DIFFICULT POLICY IN AN EASY CASE

CITY OF CHICAGO V. FULTON

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IN *CITY OF CHICAGO V. FULTON*, the U.S. Supreme Court held that a creditor's "mere retention" of a debtor's property after the debtor files for bankruptcy does not violate the portion of the Bankruptcy Code's automatic stay that forbids creditors from acts to obtain possession of, or exercise control over, a debtor's property.[1] The upshot of the decision was that Chicago could continue its policy of refusing to turn over debtors' impounded vehicles without fear of violating that portion of the automatic stay.

From a textual standpoint, *Fulton* was an easy case. Justice Alito's opinion presented a straightforward textual analysis, one that was backed by all members of the Court.[2] Although academics and practitioners can – and did – quibble over the text,[3] the Supreme Court saw little room for disagree-

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[1] City of Chicago v. Fulton, 141 S. Ct. 585, 589 (2021).

[2] The decision was 8-0. Justice Barrett did not take part in the case, since it was argued prior to her joining the bench. Danielle D'Onfro, *A Narrow Win for Creditors*, SCOTUSBLOG (Jan. 20, 2021), www.scotusblog.com/2021/01/opinion-analysis-a-narrow-win-for-creditors/.

[3] A group of seven law professors filed an amicus brief supporting the respondents (the debtors), while a group of five law professors filed an amicus brief in support of the petitioner

ment over the statute's meaning.

But a closer look at *Fulton* reveals a thorny problem lurking below the surface of all that clean textual analysis. As Justice Sotomayor took pains to emphasize in her concurring opinion, the practical implications of the Court's opinion for debtors are much more troublesome.[4] Drawing attention to the hardship debtors such as respondent George Peake suffer due to policies like those used by the Chicago, Sotomayor suggested that perhaps the bankruptcy statute or rules should change to speed up the process by which debtors can get their property back.[5]

As I have written in previous issues of this publication,[6] the Supreme Court tends to take baby steps with its bankruptcy jurisprudence, favoring narrow resolution of the immediate issue before it. The Court's decision in *Fulton* raises questions about who – or which body of government – ought to do more when faced with a policy that interferes with bankruptcy's fresh start goal and has a disproportionate impact on low-income communities of color, yet remains firmly within the letter of the law.[7]

I.
A TALE OF FOUR IMPOUNDMENTS

Fulton actually involved four separate bankruptcy cases, which were consolidated on appeal. In each case, Chicago impounded the respondent's vehicle after they failed to pay fines for various motor vehicle infractions.[8] Each respondent subsequently filed for chapter 13 bankruptcy. Through the bankruptcy, each then requested that the city return their vehicles, arguing that, as they still owned the vehicles in question (because the city had not yet sold them), § 362(a)(3) of the Bankruptcy Code required the city to return

(the City). Brief of Bankruptcy Law Professors as *Amici Curiae* in Support of Respondents, City of Chicago v. Fulton *et al.*, 141 S. Ct. 585 (2021) (No. 19-357); Brief for *Amici Curiae* Professors Ralph Brubaker et al. in Support of Petitioner, City of Chicago v. Fulton et al., 141 S. Ct. 585 (2021) (No. 19-357).

[4] *Fulton*, 141 S. Ct. at 592 *et seq*. (Sotomayor, J., concurring).

[5] *Id.* at 593-95.

[6] *See, e.g.*, Laura N. Coordes, *U.S. Bank v. Village at Lakeridge: A Small Step for Bankruptcy, and a Slightly Bigger Step for Civil Procedure*, 21 GREEN BAG 2D 307 (2018).

[7] *Fulton*, 141 S. Ct. at 593-94 (Sotomayor, J., concurring).

[8] *Id*. at 589.

their cars. Section 362(a)(3) is a portion of the bankruptcy automatic stay that bars, among other things, any "act" to "exercise control over property of the estate."[9] The respondents argued, in essence, that the City was exercising control over estate property (their cars) by virtue of its "act" of retaining the vehicles.

