)

Thus, the trustee (here, the debtor-in-possession) loses whether his status is that of a grantee under a deed with or without a covenant because the hypothetical grantor and the hypothetical grantee in such a deed are the same entity, namely the debtor-in-possession.\(^{137}\)

**D. The Automatic Stay**

The automatic stay provision of the Code permits the postpetition perfection of a lien, but only to the extent that the trustee’s rights and powers under sections 544, 545 and 549 are subject to such perfection under section 546(b).\(^{138}\) In the preceding analysis, an attempt was made to indicate the extent to which, under New York law, the trustee’s avoiding powers under sections 544 and 545 of the Code\(^{139}\) have been treated as being subject to a relation back of


137. Even if a present-day court, construing section 545(2) of the Code in a Chapter 11 case, were to accept this far-reaching basis for refusing to differentiate between the two types of grantees under section 13(5) of the New York Lien Law, the differentiation problem would still persist in a Chapter 7 case. This is because in the vast majority of Chapter 11 cases, where the debtor-in-possession seeks to avoid a transfer, the transfer will be one that the debtor himself has made. Under the view of the *Chesterfield* Court, it would be inequitable to permit the debtor to avoid such a transfer. *Cf. In re C.H. Stuart, Inc.*, 17 B.R. 400 (refusing to avoid a postpetition lien on the basis of the trustee’s status as a bona fide purchaser under section 545(2), without any reference to the section 13(5) trust fund covenant).


139. No cases were found which considered section 546(b) in the context of a trustee’s attack pursuant to section 549. A relation-back of a postpetition perfection (creation) of a mechanic’s lien pursuant to section 546(b), in order to counter a trustee attack under section 549, would require the same differentiation between types of lien creditors or purchasers that
perfection under section 546(b). Notwithstanding the sections 544 and 545 cases considered above, which have held in favor of the lienor against the trustee, the predictability for the outcome of future cases involving the stay is low because of the complexity of the "generally applicable law"—the New York Lien Law—that must be construed in each case.

In In re Fiorillo & Co., the court held that the automatic stay was no bar to the postpetition filing of a mechanic's lien. Relying on Chesterfield Developers, in which "the efficacy of § 13(5) of the Mechanics' Lien Law was explored," the court held that section 13(5) provided "a relation-back procedure [that was] effective [pursuant to section 546(b)] against a debtor in possession in its capacity as trustee under 11 U.S.C. § 1107(a)." The trust fund covenant required by Lien Law section 13(5) was not mentioned, nor was the effect of its presence or absence on the priority dispute between lienor and bona fide purchaser. Presumably, for the lienor to prevail, it was sufficient that its postpetition filing for perfection was effective against "an entity," namely a hypothetical grantee whose deed did not contain the required covenant.

The tendency of the courts, thus far, to favor the New York mechanic's lienor against the trustee in bankruptcy probably reflects a sense of what appears to be the former's tenuous status: the risk that bankruptcy will intervene between the time work is commenced and the time the notice of lien is filed. Without a relation-back of a postpetition filing, the lienor's only recourse, albeit an impractical one, is to file successive prepetition notices of lien as work progresses, or upon each delivery of materials. Arguably, then, the lienor who

was suggested for cases involving section 544 or 545. See supra part V.A.-C.

142. Id.
143. Id.
144. Cf. Hildreth Granite Co. v. City of Watervliet, 146 N.Y.S. 449, 450 (App. Div. 1914) (rejecting the contention that the trustee's status as a lien creditor could be used to
files postpetition is within the class of persons intended to be protected by section 546(b). 145

Assuming that the lienor can get past the "differentiation" problem considered above, there is an argument that will support a relation back of perfection even though the actual act of perfection also constitutes the act of lien creation. In In re Parr Meadows Racing Ass'n, Inc., 146 the Second Circuit Court of Appeals held that a New York county's real property tax lien, created and perfected postpetition, related back to the prepetition tax status date and was therefore not violative of the automatic stay. 147 The court determined that, as of such prepetition date, the county had a sufficient interest in the property to which the postpetition perfection could relate back: "[a]ll assessment of property occurs as of [the tax status date], . . . and from that time forward, the county has a real and identifiable interest in the property which cannot be erased or altered by subsequent events." 148 Section 546(b) itself does not use the term "lien," but refers generally to "an interest in property." 149 The court in Parr Meadows considered the postpetition creation of the lien to be merely part of "the taxation process and the perfection of the county's [prepetition] interest in the property." 150

