

THE "SEMI-AUTOMATIC STAY" PROVISIONS OF BAPCPA

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Disclaimer: The information contained herein is intended for discussion purposes only. It is addressed primarily to the attorney who represents consumer debtors. Those who represent creditors should contact Congress. Congress has done quite well for creditors with this new law. If you send large amounts of cash, your inquiries will receive immediate attention. No attempt has been made here to provide a complete discussion of the many changes to the automatic stay under BAPCPA. I have selected those which I believe will provide a lively discussion in the short time allowed. The description provided is the "Reader's Digest" version. If you really want to learn this stuff, you may want to buy and read a new code. I hope you don't want to know what a "repo participant", "swap agreement" or "master netting agreement" is. Some mysteries should be left alone.

Stay (verb) [from Latin stare- more at STAND] 1. To stop going forward: pause 2. To stop doing something : CEASE 3a. To continue in a place or condition: REMAIN b: to have powers of endurance 4. to stand firm, etc., etc.

Automatic (adjective) [from Greek automatōs , self acting, more at MIND] 1a. Largely or wholly involuntary: reflex. b. acting or done spontaneously, also resembling an automaton: mechanical, etc., etc.

Semi (adjective) [prefix, from Latin sami, Greek hemi] 1:precisely half of; 2:to some extent; 3: partial; (noun) [from English (specifically Detroit) A big assed truck that will squash you like a bug if you get in its way!

I cannot take credit for the phrase "Semi Automatic Stay" my good friend and colleague James King appears to have come up with it before me. But it sounded cool and we decided to go with it.

Prior to 1973, there was no automatic stay in a bankruptcy case. It was necessary to apply to the court for protection against the actions taken against the debtor or property of the debtor. So, we can't say that the automatic stay is a God given right (my first appearance in front of Judge Lazarow notwithstanding).

In 1978, when the Bankruptcy Code was enacted to replace the 1898 Bankruptcy Act, there were approximately 9 exceptions to the Automatic Stay. Prior to the effective date of the new law, there are approximately 17 exceptions. Under BAPCPA there will be closer to 30. This does not include the assorted provisions which limit the length of the stay if a debtor is lucky enough to have it come into existence in the first place.

Clearly, the good old days are over. The time of filing one case after another until someone throws you out of court is no more. The idea of "throwing it against the wall to see if it sticks" is now a mere fond memory. My God! We will have to improve the level of our game.

11 U.S.C. §362(a) is the provision of the Code which provides the automatic stay. Subsection (b) provides the exceptions to the stay, and subsection (c) tells us how long the stay lasts. Sounds simple, doesn't it? You also need to study §§342, 521, 722, and 724 to get a grasp of the big picture (yes, there is a big picture here, and it is grim!)

THE CHANGES

For purposes of this presentation, emphasis will be placed on those changes that will impact a Chapter 13 case.

§362(a) has only one change which would probably impact a Chapter 13 debtor. The I.R.S. will not be stayed from holding a proceeding to determine the tax liability of a debtor for a tax year ending after the date of the order for relief.

§362(b) is where the fun starts. The following are some of the subsections where there are significant new exceptions to the stay as it applies to Chapter 13: The applicable subsections are listed below:

(2) The angry ex spouse lobby has made some headway. With the exception of a proceeding to determine the division of property that is property of the estate, there will be no stay as to family law proceedings. Garnishment, license suspension, and tax refund interception will not violate the stay.

(19) Withholding from debtor's income to repay a loan from I.R.C. §401, 403, 408, etc. pension or other plans, as agreed to by the debtor, will not violate the stay.

Congress may have goofed here. This could actually help debtors.

(20) Enforcement of a so called “in rem “ order for relief from stay, granted under new §362(d)(4) within 2 years of the order will not violate the stay. A debtor in a subsequent case may apply to the Court for relief from such order based on changed circumstances or good cause shown. I believe this will only apply to an order entered under new §362(d)(4), not orders entered under the “old” law.

(21) There will be no stay if a debtor files a case in a chapter for which she is not eligible, or if the case was filed in violation of an order prohibiting the debtor from being a debtor in another case.

(22) There will be no stay against a landlord seeking possession only who has a pre-petition unlawful detainer judgment , except that a debtor may file with the petition and serve upon the landlord a certification under penalty of perjury that-

- (a) under nonbankruptcy law there are circumstances permitting debtor to cure the monetary default giving rise to the judgment after the judgment was entered; and
- (b) debtor has deposited with the court (which court?) any rent that would become due during the 30 days after the petition was filed.

If (a) and (b) above are complied with, debtor shall have a 30 day stay. If the monetary default is cured within the 30 day period, the exception to the stay shall not apply, unless:

Landlord files an objection, which requires that the Court hold a hearing within 10 days and landlord prevails. (See §362(l) for a full and vibrant discussion of this soon to be never used subsection).

(23) This is similar to (22) above, except this applies to the exception to the stay applies to a pending (no need for a pre-petition judgment) eviction action for “endangerment” of the property or “illegal use of controlled substances” on the premises. I call this one the Meth Lab, or Crack House, exception (although pot smokers , whoremongers and anyone who dabbles in bomb making should also beware). It has a similar absurd procedure for the accused to seek justice. I can’t go through that again. It would be too painful. Note that in the real world, you probably will not encounter exceptions (22) and (23) in the context of a Chapter 13 case.

