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# Beast of Burden

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# I. Burdens of Proof

This paper examines various burdens of proof and presumptions in the Bankruptcy Code. While the initial burden of proof often falls on the movant, the Bankruptcy Code attempts to strike the proper balance between the interests of debtors with the interests of creditors. Further, this paper will address the role of evidence in bankruptcy, including direct and cross examination and the effective use of proffers.

## A. Motion to Lift the Automatic Stay

Section 362 of the Bankruptcy Code provides for a broad automatic stay against property of the bankruptcy estate upon the filing of a bankruptcy petition. *See* 11 U.S.C. § 362(a). Creditors or other parties in interest, however, may seek relief from the automatic stay under section 362(d). Section 362(d) provides that the court shall grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, upon request of a party in interest and after notice and hearing, (1) "for cause," including lack of adequate protection, (2) if the debtor has no equity in the property and the property is not necessary for an effective reorganization, and (3) when the property at issue is a single asset real estate case as provided under section 101, and certain conditions as provided by section 362(d)(3) are not met.

The requisite burdens of proof for stay relief is provided by section 362(g). In a hearing on relief from the automatic stay, the party requesting the relief has the burden of proof on the question of the debtor's equity in the property, and the party opposing the relief has the burden on all other issues. 11 U.S.C. § 362(g). In practice, when a creditor alleges grounds to lift the automatic stay other than for lack of equity, the creditor is required to make a *prima facie* showing that it is entitled to relief from the stay. *In re Alexandra Tr.*, 526 B.R. 668, 673 (Bankr. N.D. Tex. 2015); *see also Sonnax Indus. v. Tri Component Prods. Corp. (In re Sonnax Indus. Inc.)*, 907 F.2d 1280, 1285 (2d

Cir. 1990) ("If the movant fails to make an initial showing of cause, however, the court should deny relief without requiring any showing from the debtor that it is entitled to continued protection."). If, for example, the basis for stay relief is the creditor's lack of adequate protection, the creditor must show there is a decline in value, or at least a threat of decline in value, in order to establish a *prima facie* case. *In re ELMIRA LITHO, INC*., 174 B.R. 892, 902 (Bankr. S.D.N.Y. 1994). Once the creditor meets her initial burden, the burden shifts to the debtor to move forward with evidence and ultimately prove the collateral is not declining in value, or that the creditor is adequately protected as provided by section 361. *Id*.

**B. Obtaining Credit and Incurring Debt**

Under section 364(d)(1) of the Bankruptcy Code, the court may, after notice and a hearing, authorize the obtaining of credit or incurring of debt that is secured by a senior or equal lien on property of the estate that is subject to a lien only if two conditions are met: (1) the trustee is unable to obtain credit or financing on any other basis, and (2) the existing lienholder is adequately protected. *See* 11.S.C. § 364(d)(1)(A)-(B). Boiled down, this provision essentially allows the trustee or debtor-in-possession to "prime" an existing lien, notwithstanding covenants in the existing loan agreement or provisions of nonbankruptcy law that would otherwise protect the position of the existing lienholder. 3 Collier on Bankruptcy ¶ 364.05 (Alan Resnick & Henry J. Sommer eds., 16th ed. rev. 2019).

Further, "[g]iven the fact that super priority financing displaces liens on which creditors have relied in extending credit, a court that is asked to authorize such financing must be particularly cautious when assessing whether the creditors so displaced are adequately protected." *In re First S. Sav. Asso.*, 820 F.2d 700, 710 (5th Cir. 1987). Section 364(d)(2) provides that the trustee bears the burden of proof on the issue of adequate protection. Whether the existing lienholder is

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