

THE AUTOMATIC STAY FOLLOWING  
*THE BANKRUPTCY ABUSE PREVENTION  
AND CONSUMER PROTECTION ACT OF 2005*  
("BAPCPA")

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Montgomery, AL

**Subsection (a):**

Under subsection (a) of § 362, the filing of a petition operates as a stay with respect to certain acts against the debtor or against property of the estate. BAPCPA amended only one part of subsection (a). Subsection (a)(8) previously stayed any United States Tax Court proceeding involving a debtor. In *Halpern v. Commissioner*, 96 T.C. No.43, 96 T.C.895 (U.S. Tax Ct. 1991) the court held that § 362(a)(8) stayed the commencement or continuation of a proceeding in the U.S. Tax Court involving both a debtor's prepetition and postpetition taxes.

The BAPCPA amendment supercedes *Halpern* and makes clear that the stay of a Tax Court proceeding is limited to an individual debtor's prepetition taxes and does not apply to an individual debtor's postpetition taxes. Further, in a corporate debtor's case, the stay applies to both prepetition and postpetition taxes provided the bankruptcy court has jurisdiction to determine such taxes.

**Subsection (b):**

Subsection (b) of § 362 lists those acts which are excepted from the automatic stay. BAPCPA amends one of the existing exceptions and adds 10 more acts which are excepted from the stay.

**§ 362(b)(2):**

In subsection (b)(2) the term “domestic support obligation” is substituted for the phrase “alimony, maintenance, and support.” This term is defined at new § 101(14A). A “DSO” is any debt plus accrued interest, pre or postpetition, that arises from a divorce, separation agreement, or property settlement and that is in the nature of alimony, maintenance, or support owed to the debtor’s spouse, former spouse, child, child’s parent, legal guardian, or to a governmental unit. The debt may not have been assigned unless the assignment was to a governmental unit for the purpose of collection.

The filing of a bankruptcy petition does not stay a civil action for the establishment or modification of a DSO. Further, civil actions concerning child custody or visitation, marriage dissolutions (except to the extent property of the estate is sought to be divided), or domestic violence are not stayed. *See* § 362(b)(2)(A).

Finally, collection of a DSO through income withholding orders (§ 362(b)(2)(C)), by suspension or restriction of licenses (§ 362(b)(2)(D)), by reporting overdue support to a consumer reporting agency (§362(b)(2)(E)), by the interception of tax refunds (§ 362(b)(2)(F)), or by the enforcement of a medicaid obligation (§ 362(b)(2)(G)) are not precluded by the automatic stay.

**§ 362(b)(19):**

Withholding from a debtor’s income to repay a loan from an employer-sponsored pension, stock-sharing, or stock bonus plan created under ERISA or Thrift Savings (IRC §§ 401,

403, 408, 408A, 414, 457, and 501(c)) is excepted from the automatic stay. Only the withholdings to repay the loan are excepted.

**§ 362(b)(20):**

This subsection provides for an *in rem* realty exception to the stay and is to be read in conjunction with new subsection (d)(4). The subsection applies only when the debtor has had a prior bankruptcy case in which the court found that the petition was part of a scheme to delay, hinder, or defraud creditors through full or partial transfer of realty without the consent of the mortgagee or the court or through multiple bankruptcy filings affecting the realty. If the mortgagee records the bankruptcy court's order in the probate court where the realty is situated, then the stay will not arise in a subsequent case filed within 2 years after entry of the order so as to preclude the mortgagee's enforcement of its lien on the realty. The debtor in the subsequent case, however, may move the court for relief from its prior order based upon changed circumstances.

**§ 362(b)(21):**

This subsection provides another *in rem* exception to the stay. The automatic stay will not prevent a creditor from enforcing its lien on realty if the debtor is ineligible to be a debtor under § 109(g) or has filed the current case in violation of a refiling injunction entered in a prior case. As with the (b)(20) exception, this exception is limited to *in rem* enforcement of interests in realty.

**§ 362(b)(22):**

The exception to the automatic stay created by this subsection applies only to leased residential realty. Here, a residential landlord may continue an action to evict unimpeded by the stay if a “judgment of possession” was obtained prior to the bankruptcy filing.<sup>1</sup>

Subsection (l) must be considered in conjunction with (b)(22). There, the automatic stay as to residential evictions, notwithstanding subsection (b)(22), will continue for 30 days after filing if the debtor 1) files a certification that State law permits a cure even after a landlord’s judgment of possession and 2) deposits 30 days rent with the clerk. Thereafter, the debtor must effect a complete cure of the default within the 30-day period.

The landlord may file an objection to the debtor’s certification that State law permits a cure of the default after the judgment of possession. If an objection is filed, the court must hold a hearing within 10 days to determine the truth of the debtor’s certification. If not true, then the stay as to the eviction action terminates immediately.

