Public Interest and Private Rights:
A Simpler Theory of Police and Regulatory Action[*]

Courts commonly assert that there are two tests for determining if a governmental action meets the "police and regulatory" standard under the Section 362(b)(4) exception to the automatic stay.[1] The first is the "pecuniary purpose" test; and the other is the "public interest/ private rights" test. While Congress never actually defined what it meant by police and regulatory action, the first test can reasonably be derived from language in the legislative history. The second test, though, as initially enunciated in *Dan Hixson Chevrolet*,[2] and applied most recently in *Chao v. Hospital Staffing Services, Inc*.,[3] is, I suggest, based on nothing in the Code or its history, needlessly complicates the analysis, and erroneously excludes certain actions that the Code does mean to cover. Instead, there is a far simpler dichotomy – which looks to whether the government is acting as prosecutor or merely neutral adjudicator – that can easily be discerned in the Code's language and that falls neatly within a line of analysis often articulated by the Supreme Court in recent cases. Adhering to that distinction will make the process far simpler for all concerned.

For those of us who began practicing post-1978, a little history is in order. Prior to the Code, there was neither the broad automatic stay that now exists under Section 362(a), nor the array of exceptions set forth in Section 362(b). Instead, there was a statutory authorization for the court to impose a stay, and, beginning in the mid-1970s, a series of rules, one per chapter, that imposed a stay, *inter alia*, against "the commencement or the continuation of any court or other proceeding against the debtor . . . ." Despite the absence of any explicit exception from that sweeping language for police and regulatory actions, most courts readily concluded that the Rules stays were not meant to bar governmental regulatory actions, as opposed to efforts to collect on a claim.[4] Some courts, though, took a more literal view of the scope of the Rules stay

---

[*] The views expressed herein are those of the author, the Bankruptcy Counsel for the National Association of Attorneys General, and should not be attributed to NAAG, any individual Attorney General or any member of their staffs.

[1] *See, e.g, In re First Alliance Mortgage Co. (FAMCO), (Massachusetts v. FAMCO)*, 263 B.R.99, 107-08 (9th Cir. BAP 2001) and *In re First Alliance Mortgage Co. (FAMCO), (FTC et al. v. FAMCO)*, 264 B.R. 634, 646-47 (C.D. Cal. 2001) (both finding actions by state and federal government seeking consumer restitution were excepted from the stay).

[2] *In re Dan Hixson Chevrolet Company (Volkswagen of America v. Dan Hixson Chevrolet Company)*, 12 B.R. 917 (Bankr. N.D. Tex. 1981).

[3] *Chao v. Hospital Staffing Services, Inc*., 270 F.3d 374, (6th Cir. 2001).

[4] *See, e.g., In re Bel Air Chateau Hospital,* Inc., 611 F.2d 1248, 1250-51 (9th Cir. 1979) (Supreme Court's decision in *Nathanson v. NLRB*, 344 U.S. 25 (1952), which held that bankruptcy court should defer to expertise of administrative agency "strongly supported" the view that regulatory actions are not subject to Rules stay); *In the Matter of Shippers Interstate Service, Inc*., 618 F.2d 9, 11-12 (7th Cir. 1980) (same), *In the Matter of The Briarcliff*, 16

and held that it limited the government's efforts to protect consumers, the environment or the like.[5] As a result, when Congress enacted Section 362(a), with its broad range of injunctive provisions, it simultaneously took care to also enact Section 362(b)(1), (4), and (5), to protect governmental criminal and civil police and regulatory actions from some or all of those limits.[6] The official legislative reports noted that:

> Paragraph (4) excepts commencement or continuation of actions and proceedings by governmental units to enforce police or regulatory powers. Thus, where a *governmental unit is suing* a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, *or attempting to fix damages for violation of such a law,* the action or proceeding is not stayed under the automatic stay. (H.R.Rep. p. 343; S. Rep., No. 989, 95th Cong. 2d Sess. 52 (1978) (hereinafter "S.Rep.")) (emphasis added).