Subsequent to Parr Meadows, the Court of Appeals for the Third Circuit, in Makoroff v. City of Lockport, 151 had occasion to construe and apply the New York law relating to real property tax liens, and "decline[d] to adopt the view of [the Second] Circuit." 152 The court held that the taxing entity did not acquire, at the tax status date, any interest to which a tax lien, created and

avoid a post-adjudication mechanic's lien, and remarking that a contrary view "would require a materialman, in order to protect his rights, to file a new lien immediately after each load of materials furnished, lest the contractor might file a petition in bankruptcy and defeat his rights").

145. See supra part II.


147. Id. at 1546-48.

148. Id. at 1548.

149. 11 U.S.C. § 546(b). The same is true of section 362(b)(3), which brings section 546(b) into play in reference to the automatic stay.

150. Parr Meadows, 880 F.2d at 1547.


152. Id. at 895. In dissent, Judge Weis saw "a flat disagreement [between the majority opinion and Parr Meadows] on the interpretation of state law. Certainly in the event of doubt, deference is due the Second Circuit's reading of local law." Id. at 897 (Weis, J., concurring in part and dissenting in part).
perfected postpetition, could relate back.\textsuperscript{153} Even after the tax status date, "the taxing entity still possessed no more than an expectation that taxes will be collected with respect to a particular property . . . . [The taxing entity] acquires an 'interest in property' only when it has performed the statutory acts necessary to give rise to a perfectible lien."\textsuperscript{154} Thus, the postpetition tax lien violated the automatic stay.\textsuperscript{155}

The Third Circuit's \textit{Makoroff} decision notwithstanding, the \textit{Parr Meadows} analysis could clearly be extended to uphold a mechanic's lien that was created and perfected postpetition, if there could be found a prepetition "interest" to which such perfection could relate back. In \textit{John P. Kane Co. v. Kinney},\textsuperscript{156} a non-bankruptcy case, the New York Court of Appeals held that an owner's general assignment for the benefit of creditors was not effective against a subsequently filed mechanic's lien.\textsuperscript{157}

The object and purpose of the mechanics' lien law was to protect a person who, with the consent of the owner of real property, enhanced its value by furnishing materials or performing labor in its improvement, by giving him an interest therein to the extent of the value of such material or labor. The filing of the notice of lien is the statutory method prescribed by which the party entitled thereto perfects his inchoate right to that interest. That is the manner and mode of procedure in which the right is asserted. A certain time [(i.e., the time permitted by statute for filing a notice of lien)] is allowed in which the lien may be asserted or lost. During that [prefiling] time there is a preferential statutory right, in the nature of an unperfected equitable lien, in favor of the laborer, mechanic, materialman or sub-contractor. And when a notice of lien is filed that right is perfected.\textsuperscript{158}

If a mechanic's lienor indeed has such an inchoate right, preferential statutory right or unperfected equitable lien prior to filing a notice of lien, then arguably such interest is one to which a postpetition filing for perfection could relate back. Such an outcome is doubtful, however, because later New York decisions, although not from the Court of Appeals, have rejected the concept of an inchoate or equitable

\textsuperscript{153} \textit{Id.} at 896.
\textsuperscript{154} \textit{Id.} (emphasis added).
\textsuperscript{155} \textit{Id.}
\textsuperscript{156} 66 N.E. 619 (N.Y. 1903).
\textsuperscript{157} \textit{Id.} at 619.
\textsuperscript{158} \textit{Id.} (emphasis added).
mechanic's lien.  

VI. POSTPETITION CONTINUATION OF A LIEN

If a lien has been created and perfected prepetition, may a lienor, postpetition, take whatever steps are necessary and sufficient under state law to continue the lien without violating the automatic stay in the bankruptcy case of the owner of real property? If the lienor is not permitted to do so, the prepetition lien will be lost through lapse. Moreover, if the lienor is permitted to take the necessary steps but fails to do so, the lien will also be lost through lapse. Under the Bankruptcy Code, however, the tolling provisions of section 108(c)(2) might operate to preserve the lien until the stay is terminated.