In each case, Chicago refused to return the vehicles, contending that § 362(a)(3) did not have the effect that the respondents said it did. Specifically, the city argued that § 362(a)(3) merely "stays" or "freezes" the status quo.[10] Since the vehicles were already impounded when the debtors filed for bankruptcy, the city argued, retention of the vehicles by the city could not be an automatic stay violation.[11] The city contended that should the debtors wish to have their vehicles returned, they should use a turnover process pursuant to § 542(a).[12] The rules surrounding § 542(a) require a more involved process than simply demanding return of the property at issue. Usually, the debtor (or trustee) must file an adversary proceeding – essentially a lawsuit within a bankruptcy case – seeking turnover of the property back to the bankruptcy estate.[13] This process takes time, money, and patience – three things the debtors certainly did not have in abundance, particularly when it came to accessing vehicles they used to get to work.

In each case, the bankruptcy court agreed with the debtors' interpretation of § 362(a)(3) and held that the city's refusal to return the vehicles violated the automatic stay. The U.S. Court of Appeals for the Seventh Circuit affirmed, holding that Chicago had "exercise[d] control over" the debtors' property in violation of § 362(a)(3) when it retained possession of their vehicles after their bankruptcy filings.[14] The case then went to the Supreme Court.

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[9] 11 U.S.C. § 362(a)(3).

[10] Reply Brief for Petitioner at 4, City of Chicago v. Fulton et al., 141 S. Ct. 585 (2021) (No. 19-357) ("The automatic stay freezes the state of affairs that exists at the moment the petition is filed, pending further court order.").

[11] *Id.* at 11 ("If a creditor lawfully repossessed collateral before bankruptcy and thus had legal right to possession, the collateral comes into the estate subject to that same limitation.").

[12] *Id.*

[13] 11 U.S.C. § 542(a); *Fulton*, 141 S. Ct. at 594 (Sotomayor, J., concurring) (discussing the adversary proceeding process in connection with § 542(a)).

[14] *Fulton*, 141 S. Ct. at 589.

II.
PASSIVE POSSESSION PASSES MUSTER

Justice Alito's opinion for the unanimous Court began and ended with the language of the statute. The Court held that under the plain language of § 362(a)(3), a creditor passively retaining possession of estate property does not violate the automatic stay.[15]

Recall that § 362(a)(3) stays "any act . . . to exercise control over property of the estate."[16] Justice Alito broke down that passage and examined the definitions of three words – "stay," "act," and "exercise" – to determine that § 362(a)(3) prohibits only "*affirmative* acts that would disturb the status quo as of the time the bankruptcy petition was filed."[17] An "act" to "exercise" power, according to Alito, involves more than just "having" power because "act" is defined, well, actively. An "act" is "[s]omething *done* or *performed*."[18] Thus, Chicago had not performed any post-bankruptcy "act" with respect to the vehicles because it had kept them, exactly as it had been keeping them prior to bankruptcy.

Justice Alito also expressed discomfort with the way the debtors' reading of § 362(a)(3) fit into the broader Bankruptcy Code. Alito explained that reading § 362(a)(3) broadly to cover mere retention of property, as the debtors wished, would render another Bankruptcy Code provision, § 542, largely superfluous, if not contradictory.[19] Section 542 requires those possessing estate property to turn over that property for the benefit of the bankruptcy estate. If § 362(a)(3) was read to *also* compel turnover, § 542 would not have much of a purpose – an odd result when it seemed reasonably clear to the Court that § 542 was the main provision governing turnover. Furthermore, because § 542 contains exceptions to turnover and § 362(a)(3) does not, reading § 362(a)(3) to cover turnover of estate property could actually contradict § 542 in some cases.[20]

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[15] *Id.* at 590.

[16] 11 U.S.C. § 362(a)(3).

[17] *Fulton*, 141 S. Ct. at 590 (emphasis added).

[18] *Id.* (emphasis added).

[19] *Id.* at 591.

[20] *Id.*

Justice Alito concluded his opinion by briefly turning to legislative history. In 1984, Congress amended § 362(a)(3) to add the phrase that was being disputed: "or to exercise control over property of the estate." As discussed, the debtors in *Fulton* contended that this amendment effectively created a turnover obligation.[21] However, at the time of the 1984 amendment § 542 was already a part of the Code. If Congress had wanted to make § 362 into an affirmative turnover obligation like § 542, Alito reasoned, it would have done more than just add the phrase "exercise control" when it amended the Code.[22] For example, Congress could have added a cross-reference to § 542 or otherwise clearly indicated that it was drastically changing the scope of § 362(a)(3), such that this provision of the automatic stay now also contained a turnover requirement.[23] For all of these reasons, Alito concluded that mere retention of estate property after a bankruptcy petition is filed does not violate § 362(a)(3). Thus, Chicago was not violating that portion of the automatic stay when it kept the debtors' vehicles.