That discussion would suggest a generous reading for the stay exception to protect the critical governmental functions that were discussed by the reports. On the other hand, Rep. Don Edwards of California and Sen. DeConcini of Arizona read identical statements into the record,

---

B.R.544, 546 (D.N.J. 1981) (rent control board proceeding not stayed); *In the Matter of Canarico Quarries, Inc.*, 466 F. Supp. 1333, 1339-40 (D.P.R. 1979) (environmental licensing not barred); *In the Matter of Colonial Tavern, Inc.*, 420 F. Supp. 44, 46 (D. Mass 1976) (suspension of liquor licence for hours violation not barred by stay; otherwise "Chapter XI would provide an instantly available, cheap and easy sanctuary from all regulatory enforcement proceedings.").

[5] "Under present law, there has been some overuse of the stay in the area of government regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. In a Montana case, the stay was applied to prevent Nevada from obtaining an injunction against a principal in a corporation who was acting in violation of Nevada's anti-fraud consumer protection laws." H.R Rep. No. 95-595, 95th Cong., 1st. Sess. 175, 177 (hereinafter "H.R.Rep."). See also *In Re Hillsdale Foundry Company*, 1 Bankruptcy Court Decisions 195 (W.D. Mich.1974) where the court held that the state was barred from brining an environmental action against a notorious air polluter and *In the Matter of National Hospital and Institutional Builders Company*, 658 F.2d 39 (2d Cir. 1981) which held that the stay would bar a *bad faith* action by the state to revoke the debtor's certificate of occupancy.

[6] Sections 362(b)(4) and (5) originally were exceptions to Section 362(a)(1) and (2), respectively. They were combined and expanded in the new Section 362(b)(4) in 1998 which excepts civil police and regulatory actions from Section 362(a)(1), (2), (3), and (6). It now reads in pertinent part that the stay does not apply to "the commencement of continuation of an action or proceeding by a governmental unit ... to enforce such governmental's unit's . . . police and regulatory power . . . ." The language in the original Section 362(b)(4) was essentially the same.

to the effect that "[Section 362(b)(4)] 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" (124 Cong. Rec. H11092 (Sept. 28, 1978); S17409 (Oct. 6, 1978)).

While a number of courts in the early days of the Code took those references to "health and safety" literally,[7] most other courts applied the exception more broadly, in line with the actual language in the Code and the full Committee Reports.[8] In so doing, the courts had little difficulty in distinguishing between cases where a government was bringing actions as a regulator, as opposed to when it was proceeding in its own pecuniary or contractual interest.[9] In doing so, they reject the view that the Edwards/DeConcini statements imply that true regulatory actions should be narrowly construed. Instead, they note that the statements "'do no more than state the very problem' courts must resolve in determining the parameters of § 362(b)(4)."[10]

Thus, when the government engages in normal commercial transactions to purchase goods or services, or loans money to students or small businesses, or collects taxes, its actions

---

[7] *See e.g., In re King Memorial Hospital, Inc.* 4 B.R. 704 (Bankr. S.D. Fla. 1980) (enforcement of state"certificate of need" was stayed because it did not involve issue of "urgent protection of the public health and welfare") and *In re Theobald Ind., Inc*., 16 B.R. 537, 538-39 (Bankr.N.J.1981) (NLRB proceeding was "essentially monetary in nature" and did not involve public health and safety; decision, though was based on discretionary stay). The *Theobald* judge, though, later concluded in *In re Nicholas*, 55 B.R. 212 (Bankr. N.J. 1985) that the automatic stay did *not* apply to NLRB actions and a discretionary stay would not be granted. In addition, the decision in *Theobald* was vacated when a settlement was later reached in the case.