A typical state statute might simply provide that a mechanic's lien will be lost unless, within a stated period of time after lien creation or perfection, an action is commenced to foreclose the lien. For example, Minnesota provides that “[n]o lien shall be enforced in any case unless the holder thereof shall assert the same within one year after the date of the last item of the claim.” However, although the commencement of such an action would effect a continuation of the lien, the action also constitutes enforcement of the lien.


160. The analysis that follows in the text should also apply to the case where perfection is effected postpetition but relates back to a prepetition date pursuant to § 546(b).

161. Or in the bankruptcy of the contractor or subcontractor? See supra part III.

162. See, e.g., N.Y. LIEN LAW § 17 (1993) (mechanic's lien lapses at the end of one year from the time of filing thereof unless continued by an action to foreclose, a recorded extension, or a court order).

163. Cf. In re Willax, 93 F.2d 293 (2d Cir. 1937) (holding that although the court has the power to enjoin the enforcement of liens, it has no power to recognize a lien which the lienor has failed to continue in the ways prescribed by statute). A third possibility is that the lienor will be permitted to continue the lien postpetition without violating the stay. If this were the situation, there would be no problem.

164. 11 U.S.C. § 108(c)(2) (1988); see infra notes 174-84 and accompanying text.

165. MINN. STAT. § 514.12(3) (Supp. 1993); see Victoria Grain Co. of Minneapolis v. James Elevator Constr., Inc. (In re Victoria Grain Co. of Minneapolis), 45 B.R. 2 (Bankr. D. Minn. 1984); see also, e.g., ILL. COMP. STAT. ch. 770, § 60/9 (Smith-Hurd 1993) (suit to enforce a lien must be brought within two years after completion of performance).
and as such, would violate the automatic stay.\footnote{166} Nor is such an action ordinarily an aspect of perfection,\footnote{167} so as to come within the second sentence of section 546(b), permitting a relation-back of such perfection/enforcement if the requisite notice is given as a substitute for the commencement of the action.

Some state statutes provide a specific durational period for the lien, after which time the lien lapses unless either an action is commenced to enforce the lien or some alternative step is taken. Consider, for example, the Idaho statute:

No lien . . . binds any building, mining claim, improvement or structure for a longer period than six (6) months after the claim has been filed, unless proceedings be commenced in a proper court within that time to enforce such lien; or unless a payment on account is made, or extension of credit given with expiration date thereof . . . six (6) months after the date of such payment or expiration of extension.\footnote{168}

New York has a more complicated statute:

No lien . . . shall be a lien for a longer period than one year after the notice of lien is filed, unless within that time an action is commenced to foreclose the lien . . . ; or unless an extension to such lien, except for a lien on real property improved or to be improved with a single family dwelling, is filed with the county clerk . . . within one year from the filing of the original notice of lien . . . . No lien shall be continued by such extension for more than one year from the filing thereof. In the event an action is not commenced to foreclose the lien within such extended period, such lien shall be extinguished unless . . . [a court] order be granted . . . continuing such lien . . . . No lien shall be continued by court order for more than one year from the granting thereof, but a new order . . . may be made in each successive year.\footnote{169}

\footnote{166} 11 U.S.C. § 362(a)(4) (staying any act to enforce any lien against property of the estate). Enforcement issues are discussed infra part VII.


\footnote{169} N.Y. LIEN LAW § 17 (McKinney 1993) (emphasis added). A lien on real property
MECHANICS' LIENS IN THE FACE OF A STAY

As indicated above, the commencement of an action to foreclose a lien is an act to enforce the lien, and as such, although also an act to continue the lien, would violate the automatic stay. Arguably, however, other alternative acts taken to continue a lien, such as a payment or extension of credit under the Idaho statute, or a recorded extension or court order under the New York statute, would not violate the stay.

The automatic stay... operates only as a stay of "any act to create, perfect or enforce" a lien against the property of the estate. Significantly, the section does not explicitly prohibit acts to extend, continue, or renew otherwise valid statutory liens, nor is there any indication from the legislative history that congress intended such result.

