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**REPEAT AND SERIAL FILERS:
EXTENDING AND REIMPOSING THE AUTOMATIC STAY UNDER BAPCPA**

Thankfully contributed to presenters by
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I. **Repeat filers** - Debtors having one case pending and dismissed within one year prior to filing.

1. **BAPCPA statutory provision: 11 U.S.C. § 362(c)**

(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)–

(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;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, 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) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)–

(i) as to all creditors, if–

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to–

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court;
or

(cc) perform the terms of a plan confirmed by the court; or
(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded–

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and ...

11 U.S.C. § 362(c)(3).

2. **Application** - Only applies to an individual in a single or joint case. Literally interpreting the grammar, it could mean that it would apply if an individual had a case pending, filed another petition, and had a previous case dismissed. See *In re Paschal*, 337 B.R. 274 (Bankr. E.D. N.C. 2006). This cannot be what Congress intended, and it probably will be applied to the second pending case within one year. The *Paschal* court also held that the expiration of the stay only applies to formal legal actions against the debtor. Also, several cases have held that the stay only expires with respect to property of the debtor, not property of the estate. See *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio); *In re Harris*, 342 B.R. 274, (Bkrcty.N.D. Ohio 2006); *In re Jones*, 339 B.R. 360 (Bankr. E.D. N.C. 2006); *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006); *In re Gillcrease*, 346 B.R. 373 (Bkrcty.W.D.Pa. 2006); *In re Baldasarro*, 338 B.R. 178, 185 (Bkrcty.D.N.H. 2006) and *In re Williams*, 346 B.R. 361 (Bkrcty.E.D.Pa. 2006). Thus, if the secured asset remains property of the estate, the creditor is still stayed with respect to acts to recover the property. **BUT** see *In re Jumpp*, 344 B.R. 21 (Bkrcty.DS.Mass. 2006)(Court held that the stay as to the debtor's property (including his residence in this case) was terminated as well as the stay as to the debtor personally) and *In re Jupiter*, 344 B.R. 754 (Bkrcty.D.S.C. 2006) (same result).

Co-debtor stay is not affected by multiple filings. See 11 U.S.C. §§ 1201, 1301.

See also *In re Easthope*, 2006 WL 851829 (Bankr. D. Utah) (case dismissed more than one year prior to filing second case, but not closed until less than a year prior to filing, was not "pending" within the meaning of § 362(c)(3)); *In re Moore*, 337 B.R. 79 (Bankr. E.D. N.C. 2005) (same).

3. **Procedure** - The stay is continued by motion, with notice to all creditors to whom the stay is to be applied. *In re Taylor*, 334 B.R. 660 (Bankr. D. Minn. 2005) (motion denied because not enough time given before hearing; time was less than required under local rules); *In re Collins*, 334 B.R. 655 (Bankr. D. Minn. 2005) (notice of motion to extend stay had to be served at least on creditors to be subjected to the stay, and better practice would be to serve all creditors; extension denied when only U.S. Trustee and interim chapter 7 trustee were served, and debtor could not rebut presumption); see also *In re Frazier*, 339 B.R. 516 (Bankr. N.D. Fla.) (five days notice was sufficient); *In re Ziolkowski* 338 B.R. 543 (Bkrcty.Conn. 2006) (the attorney relied on the court clerk to calendar the actual hearing within the 30-day period. Clerk actually set the hearing at a date beyond the 30-day deadline. Court held error in relying on clerk was not sufficient grounds to order an extension of the stay. Motion was denied.)
4. **Timing** - The motion must be made and acted upon by the court before the 30 days expires. Otherwise the stay automatically terminates. If the motion is not filed in time for the court to act, the debtor risks exposure to creditor action while stay is not in effect. The debtor may have to file an adversary proceeding to reimpose the stay, unless 11 U.S.C. § 362(c)(4) can be applied when only one previous case was filed and dismissed within a year of the second case. See *In re Toro-Arcila*, 334 B.R. 224 (Bankr. S.D. Tex. 2005) (debtor who had one previous case dismissed within a year of filing second case filed motion to extend stay on 30th day after filing; court held that stay could be reimposed pursuant to § 362(c)(4)), also see above cases.
5. **Hearing** - The statute states that the stay can be continued "after notice and a hearing," which implies that notice and an opportunity to object and request a hearing is sufficient. However, a request for a hearing may delay the hearing and the court's action beyond the 30 days. See *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio) (debtors scheduled hearing more than 30 days after filing even though motion was timely; extension denied).