[8] *See e.g. S.E.C. v. First Financial Group of* Texas, 645 F.2d 429 (5th Cir. 1981) (agency could seek appointment of temporary receiver since the action served to preserve rather than dismember the estate); *Donovan v. TMC Industries, Inc.*, 20 B.R. 997 (N.D. Ga. 1982) (action by Secretary of Labor to enjoin shipment of goods made in violation of Fair Labor Standards Act until "taint" had been removed by remedying violation was not stayed); *In re LaPorta,* 26 B.R. 687 (Bankr. N.D. Ill. 1982) (action by Secretary of Labor to determine if debtor violated Service Contract Act by underpaying employees not aimed at protecting *government's* pecuniary interests); *Marshall v. International Formal Wear, Inc.*, 6 B.C.D..477 (S.D. Ga. 1980) (action to determine wages due under the Fair Labor Standards Act not stayed).

[9] *In re Coporacion de Servicios Medicos Hospitalarios de Fajardo*, 805 F.2d 440, 445-46 (1st Cir. 1986) ("actions by a governmental agency to enforce [its] contractual rights," even if related in some way to a regulatory concern are not police and regulatory; no showing that government's actions were based on any generally applicable regulatory law, as opposed to rights solely derived from terms of contract).

[10] *In re Commonwealth Companies, Inc.*, 913 F.2d 518, 524 (8th Cir. 1990), citing *Penn Terra Ltd. v. Department of Envtl. Resources*, 733 F.2d 267, 274 n. 6 (3d Cir.1984).

normally fall outside the exception.[11] And, prior to the 1998 amendments to the Code, courts also applied this test to cases where the government was taking actions that directly affected the bankruptcy court's control over the property of the estate.[12] None of those cases, though, had a significant impact on core police and regulatory actions – the consumer and environmental protection, labor and securities law, and antitrust cases that are bread and butter for government prosecutors. They seek remedies for private parties, and steer clear of the pecuniary purpose test.

The far more difficult problems for the government arise from the second test that *Hixson* announced, in deciding whether a suit brought between two private parties before a government agency was excepted from the stay. Under this test, the court must determine whether an action is actually "on behalf of the public interest" or is merely an "adjudication of private rights" of affected individuals. According to *Hixson*, the court must determine whether an agency's action "concerns only parties who are immediately affected or a wider group of those subject to [its] authority." And where "the agency's action concerns only the parties who are immediately affected the debtor is entitled to the same protection it would receive under the automatic stay if the proceeding were pending [in] a judicial forum" rather than before an agency." 12 B.R. at 920-21. In *Hixson*, the action at issue was one between two private parties that was heard by a

---

[11] *See U.S. v. Nicolet, Inc.*, 857 F.2d 202, 209 (3rd Cir. 1988) (government suit would not be excepted when the government is "suing in its role as a consuming participant in the national economy") and *Coporacion, supra*, note 9. Even in such cases, there will be times where the government will still be exercising regulatory powers. The need to deal with fraud or other abuse can provide a regulatory component even to contract actions (*In re Commonwealth Companies, Inc.*, 913 F.2d 518, 523-25 (8th Cir. 1990) (suit brought under False Claims Act did not violate "pecuniary purpose" test even though it involved government contract) and to tax issues (*In re Universal Life Church, Inc.*, 128 F.3d 1294 (9th Cir. 1997) (government action to revoke church's tax-exempt status not stayed, even though making church contributions taxable would obviously be in government's financial interest)).

[12] *In re State of Missouri*, 647 F.2d 768 (8th Cir. 1981) (state effort to maintain receivership over grain elevators in which debtor held small amount of grain violated Section 362(a)(3); *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581 (9th Cir. 1993) (state action to dissolve defunct corporation during bankruptcy violated Section 362(a)(3) because it exercised control over property of the estate) Actually, the real problem in these cases was not that the action was not police and regulatory, but rather that it ran afoul of Section 362(a)(3), which, at the time, was not covered by the exception. Even before the 1998 amendments, though, many courts recognized that an overly narrow reading of the stay exception, as it applied to actions affecting estate property, could have untenable results when clear regulatory interests were at stake. See *Javens v. City of Hazel Park*, 107 F.3d 359, 367-70 (6th Cir.1997) (state could raze unsafe building even though this "controlled" property of the estate) and *In re Yellow Cab Co-op. Ass'n*, 132 F.3d 591, 598-99 (10th Cir. 1997) (government could not be barred from enforcing regulatory limits on number of cab licenses to be transferred). The 1998 Code amendments were supported by the government in order to resolve this tension. In *Chao*, 270 F.3d at 383-85, the Sixth Circuit treated the automatic stay exceptions as an implicit, *pro tanto* limitation on the bankruptcy court's exclusive jurisdiction under 28 U.S.C. 1334.

