

THE AUTOMATIC STAY UNDER BAPCPA

Michael D. Sabbath

Walter Homer Drake Professor of Bankruptcy Law

Mercer University
Walter F. George School of Law
Macon, Georgia

Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. BAPCPA and Exceptions to the Automatic Stay	4
A. Domestic Relations Proceedings	4
B. Retirement Plan Repayments	5
C. Ineligible Debtor	6
D. Residential Property Evictions	8
E. Ad Valorem Tax Liens	10
F. Post-Petition Infringement of Intellectual Property Rights	11
III. BAPCPA and Termination of the Automatic Stay	15
B. Unexpired Lease of Personal Property	18
C. Multiple Bankruptcy Filings	19
1. Section 362(c)(3)	19
2. Section 362(c)(4)	21
IV. BAPCPA and Relief from the Automatic Stay	21
A. In Rem Relief	21

THE AUTOMATIC STAY UNDER BAPCPA

I. INTRODUCTION

Section 362(a) of the Bankruptcy Code provides that “a petition filed under sections 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities” as to most activities of most creditors regarding any financial obligations of the debtor. Professor David Epstein has observed that creditors commonly summarize the scope of section 362(a) with: “If something is worth doing, you can’t do it because it will be stayed by section 362(a).” See Epstein, Markell, Nickles and Perris, *Bankruptcy: 21st Century Debtor-Creditor Law* 74 (2d ed. 2006) (Thomson). The stay is a self-executing injunction; it is triggered by the filing of a bankruptcy petition (whether voluntary or involuntary), without the need for notice or for a formal court order.

The automatic stay clearly is necessary to protect both debtors and creditors. As Professor Margaret Howard has observed:

The stay provides an opportunity to assess the debtor’s financial situation and to prepare a reorganization or distribution plan without interference or harassment from creditors. The stay also fixes the relationship of each creditor to the debtor, as of the date of the filing of the petition. In this sense, the stay protects creditors as well as the debtor, by preventing individual creditors from pursuing their own remedies at the expense of other creditors. See M. Howard, *Cases and Materials on Bankruptcy* 115 (4th ed. 2005) (Thomson).

The automatic stay is quite remarkable in that it allows virtually any party to invoke the broad injunction power of the bankruptcy court without having to show those things normally required to obtain an injunction. A party need not show any irreparable harm or the likelihood of success – all that is required is the filing of a bankruptcy petition with the bankruptcy court and the payment of a filing fee. This has led several judges to characterize the automatic stay as “one

of the most powerful weapons known to the law.” See In re Penz, 121 B.R. 602, 604 (Bankr. E.D. Okla. 1990) (Judge Ryan); In re Russo, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988) (Judge DeGunther). This transfer of the discretionary injunctive power of the court to individuals has led some debtors to abuse the automatic stay, and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) attempts to deal with these abuses in some of its provisions.

While section 362(a)’s automatic stay would appear to bar any action of any character by any party against the debtor or estate property, section 362(b) sets forth categories of actions to which the automatic stay does not apply. Section 362(b) attempts to “strike a balance between aiding a debtor’s rehabilitation and allowing socially desirable actions against the debtor to proceed.” See Howard supra at 118 (though Prof. Howard does concede that each successive set of amendments to section 362(b) “may reflect nothing more lofty than the pressure of interest groups on willing legislatures”). The previous version of section 362(b) included eighteen categories of actions to which the automatic stay did not apply, such as criminal proceedings against the debtor, proceedings by governmental units to enforce police or regulatory powers (so long as the government is not functioning as a creditor), and actions to collect alimony or child support. BAPCPA supplements some of these eighteen categories of actions, and adds ten more categories to the list. Some of the more important new exceptions will be discussed later.