If steps which do not violate the automatic stay, other than the commencement of an action, may be taken to continue a lien, failure to follow such procedure will result in a lapse of the lien. However, the lienor may avoid having to take any steps if the commencement of an action, as an alternative means of continuing the lien, falls within section 108(c):

170. Unless the commencement of an action is deemed to be part of the process of perfection, the lienor cannot avoid the stay through the application of sections 362(b)(3) and 546(b).

171. 11 U.S.C. § 362(a)(4). However, as such act is the "commencing [of]... a civil action," within section 108(c), the period for commencing such action is tolled, thus effectively continuing the lien. See infra part VII.

172. Morton v. National Bank of New York City (In re Morton), 866 F.2d 561, 564 (2d Cir. 1989) (citation omitted) (emphasis added). This case involved a prepetition judgment lien that was extended by a postpetition court order. The court held that the order did not violate the automatic stay. Cf. In re Stuber, 142 B.R. 435 (Bankr. D. Kan. 1992) (notice of federal tax lien, filed postpetition to extend prepetition federal tax lien covered by earlier filed notice of lien, did not violate the automatic stay).

Under New York law, a mechanic's lien may be lost if a copy of the notice of lien is not served upon specific persons within specified periods of time. See N.Y. LIEN LAW §§ 11, 11-b (McKinney 1993). Presumably, such service could be effected postpetition without violating the automatic stay. LoPriore v. Imperia Bros. Inc. (In re LoPriore), 115 B.R. 462 (Bankr. S.D.N.Y. 1990); cf. Denoyelles Co. v. Requa Elec. Supply Co., 588 N.Y.S.2d 753 (Sup. Ct. 1992) (recognizing that the automatic stay does not preclude serving a notice of lien; but the court discharged a filed mechanic's lien for failure to effect service pursuant to Lien Law § 11-b).

173. See, e.g., IDAHO CODE § 45-510; N.Y. LIEN LAW § 17; supra notes 168-69 and accompanying text.
if applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of —

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the [bankruptcy] case; or

(2) 30 days after notice of the termination or expiration of the stay . . . with respect to such claim.174

The case of In re Morton,175 which involved the continuation of a judgment lien, might be instructive on the approach that a court might take regarding a mechanic’s lien under section 108(c). In Morton, a creditor of the debtor had obtained and docketed a money judgment on December 10, 1975, thereby obtaining a lien on the debtor’s real property.176 Under New York law, a judgment lien expires after ten years,177 unless prior to that time the lienor obtains a court order of extension.178 The debtor filed a petition under Chapter 13 of the Bankruptcy Code in October, 1982. In late 1985, at or near the time the original ten-year period of the lien was to expire, the creditor filed for an extension.179 The court issued an order of extension in February, 1986.180 Analyzing the statutes and the prior cases on the assumption that it was dealing with a statutory lien, the court held that a postpetition extension of the prepetition-perfected lien would not violate the automatic stay.181 Thus, not only was the creditor free to apply for a CPLR 5203(b) extension notwithstanding the stay, but failure to do so would have resulted in the loss of the lien through lapse.

The court went on, however, to hold that section 108(c) of the

174. 11 U.S.C. § 108(c) (emphasis added). Compare 11 U.S.C. § 108(a) (providing the period of time within which the trustee may commence an action that the debtor could have brought).

175. In re Morton, 866 F.2d 561.

176. Id. at 562.


178. See N.Y. Civ. Prac. L. & R. 5203(b) (the extension is only for the period of time that the creditor might have been stayed from enforcing his judgment or for the time necessary to complete a sale pursuant to an execution delivered to the sheriff prior to the expiration of the original 10-year period).

179. In re Morton, 866 F.2d at 562.

180. Id.

181. Id. at 565.

MECHANICS' LIENS IN THE FACE OF A STAY

Code operated to toll the ten-year period of the lien until the automatic stay was lifted, so the creditor's application for an otherwise required extension became unnecessary. The court's rationale for fitting the lien extension of CPLR 5203(b) into section 108(c) was as follows:

[CPLR 5203(b)] "fixes a period" of ten years wherein a judgment creditor with a lien on real property may execute on its judgment and retain its priority to proceeds therefrom. Such an execution is supplemental to the original action that gave rise to the judgment . . . and is thus part of a "continuing" action against the debtor.183