special state administrative agency, with no government prosecutor involved. Its analysis, though, was later applied to an action filed *by the government itself*, is *In re Charter First Mortgage, Inc.*, 42 B.R. 380 (Bankr. D. Ore. 1984). The court held there that the government could prosecute a consumer protection action to the extent that it sought injunctive relief, or imposed penalties, but was barred to the extent that it sought to determine and liquidate the monetary damages suffered by the individual victims (even though no attempt was made to collect those damages).

There are any number of immediate problems with this theory and this test. The first is that, when combined with the pecuniary purpose test, it bids fair to eliminate the governmental exception altogether. If the government is seeking money for its own interest, the action violates the pecuniary purpose test; but if it is acting seeking compensation or other direct relief for the victims, then the action violates the private rights test! An analytical method that leaves almost no room for the exception to actually apply is unlikely to be correct.[13]

Looking at the private rights test by itself, the courts that adopt this view have provided no workable way to distinguish the public from the private cases. Is it the mere fact that the court is determining that harm has been done to particular individuals? That seems unlikely since consumer protection cases, for instance, inevitably deal with the harm done to individual victims and normally result in an order for restitution for then. Yet, as noted above, Congress explicitly stated that actions to determine violations of consumer protection laws are covered as well as actions "to fix the damages for violations of such laws."

Then perhaps the dividing line between the public interest and private rights depends on the number of victims. If only one person is involved in the state's prosecution of a consumer protection or labor case, is the action merely adjudicating a private right, but is there a public interest if there is a larger number of victims? If so, what is the tipping point? Is it two victims, ten, a hundred? The courts, of course, never specify. And if they did try to draw a line, on what basis can a court decide that protecting one person is not a valid exercise of the public interest, but protecting two people or ten is?

Or perhaps it is the type of relief? Prospective injunctive relief seems more directed to the public than monetary relief provided to remedy harm already suffered by individual victims. But, again, "fixing damages"was explicitly described by Congress as an action covered under the exception. And, conversely, some injunctive relief, such as reinstatement, directly benefits only the victim. And, even if the relief is victim-specific, why should this matter? Why is the public interest only served by action to prevent an amorphous possibility of future harm, but not by action to correct the concrete harm suffered by the *actual* victims of the debtor's misconduct? Or, as a panel majority in the Sixth Circuit suggested, is there a public interest only if the debtor is remaining in business, so that a failure to promptly correct its actions will allow the debtor to

[13] Virtually the only action that might make its way through a rigorous application of both tests might be an environmental suit seeking injunctive relief to improve general air or water quality. Even then, such actions probably have a greater impact on some individuals than on the community and could be argued as being directed to their private rights, not the general good..

unfairly compete with other employers?[14] While that is a reason for why governments prosecute cases, it seems to make little sense to say that the public is only served by indirectly protecting future victims, but not at all by providing direct relief to current victims.

Moreover, as a practical matter, the test makes little sense since in most cases, the discovery and trial work needed to make the showing for injunctive relief is the same as needed to establish the damages. Thus, so long as the government can seek *any* relief, the debtor will still be subject to virtually the same burden, so the distinction provides little real benefit.