**§ 362(b)(23):**

An action to evict a debtor/tenant from residential realty is not stayed if the eviction action is based upon the tenant’s endangerment of or use of drugs on the leased property. For this exception to apply the landlord must file and serve on the debtor a certification that such eviction action has been filed or that the property has been endangered or illegal drugs were used

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<sup>1</sup> Under Alabama law, how does a residential landlord obtain a judgment of possession under the *Sanderson Act*, § 39-9-80 *et.seq.* versus an action for unlawful detainer? Further, at what stage does Alabama law cease to permit the cure of a default?

on the property within the 30-day period prior to the certification.

Subsection (b)(23) is limited by subsection (m). Once the landlord files and serves a certification that the property has been endangered or illegal drugs have been used there, then the eviction action is stayed for 15 days thereafter. If the debtor files an objection to the landlord's certification, the court must hold a hearing within 10 days to determine if the situation giving rise to the landlord's certification existed or has been remedied. If the court finds that the situation either did not exist or has been remedied, then the stay shall continue. Conversely, if the debtor cannot make that showing, then there is no stay as to the eviction action.

Finally, if the debtor does not file an objection to the landlord's certification within 15 days, subsection (b)(23) applies immediately without the necessity of an order granting relief from stay. The clerk must serve a certified copy of the docket sheet on both the debtor and the lessor which indicates that the debtor did not file a timely objection.

**§362(b)(24):**

There is no stay of any transfer that is not avoidable under § 544 (trustee's strong-arm powers) or § 549 (post petition transfers). Transfers under § 544 generally apply only to prepetition transfers. Therefore, such transfers would not be subject to the automatic stay anyway.

Section 549 permits trustees to avoid unauthorized postpetition transfers. However, it contains an exception. The trustee may not avoid a transfer of an interest in real property to a good faith purchaser without knowledge of the bankruptcy case and for present fair equivalent

value unless a copy or notice of the petition was filed in the county recorder's office prior to the recording of the transfer.

Transfers falling within the exception to § 549 are not avoidable and therefore fall within the exception to the automatic stay. The exception to § 549 may apply to a good faith purchaser of real property at a postpetition foreclosure sale.<sup>2</sup> Therefore, it would be prudent for a debtor's lawyer to record immediately a copy or notice of every bankruptcy petition filed to stay a foreclosure.

**§ 362(b)(25):k**

The stay does not apply to a "securities self regulatory organization" (as defined in new §101(48A)) in the exercise of its regulatory powers provided it may not impose monetary sanctions against the debtor. The exercise of regulatory powers includes the delisting or deleting of stocks that do not meet the organization's requirements.

**§ 362(b)(26):**

A governmental unit may offset a prepetition refund due the debtor against the debtor's prepetition tax liability. An exception to this rule arises when the amount of the debtor's tax liability is subject to a pending action. In such cases the government may hold the refund unless the court orders otherwise following a hearing on the trustee's motion to turnover the refund.

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<sup>2</sup> If the lender is the high bidder at the foreclosure, the lender might assert lack of knowledge of the bankruptcy predicated on the lack of effective notice under § 342(g).

The trustee must provide the governmental unit adequate protection prior to a refund turnover.

**§ 362(b)(27):**

The stay does not prevent the setoff by a participant to a “master netting agreement” (defined in new § 101(38A) and (38B)).

**§ 362(b)(28):**

Acts of the Secretary of Health and Human Services to exclude the debtor from participating in the medicare program or any other Federal health care program is not stayed by the bankruptcy filing.

**Subsection (c):**

Generally, subsection (c) fixes the period of time that the automatic stay will remain in effect – both as to the debtor and as to property of the estate. The subsection has been amended to limit the duration or the imposition of the automatic stay when serial filings occur.

**§ 362(c)(3):**

In a chapter 7, 11, or 13 case by an individual debtor, whose prior case was dismissed within one year of the current case, the automatic stay as to debts, property securing debts, or as to leases terminates 30 days after the filing. This subsection does not apply to a chapter 11 or 13 case refiled following the dismissal of a prior chapter 7 case pursuant to § 707(b). Neither

does the subsection apply if the earlier case was dismissed as a result of the creation of a debt repayment plan. *See* subsection (i) *infra*.

Any party-in-interest (practically, the debtor or the trustee) may move for an extension of the stay as to any or all creditors. After notice and hearing, which must be completed within 30 days after the petition for relief, the court may extend the stay as to all or any creditors if the debtor shows that the current case was filed in good faith.

Bad faith filing of the current case is presumed as to **all creditors** if:

- 1) the debtor had more than one chapter 7, 11, or 13 case pending within the past year;
- 2) a prior chapter 7, 11, or 13 case was dismissed within the past year as a result of:
  - a) the debtor's failure to file or amend the petition or other required documents and such failure was without substantial excuse. However, the debtor's inadvertence or negligence is not a substantial excuse, but inadvertence or negligence of the debtor's attorney is a substantial excuse.
  - b) the debtor's failure to provide adequate protection as ordered; or
  - c) the debtor's failure to perform the terms of a confirmed plan; or
- 3) there has been no substantial change in the debtor's condition since the dismissal of the last case which would lead to the conclusion that the current case will succeed by either receipt of a discharge or confirmation of a plan.