Practice Point: Schedule hearing even if you do not anticipate objections and have debtor present to give evidence.

6. **Evidence** - Whether current case is filed in good faith will probably be based on "totality of the circumstances," such as
1. Timing of current petition.
 2. How debts arose.
 3. Whether debts were allowed to accumulate prior to bankruptcy.
 4. Motive for filing current petition.
 5. How debtor's actions affected creditors.
 6. Why prior case(s) dismissed.
 7. Whether trustee or creditors objected.
 8. Debtor's ability to pay.
 9. Duration of plan.
 10. How creditors are classified or treated under plan.
 11. Accuracy of information.
 12. Whether debts might be dischargeable.
 13. Whether debtor is attempting to manipulate bankruptcy system unfairly.
- See In re Ellis*, 2006 WL 625448 (Bankr. E.D. Pa.) (burden not met); *In re Baldassaro*, 338 B.R. 178 (Bankr. D. N.H. 2006) (burden met); *In re Ball*, 336 B.R. 268 (Bankr. M.D. N.C. 2006) (burden met); *In re Havner*, 336 B.R. 98 (Bankr. M.D. N.C. 2006) (burden not met); *In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005) (burden met); *In re Galanis*, 334 B.R. 685 (Bankr. D. Utah 2005) (burden met); *In re Montoya*, 333 B.R. 449 (Bankr. D. Utah 2005) (burden not met).

7. **Burden of Proof** - Stay can be extended if party in interest "demonstrates" the filing of the case is in good faith as to creditors to be stayed. The court may impose limitations on effect of stay. Burden of proof is on debtor to show case was filed in good faith. Ordinary standard of **preponderance of the evidence** would apply unless presumption of bad faith applies. There is a presumption the case was filed in bad faith with respect to all creditors if there has been more than one chapter 7, 11 or 13 case filed within the preceding one year period, the prior case was dismissed for failure to file required documents, provide adequate protection as ordered by the court, or to perform under the terms of a confirmed plan, or there has not been a substantial change in circumstances that show likelihood of successful completion of the current case. The presumption of bad faith also applies to any creditor that had had the stay lifted or modified at the time of the dismissal of the previous case. If the presumption applies, it may be rebutted by the debtor by **clear and convincing** evidence to the contrary. If the presumption is overcome, the court then exercises its discretion whether to extend the stay. *See In re Kurtzahn*, 337 B.R. 356 (Bankr. D. Minn. 2006) (no change in circumstances; debtor's income insufficient); *In re Havner*, 336 B.R. 98 (Bankr. M.D. N.C. 2006) (no substantial increase in income); *In re Mark*, 336 B.R. 260 (Bankr. D. Md. 2006) (income increased; 100% plan); *In re Warneck*, 336 B.R. 181 (Bankr. S.D. N.Y. 2006) (prior case dismissed before confirmation; no presumption of bad faith); *In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005) (prior case voluntarily dismissed; preponderance of evidence standard applied).

8. **Comfort order** - 11 U.S.C. § 362(j) provides that the court "shall" issue an order under section (c) confirming that the stay has been terminated. *See In re Gillcrese*, 346 B.R. 373 (Bkrtcy.W.D.Pa. 2006) (Stay expired after 30 days, no motion, creditor moved for comfort order, Court denied as to property of the estate); *In re Murphy*, 346 B.R. 79 (Bkrtcy.S.D.N.Y. 2006) (Creditor moved ex parte for a comfort order but included language in order that creditor not be bound by confirmation order and requested attorney fees. Court granted bare comfort order confirming termination of the §362(c)(3) stay but denied further relief).

- II. **Serial filers** - Debtors having two or more cases pending and dismissed within year prior to filing.