And, finally, perhaps the greatest problem is that it allows unelected judges to substitute their judgment for the considered decision of the legislature as to what actions should be made subject to civil or criminal prosecution in order to protect the public interest. Section 525 bars the government from discriminating against debtors so it may not prosecute them for actions that would not equally be subject to prosecution had they *not* filed bankruptcy. That fact alone provides a substantial check on the scope of governmental prosecutions since any law that a legislature passes must apply equally to the financially strong and politically influential, as well as to the financially struggling. Moreover, the legislature must also take into account the state's limited resources, since there are many drawbacks to passing broad laws that cannot be effectively implemented. Thus, when the court says a governmental action fails the public interest test, it is holding that an action that the legislature has authorized the government to prosecute is nevertheless *not* in the public interest to pursue.[15]

---

[14] *Chao*. 270 F.3d at 389-94. In that case, the Secretary of Labor had brought an action similar to that in *TMC*, *supra*, note 8, to enjoin transfer of goods in commerce that had been produced in violation of the Fair Labor Standards Act. The panel majority held that it could undertake a *de novo* review of the balance between the public interest and the private rights being served by the *particular* prosecution. It was not enough to look at the purpose of the statute; rather the court must microscopically analyze the particular suit and bar any action where *it* concluded that the public interest did not predominate. The majority held that an action to decide back pay damages *only* protected the public interest if the debtor was still operating, in which case the public interest would be served by eliminating its unfair competition. Since this debtor was out of business, no further competition could occur and, hence, the government's suit was barred by the stay. The third judge dissented vehemently from this, position noting that it was inconsistent with decisions in other circuits and, indeed, within the Sixth Circuit.

[15] *Chao* makes this point clear in stating that "The existence of the public policy test naturally presumes that some suits by governmental units, *even though they would effectuate certain declared public policies*, will nevertheless be regarded as largely in furtherance of private interests." (Emphasis added). 270 B.R. at 389. Not surprisingly, the court conceded that it was not easy for it to tell which public policy actions were not really in the public interest. It even suggested that legislatures might make *any* breach of contract a violation of law subject to state prosecution, but ignored the political realities discussed above which make such a scenario a practical impossibility.

This level of micro-management seems to violate the Supreme Court's holding in *Board of Governors of Federal Reserve System v. MCorp Financial, Inc.*, 502 U.S. 32, 40 (1991)

Indeed, Attorney Generals are normally only authorized by statute to prosecute matters in the public interest. They are given prosecutorial discretion precisely to ensure that they exercise appropriate judgment as to which cases should be pursued. That decision, perforce, considers the merits of the case, the resources of the office, and the likely remedial and deterrent effect of a settlement or judgment on this violator and on other similar parties. When a court then holds that a prosecution is *not* in the public interest, but merely an adjudication of private rights, it is, in effect, saying that the prosecutor is acting *ultra vires* of his statutory authority!

With all of these problems, why did this test ever appear? The answer is simple – it was meant to deal with a valid issue that arose in *Hixson* – namely, whether an action brought by a private party under a police and regulatory statute is covered by the exception? The court there reached the correct result (it is not), but it did so by focusing on the wrong distinction. Instead of simply focusing on the parties involved, the court instead looked to whether, in its view, the agency decision would affect anyone other than the parties before it. It concluded that it would not directly do so in that case, but then neither would the decision to provide compensation to victims of consumer fraud. That conclusion, though, ignores the educational and deterrent effect of litigation of individual cases. And, it assumes that the public has no interest in the outcome of the issues adjudicated between the private parties. But, if the legislature did not view the results of such cases as a matter of public interest, why would it have established a specialized agency to hear the matters at issue in *Hixson*? In this regard, the situation is no different than in the *Mansfield* cases where the Sixth Circuit had no difficulty in concluding that the public was interested in having a workable system to compensate injured workers.