Even if an exception to the stay does not apply, a creditor wanting to continue an activity subject to the stay may simply await the termination of the stay. Section 362(c)(1) and (2) describe two common situations in which the automatic stay terminates automatically. Section 362(c)(1) provides that the automatic stay ends as to particular property when that property ceases to be property of the estate. Section 362(c)(2) provides that the stay terminates when the bankruptcy case is closed or dismissed or the debtor receives a discharge. (Of course, if the debtor receives a discharge, the automatic stay is replaced with the section 524(a) discharge injunction that prohibits efforts to collect obligations covered by the discharge). BAPCPA adds several new grounds for automatic termination of the automatic stay based on the debtor’s recent bankruptcy filings. The Bankruptcy Code always contained provisions that police certain types

of debtor misbehavior (e.g., section 109(g) makes individuals ineligible if an earlier case was dismissed under certain circumstances; section 707(b) permits dismissal of abusive petitions; sections 1112(b), 1208(c) and 1307(c) authorize dismissal of petitions for cause; sections 1129(a)(3) and 1325(a)(3) require plans to be proposed in good faith), but none of these provisions directly addressed the problem of repeated filings made solely to take advantage of the automatic stay. Congress was persuaded that, without specific provisions to deal with this situation, bankruptcy judges were not doing enough to crack down on debtors who repeatedly filed. BAPCPA adds sections 362(c)(3) and (4) which provide that the automatic stay quickly terminates (or never even arises) in certain circumstances involving serial filings. In addition, BAPCPA adds a new section 362(h) (former section 362(h) is redesignated as (k)) that automatically terminates the automatic stay as to certain property where an individual debtor does not timely file a statement of intention as to leased property or secured personal property or does not timely redeem or reaffirm as to that personalty or does not timely assume an unexpired lease (though there is a savings clause in section 362(h)(1)(B)). These sections will be discussed in more detail later.

A creditor wanting to continue an activity subject to the automatic stay also may seek to obtain relief from the stay. Section 362(d) sets out four alternative forms of relief from the stay: termination, annulment, modification, or conditioning. The court has flexibility in granting the relief that is most appropriate under the circumstances. Prior to BAPCPA, section 362(d) set out three separate grounds for relief from stay. Section 362(d)(1) requires the court to grant relief for cause, including the lack of adequate protection of the applicant's interest in property. Section 362(d)(2) provides for relief from the stay of acts against property where the debtor has no equity in the property and the property is not necessary to an effective reorganization. Section 362(d)(3) was added in 1994 to deal with complaints by mortgage holders that the stay was being abused in "single asset real estate" cases, and its purpose is to prevent dilatory behavior by the debtor. The debtor must devise a workable plan within ninety days of the order for relief (BAPCPA adds "or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later") or, if this is not possible, must at least make payments of interest to the mortgage holder (BAPCA changed the interest rate from the "current fair market rate" to

“the then applicable contract rate of interest”). If the debtor does neither of these things, the mortgagee may obtain relief from the stay. BAPCPA adds section 362(b)(4), which provides for in rem relief from the automatic stay where, as to real property, the court finds that the bankruptcy case was filed as part of a “scheme to delay, hinder, and defraud creditors,” either by the transfer of all or part of an interest in the realty without the secured creditor’s consent or by multiple bankruptcy filings that affect the realty (e.g., stopping foreclosure actions). The details of this provision will be discussed later.

By adding numerous exceptions to the automatic stay, and by creating additional grounds for termination of the stay and relief from the stay, BAPCPA has clearly caused a “shrinkage” of the automatic stay. See generally, Napoli, “The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or against an Individual Debtor,” 79 Amer. Bankr. L.J. 749 (2005) (an excellent discussion of how many of the changes brought about by BAPCPA will impact the automatic stay in cases filed by or against individual debtors). See also Brown and Ahern, 2005 Bankruptcy Reform Legislation with Analysis 50-54 (Thomson 2005).

II. BAPCPA and Exceptions to the Automatic Stay

A. Domestic Relations Proceedings

Under prior section 362(b)(2), the stay did not bar commencement of an action or proceeding to establish paternity, to establish or modify an order for alimony, maintenance or support, or to collect such debts from property that was not property of the estate (i.e., from the debtor’s own property). New section 362(b)(2) expands upon and clarifies which domestic relations proceedings are not covered by the automatic stay. Those proceedings not covered by the stay include civil actions regarding child custody or visitation, collection of “domestic support obligations” (broadly defined in section 101(14)(A)) from property that is not part of the bankruptcy estate, divorce proceedings (except to the extent that the action involves the division of property that is part of the bankruptcy estate), and actions regarding domestic violence.

