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## Stayed or Not Stayed, That Is the Question: A Tale of the Not-So-Automatic Stay

by Thomas G. Tutton, Jr.  
Sirote & Permutt, P.C. — USFN Member (AL)

We have all experienced the classic “eve of foreclosure” bankruptcy filing. As such, we can predict with some degree of certainty that a percentage of active foreclosure proceedings will be affected by bankruptcy filings. When faced with this, the current practice in most jurisdictions is to immediately stop the foreclosure process so as to not violate the bankruptcy automatic stay. Then the matter is usually referred to the attention of the bankruptcy division, as there is not much to deliberate. However, times are changing with the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or Act).

This act essentially “grafts” itself onto the existing Bankruptcy Code, and in some cases, the BAPCPA makes dramatic changes to the current law. This article discusses selected changes to Section 362 of the Bankruptcy Code (addressing the automatic stay) and the implications of those changes for our industry.

More specifically, I will cover Sections 362 (c)(3), (c)(3)(A), (c)(3)(B), (c)(4)(A)(i), (c)(4)(A)(ii), and (c)(4)(B). These sections address the issue of whether or not an automatic stay is in effect and if so, for how long, based on whether the filing of the case was a repetitive or “serial” filing. *Be aware that nothing in the BAPCPA has changed the current law in relation to the imposition of the automatic stay when it is the debtor’s first case, and in some cases even when the debtor has filed multiple cases.*

### ***Limited or Eliminated***

Basically, the BAPCPA specifies that the automatic stay does not come into effect in one circumstance and does come into

effect, but for a limited period of time, in another. If a debtor files an individual case under Chapter 7, 11, or 13 and had a previous bankruptcy case dismissed within the preceding one-year period, the automatic stay provisions of Section 362(a) (regarding any action taken with respect to a debt or property securing the debt) terminate 30 days after the filing of a new case.

Note that a case dismissed under section 707(b) *does not* count as a dismissal that will cause the stay to be limited as set out above. Section 707(b) can be summarized to state that if a debtor is dismissed under this section, it is usually because he has not complied with requirements to submit proper schedules or certain other disclosure requirements. This is cause for concern, because it cannot be assumed that since a case is dismissed and another is refiled within one year that the stay is limited to only 30 days in the later case.

One needs to examine further to see if the previous dismissal was under 707(b) — if so, there is no limitation to the stay in the later case. However, if the dismissal of the prior case was in *Chapter 13*, then we can assume that it was not dismissed under 707(b), since that section deals only with *Chapter 7* cases. Another point worth noting is that new filing requirements are stated in Section 521, along with the consequences of a debtor's failure to file these required documents (or comply with a creditor's request for them). Accordingly, a dismissal under these circumstances would still be counted against the debtor in a subsequent case.

The instance under the BAPCPA where the stay does not come into effect at all is when the debtor had two or more pending cases within the previous year that were dismissed. The 707(b) exception is changed a little in this circumstance. This section provides that if one of the two previous cases was dismissed under 707(b), then it does not count as the second filing. The Act further provides that, on the request of a party in interest, the court shall enter an order confirming that no stay is in effect.

### ***Debtor Response***

In both of the above circumstances, the debtor may file a motion with the court for the continuation (or imposition, as the case may be) of the stay. However, there are some slight differences in how the court must handle these requests. In the case of the single dismissal and refiling within a one-year period, the debtor or party in interest must request by motion a continuation of the stay prior to the expiration of the 30-day stay period and the court must enter an order continuing the stay within that same 30-day period. The Act also requires notice and a hearing.

In the situation of a third filing after two previous dismissals, a party in interest must request imposition of the stay by motion within 30 days after the filing of the later case. Nevertheless, there does not appear to be a provision that the motion must be heard and ruled upon by the court within the 30-day period. Notice and a hearing are required in this situation as well.

