Department of the Treasury	Internal Revenue Service	Office of Chief Counsel	**Notice**

CC-2008-007

December 31, 2007

Subject:	Termination of Automatic Stay Under Bankruptcy Code § 362(c)(3)(A)	**Cancel Date**:	Upon incorporation into CCDM

Purpose

This Notice provides guidance on the application of section 362(c)(3)(A) of the Bankruptcy Code. Section 362(c)(3)(A) was enacted to discourage bad faith repeat bankruptcy filings. It provides for termination of the automatic stay when an individual debtor files a petition for relief under chapter 7, 11 or 13 within one year of the dismissal of a prior case. Under the provision, the automatic stay terminates on the 30th day after the filing of the second case, unless the bankruptcy court enters an order continuing the stay. Unlike section 362(c)(4) under which the stay does not go into effect if two or more cases were pending and dismissed within one year before the petition was filed, it is not clear whether the stay terminates under section 362(c)(3)(A) as to all acts and actions listed under section 362(a). Bankruptcy courts are currently divided about which creditors and what property are affected by the stay termination. As more fully discussed below, it is the position of the Office of Chief Counsel that the stay terminates as to all creditors but it only terminates as to acts or actions listed under section 362(a) against the debtor personally and the debtor's property. It does not terminate with respect to acts or actions against property of the bankruptcy estate.

Background

Section 362(c)(3), which was added as part of changes to the Bankruptcy Code made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), provides, in relevant part:

> (c) Except as provided in subsections (d), (e), (f), and (h) of this section –
>
> > (3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—

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> (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case; . . . .

A party in interest may request that the stay be continued upon a showing that the later case was filed in good faith as to the creditors to be stayed. The court may extend the stay in particular cases "as to any or all creditors" subject to such conditions or limitations as the court may then impose. B.C. § 362(c)(3)(B). A case is presumptively not filed in good faith as to all creditors if certain conditions occurred in the previously dismissed bankruptcy case or if there is no reason to conclude that the debtor in a chapter 7 case will be able to receive a discharge or that the debtor will be able to confirm a plan and to comply with the terms of a confirmed plan in a chapter 11 or 13 case. B.C. § 362(c)(3)(C)(i).

If two or more cases of an individual debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), section 362(c)(4) applies. Section 362(c)(4)(i) provides that "the stay under subsection (a) shall not go into effect upon the filing of the later case; . . . ."

Discussion

I. Under B.C. § 362(c)(3)(A), the stay termination applies to all creditors, not just creditors who have taken some prepetition collection act or actions to collect a debt.

Section 362(c)(3)(A) states, in relevant part, that the "stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt . . . shall terminate with respect to the debtor . . . ." This phrase specifies that the stay is terminated with respect to actions taken, specifically, actions involving a debt or property securing the debt, with respect to the debtor. At first blush, the three "with respect to" phrases could be read to limit the application of this stay termination provision to pending actions taken before the current bankruptcy case was filed against the debtor or the debtor's property. Most bankruptcy courts, however, so far have not limited the stay termination provision to creditors who have taken actions that are still pending, but have limited the scope of the termination to acts or actions against the debtor and the debtor's property, thus maintaining the protections of the automatic stay on property of the estate.

Congress chose to identify what actions were subject to the stay termination provision in section 362(c)(3)(A), but Congress put no limitations on the entities to which it applied. The automatic stay provision under section 362(a), applicable to all entities, generally enjoins three basic types of actions: (1) actions against the debtor personally; (2) *in rem* actions to create, perfect or enforce a lien against property of the debtor; and (3) actions against property of the bankruptcy estate. See B.C. § 362(a). Thus, both section 362(a), which defines the scope of the stay, and section 362(c)(3), which terminates the stay, describe the acts or actions that are subject to the stay and the termination of the stay, but contain no reference to, nor limitations on, the entities subject to those provisions.