Section 362(b)(2)(c) was added which exempts from the stay the withholding of income that is property of the estate or property of the debtor (i.e. a garnishment) for payment of a domestic support obligation under a judicial or administrative order or a statute. Other provisions were added that provide other mechanisms of collecting support obligations, including suspension of a driver's license or professional license, or the "interception of a tax refund." See Section 362(b)(2)(D) and (F).

B. Retirement Plan Repayments

BAPCPA adds several new provisions dealing with ERISA-qualified and non-ERISA qualified retirement plans, and with debtors who borrow from such plans. Section 541(b)(7) expressly excludes retirement plans from the estate, and section 523(a)(18) excepts any debt owed to such plans from a debtor's discharge. In addition, new section 1322(f) provides that a Chapter 13 plan may not materially alter the terms of the loan agreement, and that any amounts required to repay such a loan are not "disposable income."

In conjunction with these provisions, BAPCPA adds a new section 362(b)(19) which provides that the withholding of income from a debtor's wages in order to make payments to repay loans from retirement plans is not subject to the automatic stay. Retirement plan administrators will no longer need to worry about whether continued wage withholdings for retirement plan loan repayments are permissible after a bankruptcy filing by the participant. In addition, debtors will no longer suffer the serious economic consequences caused by defaulting on such loans by unintentionally missing a payment, See In re Herndon, 289 B.R. 629, 631 (Bankr. E.D. Mich. 2003)(discussing the tax consequences of a Chapter 13 debtor defaulting on the repayment of such a loan).

C. Ineligible Debtor

BAPCPA makes no changes to section 109(g), which provides that an individual cannot initiate a bankruptcy proceeding if that individual has been a debtor in a case pending at any time in the preceding 180 days and (1) the case was dismissed for the debtor's willful failure to abide by court orders or to properly appear before the court; or (2) the debtor requested and obtained the voluntary dismissal of the case after the filing of a request for relief from the automatic stay. BAPCPA, however, does settle a split of authority over the effect of a bankruptcy filing by an "ineligible debtor" on the automatic stay. For example, the court in In re Miller, 143 B.R. 815 (Bankr. W.D. Pa. 1992) stated that the purpose of section 109(g)(1) is to prevent the reimposition of stays and controls under the Bankruptcy Code when the prior performance of the debtor was wilfully inconsistent with the debtor's responsibilities to the court. The court therefore concluded that:

In light of this purpose, it would be a perversion of the bankruptcy process for an impermissible bankruptcy filing to have any effect whatever. A debtor who files a subsequent bankruptcy petition in violation of [section 109(g)(1)] has *no standing* to obtain any relief from that filing, including the automatic stay." Id. at 820.

That court went on to find that the automatic stay that was issued in the subsequent bankruptcy proceeding "was a nullity from the outset" and had no effect on a later-conducted sheriff's sale, reasoning that "[a]n automatic stay obtained by one who has no right from the outset to be a debtor in bankruptcy is null and void from the time of its issuance." Id. at 820.

The court in In re Flores, 291 B.R. 44 (Bankr. S.D.N.Y. 2003) disagreed with this conclusion, reasoning that:

[A] bankruptcy filing within 180 days of a prior dismissal under section 109(g) cannot be a nullity or void *ab initio*, because there is a threshold issue to be

decided, the issue of whether the debtor “may be a debtor” in the subsequent case. The issue may be decided one way or the other, depending upon the particular facts or circumstances. But one postulate is absolutely clear: the issue must be decided in the first instance *by the bankruptcy court*. It is *not* up to a secured creditor to make the determination that a filing in violation of the 180-day bar is void *ab initio* and, therefore, that the automatic stay does not apply” *Id.* at 52-53.

BAPCA resolves this issue by adding new section 362(b)(21) which makes clear that the filing of a petition in violation of section 109(g) does not trigger application of the automatic stay in that subsequent case as to acts to enforce a lien against or security interest in real property. Of course, a creditor relying on the provision may have a serious problem if a court later determines that the debtor was in fact eligible to file.