In retrospect, In re Morton probably offers little benefit to a New York mechanic's lienor in regard to postpetition continuation of the lien by any of the three methods provided by Lien Law section 17. First, the method of continuation by the commencement of an action to foreclose, which is a form of lien enforcement, is precluded as violative of the automatic stay. However, the period for commencing such an action is tolled by section 108(c) as a "commencing," not a "continuing," and so is not subject to the Morton analysis. Second, the stay would not be violated if the lienor recorded an extension or, third, obtained a court order under New York Lien Law section 17. Ostensibly, then, one or the other of such methods would have to be used in order to prevent the lapse of the lien. Section 108(c) would not excuse resort to either of the two methods: under no stretch of the analysis of Morton could either method be deemed as "continuing a civil action." Nonetheless, if section 108(c) operates to toll the continuation or enforcement period of the first method (the commencement of an action to foreclose) the lienor need not apply either of the other two methods; the lien is automatically continued for the tolling period, whether or not an extension is filed or a court order is obtained postpetition. It is possible, however, that a court might take a contrary view and require that the lien be continued by recording an extension or by court order, in order for the lienor to take advantage of the expanded period for enforcement. In the special case where a foreclosure action had been commenced prepetition, the Morton analysis might work to the lienor's benefit by tolling any period required for the performance of an act which would be considered as "continuing a civil action,"—that is, continu-

183. In re Morton, 866 F.2d at 567.
VII. POSTPETITION ENFORCEMENT OF A LIEN

Generally, the commencement of an action to foreclose a lien constitutes an act to enforce a lien within section 362(a)(4), and not an act to perfect it. Thus, there is no basis for a relation-back argument to avoid the stay under sections 362(b)(3) or 546(b).

184. For example, a lienor might be required to extend the lifetime of a notice of pendency filed in connection with the action to enforce a lien. See N.Y. LIEN LAW § 17 (terminating a lien if the notice of pendency ceases to be effective as constructive notice; but such notice may be extended pursuant to N.Y. CIV. PRAC. L. & R. 6513 (McKinney 1980)). This assumes that the lienor does not wish, or cannot obtain a modification of the stay applicable to such enforcement acts. See 11 U.S.C. § 362(d)-(g).


For some courts, statutes which specify a certain period of time within which a lienor must commence an action to enforce a lien are characterized as statutes of "duration," and not true statutes of "limitation." An action within the scope of the former constitutes part of the lien perfection process; thus, the notice described by the second sentence of section 547(b) of the Code, as a substitute for such action, may be used to effect a relation back of a postpetition perfection to avoid the automatic stay. There is no tolling by section 108(c). See, e.g., In re Birdview Satellite Communications, Inc., 90 B.R. 465 (Bankr. D. Kan. 1988). The contrary view is that the commencement of an action is pure enforcement and not part of perfection, and that section 108(c) applies irrespective of the characterization of the statute as durational or limitational.

186. See supra notes 57-64 and accompanying text. Under prior bankruptcy law, there was no stay provision, but a court could enjoin the postpetition enforcement of a prepetition lien. See Brower v. Schlott (In re Weston), 68 F.2d 913 (2d Cir. 1934); cf. In re Willax, 93 F.2d 293, 295 (2d Cir. 1939) (stating that "an adjudication in bankruptcy does not prevent a claimant from perfecting a lien as distinguished from enforcing it"). Under current bankruptcy law, however, the automatic stay operates against the postpetition enforcement of a mechanic's lien whether the real property is owned by the debtor, see, e.g., Meek Lumber Yard, Inc. v. Houts (In re Houts), 23 B.R. 705, 706 (Bankr. W.D. Mo. 1982); In re Fiorillo & Co., 19 B.R. 21, 23 (Bankr. S.D.N.Y. 1982); cf. Diamond Hill Inv. Co. v. Shelden, 767 P.2d 1005 (Wyo. 1989) (stay operated against lienor to prohibit the postpetition amending of prepetition foreclosure complaint to include certain mortgagees as defendants), or a contractor or subcontractor against whom the lienor has a claim. See supra part III; see also Garbe Iron Works, Inc. v. Priester, 457 N.E.2d 422, 424 (Ill. 1983); cf. Valley Transit Mix of Ruidoso, Inc. v. Miller, 928 F.2d 354, 356 (10th Cir. 1991) (holding the stay applicable to enforcement of a lien against owner-lessee's property in bankruptcy of lessee). It is immaterial whether or not the lienor who commences a foreclosure action has knowledge of the stay. See In re Victoria Grain Co. of Minneapolis, 45 B.R. at 6. But cf. Roofing Concepts, Inc. v. Kenyon Indus., Inc. (In re Coated Sales, Inc.), 147 B.R. 842, 847 (Bankr. S.D.N.Y. 1992) (voicing disapproval with the lienor's violation of the stay, but failing to impose any penalty beyond that imposed by the Code of nullifying the conduct, because of the plaintiff's uncontested lack of knowledge about the bankruptcy).
Nevertheless, because of the tolling provision of section 108(c), a lienor might be able to both avoid violating the stay and avoid a lapse of the lien.\(^{187}\)