(24) This exception is a biggy.. It, among other things, effectively overrules In re Mitchell, a Ninth Circuit BAP case from 2002 which stated that §549(c) did not create an exception to §362(a) for bona fide purchasers. With that case in place, a debtor merely filed a case. If a foreclosure sale went forward and a BFP purchased the property, the debtor could unwind the sale as void under In re Schwartz, 954 F.2d 569 (9th Cir. 1992). Schwartz is still good law, but a BFP will now be protected under §362(b)(24). We are back to the days of racing to the Recorders Office to record petitions in advance of the Trustee’s Deed of Sale. And that may not work, if the courts decide that the recordation

of the deed is a ministerial act. Light the Litigation Lamp!

(26) Kiss the tax return goodbye! Under this exception, a taxing authority may intercept a tax return, post-petition, if the return is being applied to a tax liability for a tax period that ended prior to the order for relief.

§362(c) has had some work done on it, but I can't say that it looks good. The big change here is §362(c)(3) and (4).

(3) If a debtor has a prior case that was dismissed within 1 year prior to the instant filing, the stay lasts only 30 days from the date of filing, unless within that 30 day period a party in interest (yes, this could actually be a creditor) files a motion, has a hearing, and convinces the Court that the instant case was filed in good faith. The stay may be imposed on any or all creditors, as the Court decides.

There is a presumption of bad faith (what Congress calls "not in good faith") if:

-there are more than one prior case pending within a year;

-a prior case was dismissed for failure to :

file or amend petition or "other documents" without substantial excuse (except where debtor invokes the "stupid lawyer" rule);

provide adequate protection as ordered by the court;

perform the terms of a confirmed plan; or

there has not been a substantial change in financial or personal affairs since the filing of the "next most previous" (?) case, or other reason to conclude that this case will be successful.

There was a pending or resolved (in favor of the creditor) motion for relief from stay in the prior case at time of dismissal.

§362(c)(3) will not apply if the prior was a case refiled under a chapter other than Chapter 7 after dismissal under §707(b)

So, it would seem that a guy who files a Chapter 7 case knowing that it will not pass §707(b) muster, has the case dismissed, and then refiles a Chapter 13 case that gets dismissed will not have to address §362(c) (3) on a third filing. But a guy who is in a Chapter 13 case, loses his 25 year job because his employer has decided to have the same work done in East Burpistan for 7 cents an hour, gets behind in his plan payments, and

has his case dismissed will have a problem when he attempts to refile. Score one for the bad guys!

§362(c)(4) is worse. If there were two or more priors within a year, no stay goes into effect upon the filing of the new case. There is a presumption of lack of good faith as in §362(c)(3). On request of a party in interest, the Court shall “promptly” enter an order confirming that there is no stay.

If a party in interest, within 30 days of the filing, requests the Court to impose the stay as to any or all creditors, and demonstrates that the filing is in good faith as to the creditors to be stayed, the Court may do so. It appears that a creditor could get an order confirming that there is no stay, only to have that order superceded by an order imposing the stay, as long as the request to impose the stay is made within the 30 day period. Can the Court impose a stay while the motion is pending?

There appears to be either a typo or a more serious problem with the language of §362(c)(4) viz the same language in (c)(3). While (c)(3) states that it will apply only if the prior was “other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)”, in (c)(4) it reads “other than a case refiled under section 707(b)”. If this language was intended, it makes no sense, and effectively eliminates the exclusion under (c)(4).

§362(d)(4) is new. We will probably call it the “in rem” relief from stay provision. If the Court finds that the filing of a petition was part of a scheme to delay, hinder, and defraud creditors that involves either a transfer of all or part of the ownership interest in the subject real property or multiple bankruptcy filings affecting such property, it can enter an order binding on the property for 2 years, once recorded. This provision seems to codify the ruling of *In re Tony Snow*, issued by Judge Bufford in 1996. It also appears to apply only when an order for relief has been entered under new §362(d)(4).

§362(h) will be lots of fun. If an individual debtor fails to comply with the requirements of §521(a), the stay will be terminated with respect to personal property securing a claim, or subject to a lease, and the property will no longer be property of the estate.

This new provision is designed to force debtors to actually comply with their stated intentions under §521(a). I believe a Statement of Intentions, or something close, will now be required in a Chapter 13 case. The debtor must state an intention to retain (and either reaffirm or redeem) or surrender the property. If there is a lease, it must be assumed (hopefully by simply providing for this in the plan).

I was of the opinion that in a case where a debtor was contractually current on a purchase agreement or lease on an auto and didn't want to commit to either a reaffirmation or redemption, she could just not comply with the performance portion of §521(a) and the creditor would do nothing if payments continued. After all, this is still America, where money talks, etc. But I have been advised by counsel for one of the really big players in auto lending and leasing that they will enforce their contractual provisions that deem a

bankruptcy filing to be a breach of the contract and proceed to repo the auto after the applicable period has run. It will be fun to see how this plays out.

There is much more that could be discussed. The topics listed above are the ones you will see in a Chapter 13 case. There are so many unanswered questions. A lot will be learned through trial and... (I can't even say the word!).

It is crucial that you read the new code about forty seven times. Talk to your colleagues. Attend as many seminars and "brown bag" meetings as you can. Go to court and watch others fail. As always, know thy judge!

My motto is "we can get around this". If you can't outsmart a bunch of greedy politicians and moneychangers, you ought to turn in your bar card!

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