It should be noted that new section 362(b)(21) also provides that the filing of a petition “in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title” does not operate to stay an act to enforce a lien against or security interest in real property. The Bankruptcy Code, even as amended by BAPCPA, does not specifically address the court’s authority, apart from section 109(g), to enter an order prohibiting a debtor from filing a future bankruptcy case. A number of courts have entered orders pursuant to section 105(a) that prohibit individual debtors from filing another bankruptcy case for periods longer than the 180 days set out in Section 109(g). *See, e.g., Lerch v. Fed. Land Bank of St. Louis* (In re Lerch) 94 B.R. 998, 1002 (N.D. Ill. 1989) (barring further filings for 2 years); *In re Robertson*, 206 B.R. 826, 831 (Bankr. E.D. Va. 1996) (barring further filings for 417 days). Other courts, however, have decided that the bankruptcy court’s equitable powers may not be exercised in this manner. *See, e.g., Frieouf v. United States* (In re Frieouf), 938 F.2d 1099, 1103 n.4 (10th Cir. 1991) (The broad equitable powers that bankruptcy courts have under section 105(a) may not be exercised in a manner that is inconsistent with the other, more specific provisions of the Code. The bankruptcy court’s three-year prohibition against filing a bankruptcy case plainly contradicts the 180-day limitation under section 109(g) and

cannot be sustained under section 105(a)). In those jurisdictions that allow such court orders, new section 362(b)(21) would be applicable.

D. Residential Property Evictions

BAPCPA adds sections 362(b)(22) and (23) which afford new protections to residential property landlords. Section 362(b)(22) provides that (subject to section 362(l), which will be discussed later), the automatic stay does not apply to the continuation of an eviction, unlawful detainer action, or similar proceeding involving residential property in which the debtor resides as a tenant under a lease or rental agreement if the lessor has obtained a judgment for possession of the property against the debtor before the commencement of the bankruptcy case. This exception to the stay is limited to the continuation of proceedings stayed under section 362(a)(3), which are proceedings to obtain possession of or control over property of the estate. So, for example, if the lessor has obtained a judgment for possession that includes a money judgment against the debtor for back rent owed, relief from the stay must still be sought in order to enforce the judgment against the debtor, or at least that portion of the judgment representing the claim for back rent. See 3 Collier on Bankruptcy § 362.05[20] (15th ed. Rev.2005).

Under new section 362(l)(1), the debtor-tenant can obtain a thirty day stay of the execution of the eviction if the debtor files with the petition and serves on the lessor a certification that circumstances exist that permit cure of the default under non-bankruptcy law, and the debtor deposits with the clerk of the court any rent that would accrue during the thirty day period. Section 362(l)(2) provides that the stay provided for in section 362(l)(1) may remain in force beyond the thirty day period following the filing of the petition if, within the thirty day period after the filing of the petition, the debtor files with the court and serves on the lessor an additional certification that the entire monetary default that gave rise to the judgment for possession has been cured under applicable non-bankruptcy law. If the lessor objects to the certification, the court must hold a hearing within ten days to determine whether the certification is true.

In addition, new section 362(b)(23) provides that the automatic stay does not apply to the continuation of a residential eviction based on the endangerment of the property or illegal drug use on the property if the lessor files with the court, and serves upon the debtor, a certification that the eviction has been commenced, or that the activity has occurred during the past thirty days. New section 362(m)(1) provides that this exception to the stay applies fifteen days after the lessor files and serves the certification (it does not prevent the automatic stay provided under section 362(a)(3) from taking effect immediately from the filing of the petition).

New section 362(m)(2) does permit the debtor to file and serve on the lessor an objection challenging the truth or legal sufficiency of the certification, and a hearing must be held within ten days after the filing and service of such objection. At this hearing, the debtor can demonstrate that the situation which gave rise to the lessor's certification of alleged property endangerment or illegal drug use either did not exist or has been remedied (presumably, remedied any time prior to the hearing). If the court decides that the situation did not exist or that it has been remedied, then the automatic stay under section 362(a)(3) remains in effect. If the court rules against the debtor at this hearing, the lessor may proceed with the eviction without the need to file a motion for relief from the stay.

It is not clear whether the procedures set out in Bankruptcy Rule 9014 apply when a hearing is held upon the debtor's objection to a lessor's certification filed under section 362(b)(23). There likely often will be contested allegations about drug use and property endangerment, and this would require the court to hear oral testimony and make findings on disputed facts. Some of the terms found in section 362(b)(23) also are vague and not defined in the Bankruptcy Code. For example, it is unclear when a debtor has "endangered" the property, what constitutes a "controlled substance," or when drug use has occurred "on the property" (e.g., does this include common areas in a rental complex?).