One bankruptcy court, however, has interpreted the phrase "with respect to action taken" as limiting the termination provision to only creditors who have taken an action that is pending when the petition is filed. In re Paschal, 337 B.R. 274 (Bankr. E.D.N.C. 2006); In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006). According to that court, the stay is only terminated with respect to creditors who commenced formal action, such as a "judicial, administrative,

governmental, quasi-judicial or other essentially formal activity or proceeding," before the bankruptcy petition was filed. Paschal, 337 B.R. at 280. Comparing the specific language of section 362(c)(4)(A) ("the stay under subsection (a) shall not go into effect upon the filing of the later case") with that found in section 362(c)(3)(A) ("the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt . . . shall terminate with respect to the debtor"), the court determined that if Congress intended section 362(c)(3)(A) to terminate all provisions of the stay, it could have clearly said so as it did in section 362(c)(4)(A).

As the court noted in Paschal, however, the available legislative history, H.R. Rep. No. 109-31, suggests that Congress intended section 362(c)(3)(A) to terminate all of the protections of the automatic stay. In addition, the phrase "action taken" is inherently unclear because it could refer to actions having been taken or actions to be taken. Finally, Paschal fails to consider the language in subparagraphs (B) and (C) which seem to contradict its interpretation. Section 362(c)(3)(B) provides that a party in interest may request a continuation of the automatic stay "as to any or all creditors." If a party in interest must request that the stay be continued as to any or all creditors the stay termination provision must have been applicable to any and all creditors, not just those who took prior action. See In re James, 358 B.R. 816 (Bankr. S.D. Georgia 2007) (wherein the court disagreed with Paschal and held that the limiting language of the stay termination statute does not serve to limit the stay termination to certain creditors who took prepetition action but rather the stay termination applies to all creditors). Accordingly, it is the position of the Office of Chief Counsel that the stay termination provision, section 362(c)(3)(A), applies to all creditors and entities alike, regardless of their prepetition collection actions, and the relevant inquiry is not what creditors are affected by it, but what actions are no longer barred once the stay is terminated.

II. Under B.C. § 362(c)(3)(A), the stay terminates with respect to all actions to collect a debt against the debtor personally and against the debtor's property that secures such debt, but the stay does not terminate with respect to property of the bankruptcy estate.

Section 362(c)(3)(A) provides that the stay terminates "with respect to a debt or property securing such debt" and "with respect to the debtor." When Congress wanted the stay to terminate completely and without limitation it put no limiting language in the statute. Section 362(c)(4)(A)(i), which applies when two or more cases of an individual debtor were pending within the previous year but were dismissed, merely provides that "the stay under subsection (a) shall not go into effect upon the filing of the later case; . . . ." Clearly, Congress knew how to use language to terminate the stay completely but chose to limit the stay termination in the case of a serial filer with only one case dismissed within the previous year.

It is the position of Chief Counsel's Office, in line with the majority of courts, that the stay termination under section 362(c)(3)(A) is specifically limited to actions against the debtor personally and to "in rem" actions taken against the debtor's property but that the stay does not terminate with respect to actions taken against property of the bankruptcy estate. In re Jumpp, 356 B.R. 789 (BAP 1st Cir. 2006); In re Johnson, 335 B.R. 805 (Bankr. W.D. Tenn. 2006); In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006); In re Moon, 339 B.R. 668 (Bankr. N.D. Ohio 2006); In re Brandon, 349 B.R. 130 (Bankr. M.D.N.C. 2006); In re Pope, 351 B.R. 14 (Bankr. D.R.I. 2006); In re Gillcrese, 346 B.R. 373 (Bankr. W.D. Pa. 2006). While property securing a debt could be the debtor's property or estate property, the second limiting phrase "with respect to the debtor" limits these actions to actions against the debtor's property and not against property of the estate. Congress was quite specific in omitting the phrase "with respect to property of the estate" unlike other subsections of section 362 in which it is clearly set forth. See B.C. § 362(a)(2) ("the enforcement...against property of the estate" of a judgment); B.C.

§ 362(a)(3) ("any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"); B.C. § 362(a)(4) ("any act to create, perfect, or enforce any lien against property of the estate"); and B.C. § 362(e)(1) ("Thirty days after a request under subsection (d) of this section for relief from the stay or any act against property of the estate . . .").