Bad faith filing of the current case is presumed as to **any particular creditor** if that creditor had pursued relief from stay in the previous case and the motion was either pending at the time of dismissal or had been favorably concluded.



Finally, note that rebuttal of the (c)(3) bad faith presumption requires evidence under the clear and convincing standard.

**§ 362(c)(4):**

If an individual debtor has had two or more cases dismissed within one year of the filing of the current case, the automatic stay is not effective in the current case. As with subsection (c)(3), this rule is not applicable if the current case follows the dismissal of the prior case under § 707(b).

Nevertheless, a party-in-interest may, within 30 days after the order for relief, request the imposition of the stay as to any or all creditors. Following a hearing, the court may impose the stay if it finds that the filing of the current case was in good faith as to the creditors to be stayed. The stay will become effective as of the date of the entry of the court's order and is not retroactive to the date of the petition for relief.

Bad faith is presumed as to all creditors and as to any particular creditor in virtually the same manner as is done in subsection (c)(3). Further, as with subsection (c)(3), clear and convincing evidence is required to rebut the presumption of bad faith.

**Subsection (d):**

Subsection (d) of § 362 concerns relief from the stay at the request of a party-in-interest by its termination, annulment, or modification.

Subsection (d)(3) concerns single asset real estate cases. Under the law predating

BAPCPA, the stay is to be terminated if the single asset debtor does not file a plan within 90 days after the petition for relief or has not begun making payments to the mortgagee in an amount equal to interest at the current fair market rate. BAPCPA amends subsection (d)(3) to provide that the interest rate to be paid by the debtor is at the nondefault contract rate. Further, (d)(3) permits the debtor to make these payments from the rents or other income generated from the realty notwithstanding that such funds are cash collateral under § 363(c)(2).

**Subsection (e):**

Under the law predating BAPCPA, 30 days after a motion for relief from stay has been filed as to property of the estate, the stay terminates as to that property unless the court orders the stay continued pending a final hearing.

BAPCPA adds new subsection (e)(2) which applies only to chapter 7, 11, and 13 cases filed by individual debtors. In those cases the stay will terminate by operation of law 60 days after the motion for stay relief was filed unless:

- 1) the court renders a final decision on the motion within the 60-day period,
- 2) the 60-day period is extended by agreement of all parties-in-interest, or
- 3) the court extends the period for good cause set out in specific findings.

**Subsection 362(h):**

Subsection 362(h) is new and applies to individual debtors with cases under any chapter. Here, the stay will terminate as to any personal property securing a claim or that is the subject

of a lease if the debtor does not timely file the statement of intention required under § 521(a)(2). Under amended § 521(a)(1), such statement must be filed either within 30 days after the order for relief or before the meeting of creditors, whichever is earlier. The § 521(a)(2) statement sets forth the debtor's intent to either reaffirm, redeem, or surrender collateral subject to secured debts or to assume or reject unexpired leases.

In addition, the stay will terminate as to this personal property if the debtor fails to perform under the statement of intent within the time allowed in § 521(a)(2)(B). This section, too, has been amended. The debtor must perform the statement of intent within 30 days after the date first set for the § 341 meeting unless the court, for cause, extends the time.

This subsection is somewhat unique in that if the debtor fails to timely accomplish the § 521(a)(2) requirements, the stay does not merely terminate, but the property is no longer property of the estate. Hence, it is vitally important that the trustee monitor the debtor's compliance closely, particularly in situations where trustee plans to sell the property involved. The trustee may prevent the stay termination and the loss of property of the estate if a motion is filed within the § 521(a)(2) periods. To prevail, the trustee must show that the property has beneficial value for the estate and that the creditor is adequately protected.

**Subsection 362(i):**

Recall that under subsection (c)(3), the automatic stay is implicated when an individual chapter 7, 11, or 13 debtor had a prior case dismissed within one year of the current case. Recall, too, that the stay is not implicated if the earlier case was dismissed under § 707(b).

New subsection (i) is similar. It provides that subsection (c)(3) does not apply if the earlier case was dismissed as a result of the creation of a debt repayment plan.

**Subsection 362(k):**

This subsection, which was formerly § 362(h), provides for damages available to an individual debtor as a result of a willful violation of the stay. BAPCPA has added a new subsection (k)(2) where only actual damages are available against a creditor who acted under subsection (h) in good faith. Recall that subsection (h) concerns termination of the stay for failure of the debtor to timely file and, thereafter, timely perform a statement of intent.

**Subsection 362(n):**

The automatic stay does not apply in a small business case if the debtor was a debtor in a prior small business case:

- 1) that was dismissed within two years of the filing of the current case;
- 2) in which a plan was confirmed within two years of the filing of the current case; or
- 3) is an entity that acquired substantially all of the assets of a small business debtor.

Here, however, the stay will apply if the debtor can establish by preponderance that it bought the assets of the prior small business debtor in good faith.

Finally, the stay will apply if the debtor proves by a preponderance that the current filing was precipitated by circumstances which were beyond its control and unforeseeable and that a non-liquidating plan is likely to be confirmed within a reasonable time.