It has been suggested that, when a lessor files a certification, Sections 362(b)(23) and 362(m) function much like a motion for relief from the stay under section 362(d). One

commentator observes:

[P]erhaps as an unintended consequence of the amendment, courts may be called upon to conduct contested hearings and make findings of fact on issues that they would previously have permitted state courts to deal with by granting relief from the stay under section 362(d) on the basis that the eviction litigation should be initiated or concluded in another forum. Thus, despite the possible advantage to the lessor of an expedited termination under subsections (b)(23) and (m), lessors may prefer to file a stay relief motion rather than submit a certification. See 3 Collier on Bankruptcy § 362.05[21] (15 ed. Rev. 2005).

E. Ad Valorem Tax Liens

Prior to the enactment of section 362(b)(18) as part of the Bankruptcy Reform Act of 1994, courts disagreed on whether the automatic stay prohibited local taxing authorities from creating or perfecting a statutory lien for ad valorem taxes that became due after the petition date. Most courts found such liens as void or voidable as violating the automatic stay. See, e.g., Lincoln Sav. Bank v. Suffolk County Treasurer (In re Parr Meadows Racing Association), 880 F.2d 1540 (2d Cir. 1989), *cert. denied*, 493 U.S. 1058 (1990); see generally Carlson, “Bankruptcy’s Acephalous Moment: Postpetition Transfers Under the Bankruptcy Code,” 21 Emory Bankr. Dev. J. 113, 153 (2004); Jenks and Day, “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Summary of Tax Provisions,” SL068 ALI-ABI 121, n.47 (2005). One effect of cases deciding that section 362 stayed the creation and perfection of such liens was to create a windfall for the holders of contractual liens on the property in question. By preventing the taxing authority from imposing its lien for property taxes, the interest of the mortgagee would retain an interest senior to that of the taxing authority. So it was the nondebtor mortgagee who benefitted from the stay on the creation of the property tax lien and not the debtor (unless the debtor had substantial equity in the property).

In 1994 Congress attempted to aid local taxing authorities by enacting section 362(b)(18) which permitted the creation or perfection of a statutory lien for ad valorem property tax if such tax became due after the filing of the petition. BAPCPA expands section 362(b)(18) so that the creation of a special tax or special assessment on real property, whether or not an ad valorem tax, if the tax or assessment comes due after the date of the filing of the bankruptcy petition, is not subject to the automatic stay.

It should be noted that the taxing authority may not take action to enforce the lien free of the automatic stay, which would deprive the estate of use and possession of the property. This exception is limited to the creation and perfection of liens for ad valorem property taxes and special taxes and assessments on real property.

F. Post-Petition Infringement of Intellectual Property Rights

Section 362(a) operates to stay “the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title.” The stay of litigation, therefore, is limited to actions that could have been commenced before the commencement of the case or which are based on claims that arose before commencement of the case. Actions on claims that arise after commencement of a case are not stayed (though enforcement of a judgment on a postpetition claim typically is stayed).

So, for example, if a holder of intellectual property sues for damages based solely upon prepetition infringement, where it would have been possible to commence the action prepetition, section 362(a)(1) clearly would apply to stay such an action. See, e.g., Bambu Sales, Inc. v. Sultana Crackers, Inc., 683 F. Supp. 899, 917 (E.D.N.Y. 1988) (plaintiff could not pursue its claim for prepetition damages for trademark infringement without seeking relief from the automatic stay). On the other hand, if the alleged infringement did not begin until after the bankruptcy petition was filed, the nondebtor could not have commenced the action prepetition,

so section 362(a)(1) would not stay the action. See, e.g., Alloc, Inc v.Unlin Decor N.V., 2005 WL 3448060 (E.D. Wis.); Laramie Ltd. v. Yes! Entertainment Corp., 244 B.R. 56, 58-59 (D.N.J. 2000), Broadcast Music, Inc. v. Game Operators Corp., 107 B.R. 326, 327 (D. Kan. 1989).

