

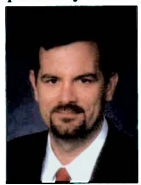
Takings and Title 11: Governmental Power and the Bankruptcy Estate

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The Takings Clause of the Fifth Amendment to the Constitution gives the government the power to divest persons of their property, provided that the rationale for the taking is justified and that the property owner is justly compensated.¹ The courts have examined and reexamined the circumstances under which the government may impose this potentially drastic action upon its citizenry.



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Recently, in *Kelo v. City of New London*, the U.S. Supreme Court held that a governmental entity may take privately held property for a private economic re-development project so long as the project serves an established "public purpose."² The Supreme Court decided *Kelo* by a bare majority, but the decision still defines the outer boundaries of takings jurisprudence under the U.S. Constitution. In response to *Kelo*, a majority of states took action to ensure that their own eminent-domain powers would not be as broad as those permitted by the *Kelo* decision.³ *Kelo*, and the reactions to it, are illustrative of the high-stakes issues involved when cherished personal property rights and raw governmental power collide.

In the bankruptcy context, the applicability of the automatic stay is frequently an issue when a governmental entity seeks to "take" the privately held property of a debtor. Section 362(a) of the Code provides that a petition operates as a stay of, among other things, acts

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to commence or continue judicial or administrative actions against the debtor, acts to enforce judgments against the debtor or debtor property, acts to obtain control over debtor property, or acts to assess or collect claims.⁴



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Obviously, procedures necessary to institute a governmental taking could involve actions that would violate each of these automatic stay provisions. In an effort to permit certain actions to go

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forward, however, Congress has provided significant exceptions to the automatic stay for efforts undertaken by a "governmental unit." Section 362(b)(4) of the Code provides that the above-quoted sections of the automatic stay do not apply to:

the commencement or continuation of an action or proceeding by a governmental unit...to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.

According to the Legislative Statement attached to Section 362(b)(4), "[t]his section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary

interest in property of the debtor or property of the estate."⁵

The case of *In re Catalano* provides a classic example of the application of the "police or regulatory" exception to the automatic stay.⁶ In *Catalano*, a chapter 13 debtor held an ownership interest in a house that stood incomplete and vacant for more than 30 years.⁷ After unsuccessful attempts to have the debtor complete and repair the house, municipal authorities determined that the house had become a nuisance, and unfit for habitation, and that "illegal activities had taken place at the house."⁸

Following a condemnation proceeding, the city arranged for the house to be destroyed. The debtor filed his chapter 13 petition the day before the scheduled demolition.⁹ Upon learning that the city intended to go forward with the demolition notwithstanding the filing, the debtor filed an application for

a temporary restraining order to enjoin the city's actions. The bankruptcy court quickly determined that the city's actions were not subject to the automatic stay, deciding: "A condemnation proceeding by a city to rid the city of a structure deemed unsafe is certainly the exercise of a police or regulatory power by a governmental unit...."¹⁰ The court also denied the debtor's request for an injunction after determining, among other things, that the debtor lacked any realistic means to make repairs to the house.¹¹ Many courts have followed the logic of the *Catalano* court to permit or condone governmental action to correct matters directly affecting public safety.¹²

When the governmental action

⁵ See 11 U.S.C.A. §362(b)(4) (2006).

⁶ 155 B.R. 219 (Bankr. D. Neb. 1993).

⁷ *Id.* at 222.

⁸ *Id.* at 223.

⁹ *Id.* at 220.

¹⁰ *Id.* at 221.

¹¹ *Id.* at 224.

¹² See, e.g., *In re Javens*, 107 F.3d 359, 363-64 (8th Cir. 1997) (buildings demolished for building and fire code violations); *In re Blank*, 210 B.R. 626 (Bankr. M.D. Fla. 1997) (apartments demolished as fire hazard); *In re Weiler*, 189 B.R. 467, 471 (Bankr. E.D. Wis. 1995) (nonbankruptcy court judgment entered against debtor for unfair rental practices); *In re Lux*, 159 B.R. 458, 461 (Bankr. E.D. Va. 1992) (unauthorized water supply cut-off).

¹ "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Takings Clause is applicable to the states pursuant to the Fourteenth Amendment. See *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 186 U.S. 226, 241 (1907) ("[A] judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the fourteenth amendment.")

² 545 U.S. 469, 480 (2005).

³ Ilya Somin, "The Limits of Backlash: Assessing the Political Response to *Kelo*," 93 *Minn. Law Rev.* 2100, 2102 (2009) (noting 43 states have enacted post-*Kelo* reform legislation).

⁴ See 11 U.S.C. §362(a)(1), (2), (3) and (6).

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