



The Not-So-Automatic Stay



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For quite some time, we have been discussing the implications of many aspects of the new bankruptcy reform act (commonly referred to as BAPCPA). Many pages of analysis have been brought to you in earlier editions of this publication. We all knew that when BAPCPA was adopted, it was going to take some "twists and turns" before we could begin to see how the law would be interpreted by the various courts around the country.

One important development has occurred in several jurisdictions. As you may recall in some cases under the new act, the stay is either limited or is simply not imposed. This happens in the case of a serial filer. The particularities of those situations will not be covered here. What will be addressed is what happens *after* the stay is not extended or imposed.

For the purposes of discussion, let's assume that either (1) the debtor did not move to

extend the stay or to impose the stay, or (2) the debtor did move to extend or impose, and it was objected to, and the court *refused* to extend or impose the stay. In this situation, there is no stay. In the past, we have always taken the position that once the stay is lifted, it is lifted; therefore, we are free to pursue state-law remedies such as foreclosure and eviction. However, under BAPCPA, another very important issue is created.

Suppose that the debtor has proposed a plan to cure the mortgage arrearage and further has proposed to pay the creditor future payments either directly or through the trustee. Upon the filing of a plan, there is nothing in the way to stop it from being confirmed. Once confirmed, the plan is then binding on both the creditor and the debtor. So what significance, if any, does the fact that there isn't a stay in place have on the confirmed plan?

No Stay? Not So Fast...

Several courts have taken the position that it is of no significance and that the confirmed plan controls; therefore, the fact that there is no stay in effect will not allow the creditor to go forward with foreclosure since the confirmed plan provides for curing the arrearage and for future payments — hence

there is no "default." One such case is *In re Murphy*, 346 B.R. 79 (S.D.N.Y. 2006). Here the court concluded that where the debtor has a feasible plan confirmed prior to the foreclosure sale, then the creditor is bound to the terms of that confirmed plan, regardless of whether the stay was in effect. See also, *In re Fleming*, CIA No. 06-0888-JW (Bankr. S.C. 2006). These cases seem to indicate that in a situation where there is no stay, a creditor that completes the foreclosure sale *prior* to confirmation would be okay.

So what steps should a creditor take to prevent being placed in this situation? First, the plan should be reviewed carefully so as to determine how the debtor proposes to treat the mortgage debt. If the plan proposes to cure the debt and pay future payments, a decision must be made to object to confirmation. By virtue of the *Murphy* and *Fleming* rulings, the process has essentially evolved into a two-step process: (1) object to the extension or imposition of the stay, and (2) object to plan confirmation.

A creditor who has not objected to plan confirmation in these situations and goes forward with foreclosure could subject itself to an adversary proceeding, alleging violation of the confirmation order. ■

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