Courts have not agreed on the applicability of section 362((a)(1) where the debtor commits infringement activity both prepetition and postpetition. As one article notes:

Some courts view the postpetition infringement as separate and distinct from the prepetition infringement, while other courts treat the infringement as a single continuous act. The distinction is crucial because if the postpetition infringement is viewed as entirely distinct from the prepetition infringement, section 362(a)(1) will not apply to actions against the postpetition conduct. If, on the other hand, the postpetition infringement is viewed as a continuation of the prepetition infringement, the Automatic Stay will bar an action against the postpetition infringement as an action that could have been commenced prepetition. See Cieri, Olack and Witalec, “Protecting Technology and Intellectual Property Right when a Debtor Infringes on those Rights,” Am. Bankr. Inst. L. Rev. 349, 374 (2000).

For example, the court in Voice Systems and Services, Inc.v. VMX, Inc., 1992 WL 510121 (N.D. Okla.), found that postpetition infringement is independent from prepetition infringement for purposes of section 362(a)(1), even when an action was brought prepetition against the infringer for patent infringement. The plaintiff also sought a preliminary injunction to enjoin the debtor’s alleged patent infringement. The court found that the automatic stay did not apply to the injunction action, noting that the relief sought “does not involve pre-petition claims, but only seeks to enjoin post-bankruptcy petition alleged acts of patent infringement.” Id. at 11. The court found support for its conclusion in section 959(a) of the Bankruptcy Code, which provides that: “Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be

subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury.” The court noted that section 959(a) “has been held to constitute an exception to the section 362 automatic stay.” Id. at 10.

It has been pointed out that the view that postpetition infringement should be treated separately from prepetition infringement (and so not subject to the automatic stay) is consistent with the decisions of those courts finding that infringement by a debtor occurring prior to confirmation of the debtor’s plan for reorganization is separate and distinct from postconfirmation infringement. Those courts have found that even if a party fails to participate in a bankruptcy by failing to file a timely proof of claim and so is barred from pursuing claims based on preconfirmation infringement, that party may still pursue a cause of action based on infringement that continues postconfirmation. Also, treating postpetition infringement separately from prepetition infringement is supported by the general proposition under intellectual property law that each act of infringement by a party constitutes a separate and distinct wrong; each act of infringement is an independent tort. See generally Cieri at 376.

Nevertheless, some courts have concluded that the postpetition infringement is merely a continuation of prepetition conduct, thereby constituting a single wrong, and that the automatic stay remains in effect to bar the action for postpetition infringement. See, e.g., In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litigation, 140 B.R. 969, 976 (N.D. Ill. 1992) (the continuation during bankruptcy of conduct begun beforehand is most certainly one in which an action “was or could have been commenced” before commencement of the bankruptcy case); Nike, Inc. v. National Shoes, Inc. (In re National Shoes, Inc.), 18 B.R. 507, 509 (Bankr. D. Me. 1982) (bifurcating its claim between prepetition and postpetition infringement does not change the fact that its claim arose before the commencement of defendant’s chapter 11 case and this proceeding could have been commenced before the commencement of defendant’s chapter 11 case within the meaning of section 362(a)(1)).

In addition to section 362(a)(1), debtors have argued that section 362(a)(3) prevents

actions against them for violations of intellectual property rights. Section 362(a)(3) protects the bankruptcy estate by preventing “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.” Section 541 contains a broad, all encompassing definition of property of the estate that includes virtually all prepetition property. It defines property of the bankruptcy estate as including “all legal and equitable interests of the debtor in property as of the commencement of the case.” It is clear that property of the estate includes the debtor’s interests in intellectual property. See United States v. Inslaw, Inc., 932 F.2d 1467, 1471 (D.C. Cir. 1991) (it is undisputed that property of the estate includes the debtor’s intellectual property). Debtors have therefore argued that any attempt to restrict or limit a debtor’s use of its intellectual property is an attempt to exercise control over property of the estate, and so should be stayed.

For example, in In re Cinematronics, Inc., 111 B.R. 892 (Bankr. S.D. Cal. 1990), a creditor sought a temporary restraining order against the debtor’s use of debtor’s software that allegedly infringed on the creditor’s software. The court found that the restraining order was intended “to wrest the possession and management of [the software] away from [the debtor]” and that this was prohibited by section 362(a)(3). The court concluded that “these actions cannot be taken without leave of the bankruptcy court.” Id. at 897.