Almost "any act to . . . enforce any lien against property of the estate"\(^ {188}\) would be part of the process of commencing or continuing a civil action, within the meaning of section 108(c) of the Code, and therefore be subject to the automatic stay. However, although the stay would operate against such an action, the time period under "applicable nonbankruptcy law"\(^ {189}\) for performing such act would be extended to the later of "(1) the end of [the applicable time] period, including any suspension of such period occurring on or after the commencement of the case; or (2) 30 days after notice of the termination or expiration of the stay."\(^ {190}\) But, the courts disagree about the meaning of the term "suspension" in section 108(c).

For instance, in Garbe Iron Works, Inc. v. Priester,\(^{191}\) a subcontractor completed work on February 2, 1979 and filed a claim for a lien on May 2, 1979.\(^ {192}\) The Illinois statute required that a suit to enforce a lien be brought within two years after the completion of performance.\(^ {193}\) Thus, the two-year period would have expired on February 2, 1981.\(^ {194}\) On August 11, 1980, within the statute of limitations period, the debtor filed a petition in bankruptcy. Subsequently, on December 23, 1980, 133 days after the petition was filed, the lienor obtained a court order permitting it to proceed against the debtor—\(^ {195}\) in effect, a lifting of the stay.\(^ {196}\) The lienor filed suit on March 16, 1981, after the expiration of the two-year limitations period, and the defendants moved to dismiss because the plaintiff had

187. Technically speaking, the lienor is not free to disregard the stay and go about his or her business. Instead, the stay remains in full force; the time period for enforcement is merely extended. See supra part VI; infra notes 188-203 and accompanying text.
191. 457 N.E.2d 422 (Ill. 1983).
192. Id. at 424. The contractor, not the owner, was the debtor in bankruptcy; however, as the contractor was a necessary party in a suit by the subcontractor to enforce its lien against the owner’s property, the stay precluded such suit. See supra part III.
194. Id.
195. Id.
failed to file suit within the applicable limitations period.\textsuperscript{197}

The court, however, held that the plaintiff's filing was timely: the plaintiff was precluded from suit for the 133 days between the date of bankruptcy and the lifting of the stay and thus, the plaintiff should be given that same period after the expiration of the two-year limitation period to commence a suit.\textsuperscript{198} In effect, the court construed the "suspension" language of section 108(c) to include the period during which the lienor was precluded by the bankruptcy itself from bringing suit. The court rejected the defendants' contention that such language applied only to particular nonbankruptcy statutory schemes providing for suspension and concluded that

\textit{\textquoteleft\textquoteleft}while not entirely free from doubt, the intent . . . seems to be to extend the period within which a creditor may act by the greater of (1) the period granted by a particular statutory scheme, (2) the period during which action has been stayed by the Bankruptcy Act, or (3) 30 days after notice of the termination of the stay.\textsuperscript{199}

The cases holding to the contrary would limit the "suspension" language in section 108(c) to nonbankruptcy tolling periods, such as those for minority or incompetency,\textsuperscript{200} or those specialized federal suspension statutes, such as the Internal Revenue Code.\textsuperscript{201} In \textit{Grotting v. Hudson Shipbuilders, Inc.},\textsuperscript{202} for example, the court rejected the plaintiff's contention that the unexpired portion of the statute of limitations period as of the time the stay took effect, should have been added on to that limitations period, and therefore that a suit