Justice Sotomayor was the only Justice who wrote a concurrence. Although she agreed with the majority's reading of the statute, she wrote separately to emphasize that the Court's decision was narrow. In particular, the Court *hadn't* decided when or whether other provisions of the automatic stay might require return of property, and the Court *didn't* address the process by which creditors must "deliver" estate property under § 542.[24]

Justice Sotomayor also had harsh words for Chicago's policy of refusing to return impounded vehicles to debtors in bankruptcy.[25] She took pains to highlight the problems debtors face when they are deprived of the very vehicles they need in order to get to work – and pay their creditors.[26] And she emphasized that these problems disproportionately impact those who are already struggling. Sotomayor then observed that, to address this practical problem, some bankruptcy courts had tried to speed up the process by

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[21] *Id.*

[22] *Id.* at 592.

[23] *Id.*

[24] *Id.* (Sotomayor, J., concurring).

[25] *Id.* at 592-93 ("Regardless of whether the City's policy of refusing to return impounded vehicles satisfies the letter of the Code, it hardly comports with its spirit.").

[26] *Id.* at 593-94.

which debtors could get their vehicles back using § 542.[27] Sotomayor cautioned, however, that it wasn't the place of bankruptcy judges to engage in this ad hoc, discretionary action when the rules of bankruptcy procedure require more process.[28] Instead, she called upon "rule drafters and policymakers" to put new rules and laws in place to speed things up.[29]

III.
LEGAL EASE AND PRACTICAL PROBLEMS

Neither the majority opinion nor the concurrence was a huge surprise from this Court. The majority opinion essentially says: it's not our job to focus on policy or practicalities if we read the statute, and the statute is clear. The concurrence, though perhaps written more vibrantly, is not substantially different. It emphasizes that not only is it not the Supreme Court's job to try to mitigate negative practical effects of a clearly written statute – it is not any court's job to do so. Although the concurrence more strongly condemns Chicago's policy and points out the negative practical consequences of that policy, ultimately the concurring Justice is just as convinced as the majority that there is nothing for a court to do here. As Sotomayor put it, "any gap left by the Court's ruling today is best addressed by rule drafters and policymakers, not bankruptcy judges."[30]

From a practical standpoint, the biggest problem laid bare by the Court's decision is that bankruptcy law is slow to catch up to creative creditor tactics. Chicago's policy of not returning impounded vehicles may make life very difficult for debtors and defeat one of the core purposes of individual bankruptcy – but the Court has been clear that Chicago's policy can't be struck down by a creative reading of a statute adopted well before the policy came into existence. While we wait for Congress or the Advisory Committee on Rules of Bankruptcy Procedure to consider and implement changes and corrections, Chicago will continue its practice of refusing to return impounded vehicles absent a more involved § 542 turnover proceeding. The wheels of justice are turning very slowly indeed.

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[27] *Id.* at 594.

[28] *Id.* at 595.

[29] *Id.*

[30] *Id.*

The Court's narrow bankruptcy decisions may alternately be annoying or comforting, depending on one's perspective and the case at hand. *Fulton* showcases the particular problems inherent in the process of getting the Court to hear and decide a case. A decision that examined the automatic stay more broadly (rather than just a portion of it) might well have provided more clarity. However, only a portion of the potentially relevant statute was before the Court, because the Seventh Circuit below did not reach the parties' arguments about whether Chicago had violated other provisions of the automatic stay.[31] But a string of narrow decisions, issued over time, means that it takes years – decades, even – to fully understand an issue of critical, practical importance: exactly what creditor action (or *in*action) the automatic stay prohibits. Unless Congress updates the Bankruptcy Code or the Advisory Committee updates the Bankruptcy Rules, creditors' creativity can flourish while the courts examine the automatic stay provisions, seemingly one by one.

CONCLUSION

The Court's opinion in *Fulton* is fair, within the lines, reasonable, and about as plain vanilla as it gets. It sent a signal – one that is perhaps yet to be heard – to policymakers and lawmakers: it is not the courts' job to correct the troubling practical implications of a straightforward legal decision. Someone else needs to step up.

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[31] In re Fulton, 926 F.3d 916, 926 n.1 (7th Cir. 2019).