1. **BAPCPA statutory provision: 11 U.S.C. § 362(c)**

- (4)(A) (i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and
(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;
(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;
(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and
(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--
(i) as to all creditors if--
(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;
(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or
(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed;
or
(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

11 U.S.C. § 362(c)(4).

- B. **Application** - Stay does not go into effect with respect to multiple filer, but it does go into effect with respect to spouse in a joint case who is not a multiple filer. See *In re Parker*, 336 B.R. 678 (Bankr. S.D. N.Y. 2006). Co-debtor stay is not affected by multiple filings. See 11 U.S.C. §§ 1201, 1301.
3. **Timing** - Motion must be filed within 30 days of later case. See *In re Beasley*, 2006 WL 689513 (Bankr. E.D. Ark.) (motion filed within 30 days; relief granted); *In re Wright*, 2006 WL 689512 (Bankr. E.D. Ark.) (motion filed more than 30 days after filing petition in later case; relief denied). Both cases involved only one prior pending case in year before filing petition, but motion was not filed in sufficient time for court to act before stay expired, and court held that stay could be imposed under § 362(c)(4), provided motion was timely filed. These cases are consistent with the holding in *In re Toro-Arcila*, 334 B.R. 224 (Bankr. S.D. Tex. 2005), which reasoned that subparagraphs (II) and (III) under § 362(c)(4)(D)(i) would be surplusage if all that was necessary

for the presumption of bad faith to apply was to have at least two pending cases in the year prior to filing the instant case, as is necessary for the presumption under subparagraph (I). Therefore, if the motion is filed within 30 days of filing the petition, but the court cannot act within 30 days of filing, the stay can still be reimposed under § 362(c)(4). The reimposed stay is effective only from the time of entry of the order, not retroactively. 11 U.S.C. § 362(c)(4)(C).

4. **Evidence** - see I.F. above.

- III. **Chapter 7's & Statement of Intention** - Failure of the debtor to reaffirm debt secured by personal property or to redeem such property within 45 days after the first meeting of creditors results in termination of the automatic stay, and the asset is no longer property of the estate unless before this 45 day period expires, the trustee moves the court for a finding that the property is of consequential value or benefit to the estate. The order must provide adequate protection for the creditor and order the debtor to turn over the property to the trustee. 11 U.S.C. § 521(a)(6). See also 11 U.S.C. § 521(d) (failure to the debtor to perform pursuant to the statement of intention with respect to leased, rented, or bailed property; if not otherwise avoidable, bankruptcy may be event of default). See *In re Record*, 347 B.R. 450 (Bkrty.M.D.Fla. 2006)(Creditor was entitled to comfort order that stay was terminated as to motor vehicle where debtor's statement of intentions purported to elect invalid option of "ride-through")
- IV. **See also** - Daniel C. Bruton, *30-Day Lifting of the Automatic Stay under § 362(c)(3)(A): Not What It Purports to Be*, Vol. XXV, No. 3, Am. Bankr. Inst. J. 10 (April 2006); Howard Gershman, *Automatic Termination of the Stay upon Second Filing under § 362(c)(3) - Has Congress Made Two Strikes an Out?*, Vol. XXV, No. 3, Am. Bankr. Inst. J. 12 (April 2006); Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or against an Individual Debtor*, 79 Am. Bankr. L. J. 749 (Issue 3, Summer 2005). This has also been referred to by some bcr wags as the "manual stay" or the "stick stay."
- V. **Don't forget** - If the court finds the filing of a case involving a creditor with an interest in real property is part of a scheme to hinder, delay, and defraud creditors, and the scheme involves property transfers or multiple filings, the order for relief from the stay may be recorded and will be binding on future filings involving the same property. 11 U.S.C. § 362(d)(4).
- VI. **And finally** - Serial filings can make the entire case go away, not just the automatic stay, if it is dismissed under § 707(b). See, e.g., *In re Casse*, 198 F.3d 327, 332 (2^d Cir. 1999) ("If the [debtors] fit this profile of serial filers, they are to be found not in the ranks of the nation's honest debtors, but among the Hannibal Lecters of current bankruptcy litigation." (quoting *In re Felberman*, 196 B.R. 678, 681 (Bankr. S.D. N.Y. 1995))).