# Automatic stay

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August 23 2012



*Hiraldo v. Banco Popular Depuerto Rico (In re Hiraldo)*, 471 B.R. 676 (D. P.R. 2012) –

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*Hiraldo* illustrates the key role that state law can play in determining the outcome of a bankruptcy case. Despite the fact that a mortgage presented for recording was still unrecorded six years later after the mortgagor filed bankruptcy, the debtor was not able to avoid the mortgage because it was eventually recorded post-petition, and under applicable state law recording related back to the time of presentment for purposes of determining priority.

As discussed in a prior blog on strong arm powers, a debtor can assert the rights of a hypothetical bona fide purchaser of real estate as of the commencement of the bankruptcy. That normally means that the debtor can avoid a mortgage that is unrecorded at the commencement of the case since the hypothetical bona fide purchaser would typically take title free and clear of unrecorded interests under state law. However, that was not the result in this case.

In *Hiraldo* the bank filed a mortgage at the Property Registry on September 15, 2003, as noted in the daily entry books. The registrar did not notify the bank of any defects. The debtor filed bankruptcy on July 21, 2008. On August 11, 2009, the debtor filed a complaint alleging that the mortgage was not perfected and should be reclassified as unsecured since the mortgage had not yet been recorded. Eventually the mortgage was recorded in 2011. The delay in registration was apparently due to a backlog.

A threshold issue was whether the post-petition act of recording was subject to the automatic stay imposed under the Bankruptcy Code. There is an exception from the stay for acts to perfect or to maintain or continue perfection of an interest to the extent that the rights and powers of a trustee or debtor are subject to perfection under Section 546(b) of the Bankruptcy Code. In essence, Section 546(b) provides an exception where laws of general applicability allow a creditor to perfect an interest that relates back to a time prior to the commencement of the case.

Under the Mortgage Law of Puerto Rico, a registrar is required to handle documents presented in the order of their presentation, and registration relates back to the date of filing. Consequently, the bank's mortgage took priority based on the date of presentation and had priority over any other documents that might have been recorded prior to the filing of the bankruptcy but were presented after the mortgage (including a purchaser as of the commencement of the case). This meant that the post-petition act of recording was not subject to the automatic stay. It also meant that the hypothetical bona fide purchaser would take title subject to the mortgage, so that the mortgage could not be avoided on that basis.

The court also considered whether the grant of the mortgage lien constituted a preference. (See prior blog on construction liens for elements of a preference.) This turned on when a transfer is deemed to have been perfected. Under Section 547 of the Bankruptcy Code, a real estate transfer is deemed perfected when a bona fide purchase can no longer acquire a superior interest. In this case, a bona fide purchaser would have had to present a deed prior to the date that the bank presented its mortgage. So the transfer (*i.e.* grant of the mortgage lien) was deemed perfected in September 2003, which took it outside the preference period.

The issue of the "gap" between the date a document is submitted for recording and the date it is actually recorded can be a significant one. While the delay in this case of over 7 years is rather extreme, there are certainly jurisdictions with a backlog of weeks or months.

Under Section 547 if a real estate transfer (grant of mortgage lien) is perfected (typically recorded) within 30 days after the transfer, the transfer is deemed made at the time of the transfer. If it is perfected ***more*** than 30 days after the transfer, the transfer is deemed made at the time of perfection.

For a mortgage loan, this 30 days means the difference between a contemporaneous exchange that is not a preference and the grant of a lien on account of an antecedent debt that may constitute a preference. Unless the applicable state law recording system gives a document a priority date based on the date that it is presented (as is the case in Puerto Rico), a delay in recording of more than 30 days – whether due to a recording backlog or a delay in submitting a document for recording – results in potential preference exposure.

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