On the other hand, the court in Larami Ltd. v. Yes! Entertainment Corp., 244 B.R. 56 (D. N.J. 2000) found that a party seeking injunctive relief for patent infringement did not violate the automatic stay provision barring actions to exercise control over estate property. The court stated that section 362(a)(3) was intended to prevent interference with the bankruptcy court’s orderly disposition of estate property, and not to preclude post-petition suits to enjoin unlawful conduct. The court reasoned that “[i]f this section [362(a)(3)] were read to prevent the injunctive relief sought here, bankrupt businesses which operated post-petition could violate patent rights with impunity.” Id. at 61.

Commentators also have suggested:

Another reason that an action against the debtor for the violation of intellectual property rights – particularly an action to enjoin infringing conduct by the debtor – should not be stayed by section 362(a)(3) of the Bankruptcy Code is that the requested relief against the debtor will only be granted upon a finding that the debtor has no valid property rights in the infringing product. That is, upon a finding of a violation of intellectual property rights, the debtor’s alleged property rights in the infringing product will be deemed unlawful and invalid. With the debtor having no legitimate property rights in the infringing product, the product is not protected by section 362(a)(3) of the Bankruptcy Code. See Cieri at 380.

III. BAPCPA and Termination of the Automatic Stay

A. Failure to Comply with Section 521

Section 362(h), added by BAPCPA, provides for the termination of the stay as to certain personal property if the debtor fails to comply in a timely manner with certain requirements in section 521. Section 521 sets out a list of duties for debtors. For individual debtors with debts secured by property of the estate, section 521(2)(A) requires the filing of a statement of intention with respect to the retention or surrender of the secured property, and, if applicable, specifying that the property is being claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by the property. This must be done within thirty days of the filing of a petition under Chapter 7 or on or before the first meeting of creditors, whichever is earlier (or within such additional time as the court, for cause, fixes). In addition, section 521(2)(B), as amended by BAPCPA, requires the debtor to perform his intention with respect to such property within thirty days after the first date set for the meeting of creditors (or within such additional time as the court, for cause, within such thirty-day period fixes).

The previous version of the Bankruptcy Code did not state the consequences of a debtor's failure to fulfill its duties under Section 521. BAPCPA adds section 362(h)(1)(A), which provides that the automatic stay will terminate if a statement of intention is not timely filed which adequately indicates what the debtor intends to do with respect to the personal property. Even if an appropriate statement of intention is timely filed, new section 362(h)(1)(B) provides that the automatic stay will terminate if the debtor fails to timely take the action specified in the statement (unless the statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms).

There are questions that likely will arise concerning section 362(h). For example, if personal property securing a consumer debt is involved, the debtor may state an intention to claim the secured property as exempt and the lien voidable under section 522(f) or (h). This option is allowed under section 521(a)(2), but it is not listed in section 362(h)(1)(A). If the purpose of section 362(h) is to encourage debtor compliance with section 521, it would seem that the automatic stay should not terminate so long as the debtor does comply with section 521; Section 362(h) should not limit the debtor's options under section 521. Questions likely also will arise on whether a debtor has failed to timely take the action specified in the statement of intention, an event that triggers stay termination under section 362(h)(1)(B). For example, a debtor might make a timely statement of an intention to reaffirm the debt on the original contract terms, but the creditor may not respond to the offer within the time specified in section 521(a)(2). Or the debtor may state an intention to redeem but the court hearing required to determine the redemption amount may not be held within the time specified in section 521(a)(2). Various things may legitimately delay the debtor's performance of those things set out in the statement of intention. It has been suggested that;

Because of the consequences of stay termination, particularly when done automatically without a stay relief proceeding, courts may be reluctant to construe the phrase "take timely the action" in section 362(h)(1)(B) in a manner that would require complete performance of the stated option within the time specified if

extenuating circumstances exist. See Collier at § 362.10A

It also is very likely that confusion (and litigation) will arise because of new section 521(a)(6). This new section, which eliminates the “ride through” option which had been permitted by some courts, provides that an individual Chapter 7 debtor may not retain possession of personal property that is subject to a purchase money security interest unless the debtor, within forty-five days of the first meeting of creditors, either redeems the property or reaffirms the debt secured by the property. If the debtor fails to so act within this forty-five day period, the stay under section 362(a) is terminated with respect to the affected property. Section 521(a)(6) makes no reference to section 362.

