

SELECTED AUTOMATIC STAY ISSUES

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The summaries below were prepared for the use of Florida state court judges, and are couched in very general terms. Users of this guide should consult the actual language of the cited code provisions before making a ruling regarding the applicability of the automatic stay.

11 U.S.C. § 362(a)

Upon the filing of a bankruptcy petition, an “automatic stay” (i.e., an automatic injunction) goes into effect. The automatic stay restrains creditors from taking certain actions against the debtor or against “property of the estate.” Under Section 541, “property of the estate” includes all legal and equitable interests of the debtor as of the filing date. The types of actions which are stayed include the continuation of litigation, the enforcement of judgments, acts to obtain possession or control of property of the estate, and acts to collect claims against the debtor.

11 U.S.C. § 362(b)

Section 362(b) sets forth the type of actions which are not stayed upon the filing of a bankruptcy petition. These include --

Section 362(b)(1). **Criminal Actions and Proceedings** – not stayed

Section 362(b)(2). **Family Law Cases** - the following actions are not stayed: the commencement or continuation of actions to establish paternity, to modify domestic support obligations, concerning child custody or visitation, for dissolution of a marriage (but not to determine the division of property that is property of the estate), and with respect to withholding income that is not property of the estate for the payment of a domestic support obligation. Note that in Chapter 13 cases and individual Chapter 11 cases, the debtor’s earnings from services performed after the case is filed are property of the estate. 11 U.S.C. §§ 1306 and 1115. However, in a Chapter 7, the debtor’s post-petition earnings are not property of the estate.

Sections 362(b)(10) and 363(b)(22). **Eviction Cases** - actions by a landlord to obtain possession of nonresidential real property are not stayed if the lease has expired by its own terms prior to the filing of the bankruptcy. Section 362(b)(22) provides that the

stay does not apply to the continuation of eviction proceeding with respect to residential property if a judgment for possession was entered prior to the filing of the bankruptcy. Caveat: the provisions of section 362(b)(22) may not apply if state law permits a tenant to cure a lease default after the entry of a judgment for eviction.

Multiple Bankruptcy Filing Issues

Section 362(c)(3) – if a debtor had a prior case pending within one year of his or her current bankruptcy case, the automatic stay goes into effect upon the new filing but only stays in effect for thirty days after the case was filed. There is a split of authority on the technical issue of whether the expiration of the automatic stay under section 362(c)(3) applies only to “property of the debtor” or to both “property of the debtor” and “property of the estate.” *Compare In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008) and *In re Curry*, 362 B.R. 394 (Bankr. N.D. Ill. 2007). Given this issue, state courts may wish for creditor’s counsel to obtain an order of the bankruptcy court confirming that the automatic stay is no longer in effect.

In addition, section 362(c)(3) permits a party in interest (which includes the debtor, the trustee, or a creditor) to seek an extension of the automatic stay by filing a motion which demonstrates that the new filing is in good faith. The new case is presumed to have been filed “not in good faith” if the debtor had more than one case pending during the preceding one year period, or the debtor’s prior case was dismissed after the debtor failed to comply with court orders, or if there has not been a substantial change in the debtor’s personal or financial affairs since the dismissal of his most recent case, or any other reason to conclude that the new case will not result in a Chapter 7 case, with a discharge, or a confirmed Chapter 11 or 13 plan that will be fully performed.

Section 362(c)(4) – if the debtor has had two or more cases that were pending within the previous year, there is no automatic stay in effect upon the filing of a new case. However, a party in interest may, within 30 days of the new filing, seek to impose the automatic stay. The party in interest must demonstrate that the new filing is in good faith as to the creditors to be stayed. And, section 362(c)(4)(A)(ii) provides that on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect. Although the language of section 362(c)(4) clearly states that there is no stay if the debtor has had two or more cases pending during the previous year, until the thirty days during which the debtor or other party in interest may request that the court impose the automatic stay has expired, there is always the possibility that such a request will be granted.

Section 362(d)(4) provides that with respect to the stay of an act against real property, if the court finds that the filing of the bankruptcy petition was part of a scheme to hinder, delay or defraud creditors through multiple bankruptcy filings or transfers of the property, the court may enter an order that, when recorded in compliance with State law, is binding in new cases for two (2) years. However, the debtor may seek relief from this order based upon changed circumstances or good cause.

Section 362(j) authorizes the bankruptcy court to issue orders under Section 362(c) confirming that the automatic stay has been terminated.

State courts have concurrent jurisdiction with the bankruptcy courts to determine the applicability of the automatic stay. *In re Baldwin-United Corp.*, 765 F. 2d 343, 347 (2d. Cir. 1985). However, the bankruptcy court may enter orders extending or imposing the automatic stay, or may exercise its equitable powers under 11 U.S.C. § 105. Most state courts prefer that creditors' counsel obtain "comfort orders" from the bankruptcy court prior to taking any action which could arguably be in violation of the automatic stay.