\textsuperscript{197} \textit{Garbe Iron Works}, 457 N.E.2d at 424. On January 9, 1981, plaintiff received notice of the order lifting the stay, so paragraph (1), not paragraph (2), of section 108(c) of the Code provided the "later" outside date for filing suit. \textit{Id.}

\textsuperscript{198} \textit{Id.}

\textsuperscript{199} \textit{Id.} at 425 (emphasis added). It is not clear from this language whether the 133 days is to be computed from the date the stay was lifted or from the date of expiration of the two year limitations period; however, the particular date chosen would not affect the outcome in this case. The \textit{Garbe Iron Works} approach was followed in \textit{Major Lumber v. G. & B. Remodeling, Inc.}, 817 S.W.2d 474 (Mo. Ct. App. 1991). In \textit{Major Lumber}, the operative dates, all in 1989, were as follows: (1) lien filing on May 10; (2) bankruptcy filing on May 11; (3) automatic stay lifted on September 25; (4) 30-day period of section 108(c)(2) expired on October 25; (5) Missouri six month statute of limitations expired on November 10; and (6) lienor's action to enforce his lien was filed on November 15. \textit{Id.} at 475. The court held that the action was timely, adding the period of the operation of the stay onto the original statute of limitations. \textit{Id.} at 424-25.


\textsuperscript{201} \textit{Wilkey v. Union Bank & Trust Co. (In Re Baird)}, 63 B.R. 60, 63 (Bankr. D. Ky. 1986).

\textsuperscript{202} 85 B.R. 568 (W.D. Wash. 1988).
filed within such extended period should be deemed timely.\textsuperscript{203}

VIII. CONCLUSION

A mechanic's lienor has to be wary of the possibility of the bankruptcy of an owner of real property improved by the rendition of services or the furnishing of materials, as well as the bankruptcy of a contractor or subcontractor against whom such lienor has a claim, where such claim is not against the owner directly. Not only might certain acts taken by the lienor to create, perfect, continue, or enforce his lien be subject to avoidance by the trustee exercising his formidable powers under sections 544, 545 and 549 of the Bankruptcy Code, but such acts might violate the automatic stay of section 362 of the Code.

A mechanic's lien that is created and perfected prepetition will survive bankruptcy, although the underlying claim against the debtor will be discharged. The lienor will be precluded by the automatic stay from enforcing his lien postpetition and during bankruptcy, but any statute of limitations relating to such enforcement may be tolled to enable the lienor to enforce the lien once the stay is terminated. If the lienor has acquired the lien prepetition, a postpetition perfection might relate back to a prepetition date, thereby avoiding the stay. Whether the lien is originally perfected prepetition or postpetition, the continuation of such perfection should be permissible and not violative of the automatic stay, at least where the particular act of continuation does not also involve enforcement.

\textsuperscript{203} Id. The sequence of events in Grotting was as follows: (1) the plaintiff suffered personal injuries, which gave rise to his cause of action; (2) defendant filed a Chapter 11 petition on February 9, 1983; (3) because this was a maritime tort, the three-year statute of limitations under 46 U.S.C. app. § 763a (1988) expired on November 29, 1984 (unless tolled or suspended by section 108(c)); (4) on plaintiff's motion, the automatic stay was lifted on June 30, 1986; (5) plaintiff filed suit for damages on September 4, 1986. \textit{Id.} at 569.

When the statute of limitations was asserted as a defense, the plaintiff argued that the portion of the original limitations period which was left at the time the stay took effect—one year and 294 days—should have been added onto the limitations period to determine a new limitations period available to the plaintiff once the stay was lifted. \textit{Id.} Roughly computed, the new period would have extended to September 20, 1986, and the plaintiff's action, commenced on September 4, 1986, would have been timely. \textit{Id.} at 568-70. The court rejected the argument, however, holding that because the original statute of limitations had expired at the time the stay was lifted, the plaintiff had only 30 days from such time—until July 30, 1986—to file suit. \textit{Id.} at 569. The court viewed section 108(c) to "merely provide[ ] an extra 30 days to file a claim if the claims' limitation period expired before the automatic stay was lifted." \textit{Id.} at 569-70.