Under both circumstances, the debtor has the burden of proving that the filing of the later case was in good faith as to any creditor he seeks to have stayed. Likewise, creditors may defend these requests to limit or impose the stay on the basis that the new case is not filed in “good faith.” The BAPCPA provides that a case is presumptively filed not in good faith if the new case was filed within the one-year period from the dismissal of an earlier case. Further, the presumption that the new case was not filed in good faith applies if in the earlier case the debtor: (i) failed to file or amend the petition as required by the law or the court, (ii) failed to provide adequate protection as ordered by the court, or (iii) failed to perform the terms of the previous confirmed plan. The debtor must rebut these presumptions by “clear and convincing” evidence.

### ***Implications***

How might these provisions affect the industry in our day-to-day activities? The effect will differ based on the business models of particular companies and the potential for divergent rulings by various bankruptcy courts. Trying to predict how the BAPCPA will be interpreted by the courts throughout the country would at best be a shot in the dark. For that reason, I shall now don my trusty night vision goggles.

Let’s say an active foreclosure is in place and a bankruptcy is filed. Will we stop the foreclosure, as we may have done in the past, or should we dig deeper to see if one of the circumstances as set out above exists? If such conditions are present, they may cause the stay to be limited or not be in place at all. Anyone attempting to determine if these conditions do in fact exist will likely have to be a highly trained and qualified individual with an in-depth understanding of how to tell why and when a case was dismissed in order to make the call. My thought is that this decision should be made by legal counsel.

I caution again: it would be a good practice to *never* assume that the stay is not in effect without substantial and qualified due diligence. Practically speaking though, this may seldom be an issue. It is predicted that debtors will routinely file motions to extend or impose a stay in every situation where one is limited or not in effect. The notices for the hearing of these motions will likely be

generated very quickly by the bankruptcy courts, especially in the circumstance where the court must hear and rule on the motion within 30 days. Anyone wanting to contest such a motion must be prepared to refer it to counsel with light speed.

### ***Oppose or Not?***

Various company business models may dictate that there is no need to fight these motions. Reasons for non-opposition might include situations where the debtor's previous case or cases were fairly successful and their payments were mostly regular, or in the event of another filing, a second chance might be approved if the debtor is now better equipped to pay than before.

Conversely, there will be many situations where these motions should be opposed, such as those involving multiple filers whose previous cases have not been remotely successful, debtors who have repeatedly filed bankruptcy on the eve of foreclosure, and debtors who seem to be intent on frustrating the ability of a creditor to be paid.

We should all be alert to local rules that may develop in order to handle motions to continue or impose the stay. Some jurisdictions may attempt to deal with these motions by using "negative notice" notices. These notices usually require the creditor to take an immediate affirmative act to defend or oppose the relief requested, otherwise the court grants the relief requested with no hearing or upon a perfunctory hearing. Of course, there may be other creative ways that courts will resolve the burden that these motions will surely place on their already heavy dockets.

### ***Importance of Local Rules***

Awareness of the potential for local rules to assume a big role in how this plays out is crucial. The best way to remain abreast of local rules is by staying in touch with your local counsel. It is possible that debtors may simply include a provision in their plan that continues or imposes the stay. While this would be harder for the creditor to detect unless the entire plan is reviewed, it would be a risky choice for the debtor. If for some reason the plan is not confirmed, the debtor could lose the ability to have the stay continued or imposed by virtue of the fact that the 30-day period for requesting relief has generally passed by the time a case is up for confirmation.

It will be necessary for all of us to keep an "ear to the ground" to ascertain how the courts will apply this new law; undoubtedly, the interpretations will widely vary. In any case, foreclosure and bankruptcy departments will need to closely

coordinate with each other as some of the issues will arise very quickly after a new case is filed. Hang in there — six months or so after the implementation of the new law, we should all have a better feel for where things are heading.

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14471 Chambers Road, Suite 260, Tustin, CA 92780  
P (800) 635-6128 or (714) 838-7167 · F (714) 573-2650 · E [info@usfn.org](mailto:info@usfn.org)  
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