But, when one reads the statue, that is not the point. One can readily assume that an action such as that in *Hixson* may involve the public interests and regulatory matters, but the crucial difference set by the Code turns on which party is *bringing* the action – the government as prosecutor or the private party as plaintiff. Unlike the public policy test as courts now articulate it, which has no textual support, the Code clearly states that it is only excepts actions "*by* a governmental unit." Actions are not brought "by" judges, they are brought by plaintiffs. And, by its own terms, the Code only protects actions where the *prosecutor* is the plaintiff. The distinction can be seen even more clearly in the legislative history, which states that "where a *governmental unit is suing* a debtor," the stay does not apply. This clearly distinguishes between when the government is acting in its prosecutorial role, as opposed to when it is merely serving as a neutral adjudicator. Even the literal phrasing of "public policy" test itself draws the same distinction. It purports to contrast cases where the government is suing in the public interest versus when it is merely adjudicating private rights. But this is apples and oranges. Prosecutors

---

that courts should not be in the business of scrutinizing the validity of enforcement actions in making the stay determination. "Such a reading [of the Code] is problematic, both because it conflicts with the broad discretion Congress has expressly granted many administrative entities and because it is inconsistent with the limited authority Congress has vested in bankruptcy courts." It added, "We are not persuaded, however, that the automatic stay provisions of the Bankruptcy Code have any application to ongoing, nonfinal administrative proceedings." *Id*. 502 U.S. at 41. While the issues was somewhat different there, the Court's view that deference should be accorded to administrative decision-makers is clear.

sue, courts *adjudicate* – and never the twain shall meet. A prosecutor cannot adjudicate a right, whether public or otherwise. It can only submit its arguments to a court and that body, in turn, can adjudicate private *and* public rights. One need only focus on what role the government is actually playing in a given case.

In short, if *Hixson* had analyzed the issue solely in terms of *who* was bringing the case, then its reference to an adjudication of private rights would both make sense, and would define the essential difference between two separate governmental roles – as partisan advocate or as neutral adjudicator. Only the former fits the statutory exception for a police and regulatory action brought *by* the government. When it merely adjudicates, it is not a party bringing the action; it is only an observer of a dispute between private parties.[16] And, this is true even where both private and governmental parties can bring similar actions under the same statute. For instance, when the EEOC prosecutes a race discrimination case, the action is excepted from the stay, even if the same litigation, when pursued by the individual victim under a "right to sue" letter, is barred.[17]

Why does the statute make such a distinction? The answer, I submit, is the same reason the Supreme Court has oft stated – governments are different. Prosecutors are expected, *by definition*, to operate in the public interest; to take into account a variety of global concerns and interests that private parties need not, and to act with judgment, and informed discretion.[18] It is precisely those expectations, I suggest, that are the reason Congress gave governmental entities greater rights to proceed than private parties. In *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), the Supreme Court considered an argument that the right of the federal government

---

[16] Even there, some cases would take an opposite view. Ironically, in light of *Chao*, the Sixth Circuit actually took a very broad view in *Mansfield Tire and Rubber Company (Ohio v. Mansfield Tire and Rubber Company)*, 660 F.2d 1108 (6th Cir. 1981). There, it held that the determination of individual workers' right to workers compensation benefits was excepted from the stay, even though there was no government prosecutor involved. Most courts now would be more likely to find that the stay applied but that the bankruptcy court should lift the stay and defer to the agency's expertise in resolving these claims. The court's decision here was likely influenced by practice under the Act where there was no explicit stay exception and the analysis tended to collapse the two issues of whether the stay applied and whether it should be lifted into a single analysis.

[17] *Compare EEOC v. Rath Packing Co.*, 787 F.2d 318 (8th Cir. 1986) (government action not stayed) *with Place v. California Webbing Industries, Inc.*, --- F.Supp.2d ----, 2003 WL 1798958 (D. R.I., Apr 03, 2003) (private action stayed); *In re Pincombe*, 256 B.R. 774 (Bankr. N.D. Ill. 2000) (same); *In re America West Airlines*, 148 B.R. 920 (Bankr. D. Az. 1993) (same). *Compare also In re 1736 18th Street, N.W. Ltd. Part.*, 97 B.R. 121 (Bankr. D. D.C. 1989) (rent control action by tenants barred by stay) *with In re Berry Estates, Inc.*, 812 F.2d 67 (2d Cir. 1987) (rent control action brought by state not barred).