A minority of bankruptcy courts disagree with this view and construe the phrase "with respect to the debtor" differently. They argue that this phrase serves to identify which debtor in the case of a joint bankruptcy filing is affected by the stay termination. In re Curry, 362 B.R.394 (Bankr. N.D. Ill. 2007); In re Jupiter, 344 B.R. 754, 759 (Bankr. D.S.C. 2006). Adherents to this view maintain that the stay termination is "meaningless and of no utility if property of the estate remains protected by the automatic stay, notwithstanding a termination of the automatic stay under § 362(c)(3)(A)." In re Jupiter, 344 B.R. at 760.

The minority view is incorrect for two reasons. First, terminating the stay with respect to the debtor and property of the debtor is not meaningless, because it penalizes the debtor while providing meaningful collection options to his creditors. Creditors may commence or continue suits against the debtor; judgments may be enforced against the debtor; collection actions may proceed; and liens against the debtor's property may be created, perfected and enforced. See Jumpp, 356 B.R. at 795. Creditors may bring actions against property excluded from the bankruptcy estate, as well as property exempted from the bankruptcy estate. Moreover, once a debtor has a Chapter 13 plan confirmed or an individual Chapter 11 plan confirmed, creditors may bring actions against the property that revests in the debtor as it is no longer property of the estate. See B.C. §§ 1141(b) and 1327(b).[1] Thus, contrary to the minority view, a limited stay termination does provide meaningful relief as a number of nonbankruptcy collection options would still be available to creditors.

Second, the minority view does not adequately address the argument that, if Congress wanted the stay to terminate completely and without limitation, it would have used non-limiting language as it did in section 362(c)(4). Specifically, in section 362(c)(4)(A)(i), Congress provided that, in the case of two or more previous bankruptcies pending and dismissed in the previous year, "the stay under subsection (a) shall not go into effect . . . ." The flaw in the minority view is that, if the phrase "with respect to the debtor" merely serves to identify the debtor in a joint case, the purpose of the phrase "with respect to a debt or property securing such debt" in section 362(c)(3)(A) and the omission of the same in section 362(c)(4)(A)(i) is unexplained. Further, the minority view does not explain why there is no parallel phrase "with respect to the debtor" in section 362(c)(4)(A)(i) protecting a non-serial filing debtor spouse from the effects of a stay termination in those cases. Nothing in the BAPCPA or its legislative history would justify the differing treatment and harsh punishment of the innocent non-serial filing debtor spouse in one case but not the other. Accordingly, there is no reason for the presence of limiting language in section 362(c)(3)(A) and the absence of such language in section 362(c)(4)(A)(i), except to apply limitations to the stay termination provision in the case of a serial filer who has had only one prior case pending and dismissed within the year.

[1] Of course, creditors would be bound by the confirmed bankruptcy plan and would be barred from collecting against property needed to fund the plan because repeat filers are not denied bankruptcy protection but are just denied the benefit of the automatic stay.

Conclusion

It is the position of the Office of Chief Counsel that a serial filing debtor who has had a prior case pending and dismissed within the year will get some benefit, but not the full benefit, of the automatic stay. While property of the estate will be protected, a debtor will not be protected from creditor actions against himself personally or actions against his property. And, logically, in the case of a serial filer with two previous cases pending and dismissed within the year, the punishment will be more severe as such a filer will not be entitled to any benefit of the stay because creditors will be able to bring actions against property of the estate, as well as actions against the debtor personally and against his property. This is consistent with a purpose of BAPCPA, i.e., to discourage serial filers who aim merely to thwart collection actions and to discourage serial filers in a graduated manner commensurate with the number of serial filings. Further, it is the position of the Office of Chief Counsel that, if the automatic stay is not continued by the court, the stay terminates after the 30th day as to all creditors with respect to actions against the debtor and actions against the debtor's property.[2]

All bankruptcy cases involving litigation over B.C. § 362(c)(3)(A) should be coordinated with Branch 5, Office of the Associate Chief Counsel (Procedure and Administration). Questions about this Notice should be directed to Branch 5 at (202) 622-3620.

/s/
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[2] Questions may arise regarding whether and when the period of limitations on collection under I.R.C. § 6502 is suspended under I.R.C. § 6503(h).