[18] And, no, governments do not always achieve those objectives, anymore than any other human institution – but they are expected to strive for those goals in ways that private parties with no obligation to any interest but their own are not expected to.

to sue a state could be "delegated" to an Indian tribe. The Court rejected that argument, stating, "The consent, 'inherent in the convention,' to suit by the United States--*at the instance and under the control of responsible federal officers*--is not consent to suit by anyone whom the United States might select; and even consent to suit by the United States for a particular person's benefit is not consent to suit by that person himself." (Emphasis added). *Id*. 501 U.S. at 785.

The same theme of government accountability was sounded in *Alden v. Maine*, 527 U.S. 706 (1999) where the Court held that the federal government could not authorize private parties to sue states even though *it* could do so, noting that "Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States." And in *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002), the Court rejected the argument that federal intervention at a subsequent stage of the case could validate an earlier proceeding by a private party, reiterating that "The prosecution of a complaint filed by a private party with the FMC is plainly not controlled by the United States, but rather is controlled by that private party; . . . As a result, the United States plainly does not 'exercise ... political responsibility' for such complaints, but instead has impermissibly effected 'a broad delegation to private persons to sue nonconsenting States.'" (citing *Alden).*[19]

And, in a context that is even closer to the automatic stay situation, the Court held that an arbitration agreement entered into by an employee could not limit the EEOC's ability to seek relief for that same individual. In *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002), the Court reversed a decision by the lower court that distinguished between the award of prospective general injunctive relief that would benefit employees generally, as opposed to narrowly tailored injunctive and monetary relief that would benefit the individual complainant. The lower court had concluded that the values served by the arbitration agreement (like the automatic stay) should be deemed to outweigh the benefit to be served by providing specific relief to the actual victim. The Court held, though, that "the statute clearly makes the EEOC the master of its own case and confers on the agency the authority to evaluate the strength of the public interest at stake. Absent textual support for a contrary view, *it is the public agency's province--not that of the court*--to determine whether public resources should be committed to the recovery of victim-specific relief." *(*Emphasis added). 534 U.S. at 290-91. And, the Court concluded, "whenever the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, *the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief. (*Emphasis added). 534 U.S. at 296. In short, Congress having provided this legislative grant of

---

[19] Compare *Chao v. Virginia Dept. of Transp.*, 291 F.3d 276, 281 (4th Cir. 2002), which allowed a suit, brought by the United States seeking wage benefits for private individuals, to proceed, noting that the United States was the true party in interest in bringing suit where "the Secretary's suit has the political control found lacking in *New Hampshire [v. Louisiana*, 108 U.S. 76, 2 S.Ct. 176, 27 L.Ed. 656 (1883)]. *The case is being litigated by lawyers within, and is under the full control of, the Executive Branch*." (Emphasis added). The suit was allowed even though an earlier action by the private plaintiffs had been barred by the Eleventh Amendment.

authority and discretion to the EEOC, courts should not be second-guessing that determination.[20] Nor should the courts assume that they can decide when victim-specific relief is in the public interest – that decision is left to the public prosecutor.

In sum, the courts can greatly simplify their decision-making process by recognizing that the Supreme Court has made clear that government prosecutions *are* in the public interest with no need to show more. So long as there is no allegation of bad faith conduct by the government, the only real issue the court needs to review is whether the government is appearing in the case as adjudicator or as prosecutor. Under that approach, the government and the courts could devote less time to dealing with undefined – and undefinable – challenges to the government's right to proceed and more time to the real issues in the case, such as seeking justice for those whom the debtor is alleged to have victimized.

[20] The Court also emphasized the substantial screening function undertaken by the EEOC. It noted, in footnote 7, that of the 80,000 charges received by the EEOC, the agency found reasonable cause in 798 – but only filed 291 suits. This plain evidence of the exercise of prosecutorial discretion weighed heavily with the Court.