The forty-five day time-frame set out in section 521(a)(6) is inconsistent with the thirty day time-frame set forth in section 521(a)(2). It is unclear how courts will interpret these sections together. One commentator suggests:

When different terminology is used in the same body of legislation an intentional differentiation is to be presumed. As for the two provisions of BAPCPA, § 521(a)(6) should be construed as setting forth a separate time frame for individual Chapter 7 debtors to act under a statement of intention as to personal property securing a PMSI. However, until the time difference is clarified, it may be in a Chapter 7 debtor’s best interest to reaffirm a PMSI or to redeem the collateral in which a creditor holds the PMSI by not later than thirty days after the first date set for the meeting of creditors Napoli, supra at 759.

There is a savings clause in section 362(h)(1)(B) which provides that the stay is not terminated if the debtor proposes to reaffirm the debt on the original contract terms and the creditor refuses to agree; the creditor, presumably, would have to move for relief from the stay. In addition, section 362(h)(2) provides that the stay is not automatically terminated if the court finds on the trustee’s motion that the property has value to the bankruptcy estate. The court may order that adequate protection be afforded to the secured creditor and that the collateral be

surrendered to the trustee. If the court denies the trustee's motion, the automatic stay terminates upon the conclusion of the hearing on the trustee's motion. It would appear that the termination is automatic, though it may be wise to obtain an order.

It also should be noted that BAPCPA adds section 362(k)(2), which provides that a creditor who violates the automatic stay because of a good faith belief that subsection (h) applies will only be liable for actual damages.

B. Unexpired Lease of Personal Property

Section 365(d)(1) provides that, in a Chapter 7 case, the trustee must assume or reject an unexpired lease of personal property within sixty days after the order for relief (or within such additional time as the court, for cause, within the sixty-day period fixes) or the lease is deemed rejected. Prior to BAPCPA, the Bankruptcy Code required the lessor of personal property under a rejected lease to seek relief from the stay before it could proceed to recover the leased property. New section 365(p)(1) provides that once a lease of personal property is rejected or not timely assumed, "the leased property is no longer property of the estate and the stay under section 362(a) is automatically terminated." It is likely that, in most individual Chapter 7 cases, the unexpired lease will have no value to the estate and will be rejected by the trustee. Such leases may have value to the debtor, though, and new section 365(p)(2) expressly permits the debtor and the lessor to communicate regarding the unexpired lease, and even to negotiate a cure, without violating the automatic stay (or the discharge injunction under section 542(a)(2)).

Section 365(d)(2) provides that, in Chapter 11 and 13 proceedings, an unexpired lease of personal property may be assumed or rejected at any time before the confirmation of a plan (unless the court, on request of a party to the lease, orders the debtor determine whether to assume or reject within a specified period of time). Sections 1123(b)(2) and 1322(b)(7) allow a debtor to address the assumption or rejection of unexpired leases through his plan, but prior to BAPCPA, there was no provision that failure to assume an unexpired lease of personal property

was a deemed rejection. New section 365(p)(3) provides that in Chapter 11 and 13 cases where the debtor is an individual, and an unexpired lease of personal property is not assumed in a confirmed plan, “the lease is deemed rejected as of the conclusion of the hearing on confirmation,” and “the stay under section 362 and any stay under section 1301 is automatically terminated with respect to the property subject to the lease.” If the lessor would rather not wait for the plan to be confirmed before taking action against the leased property, the lessor can still seek relief from the stay under section 362(d).

C. Multiple Bankruptcy Filings

1. Section 362(c)(3)

BAPCPA has added two new provisions to section 362(c) that apply when an individual has made multiple bankruptcy filings. Section 362(c)(3) generally limits the duration of the automatic stay in a case filed by a debtor who has had a prior case dismissed within the year. More specifically, it applies when the certain conditions exist. First, a single or joint case is filed by or against a debtor who is an individual in a case under Chapter 7, 11 or 13. So section 362(c)(3) applies in both voluntary and involuntary bankruptcy cases, but not in a case brought by a family farmer under Chapter 12. Second, a single or joint bankruptcy case of that same individual was pending within the preceding 1-year period. Most likely, a case is “pending” until it is fully administered and an order discharging the trustee has been entered, though it can be argued that a case is “pending” until it is actually closed on the court’s docket (the formal closing of the case is a ministerial act that does not have to occur within a specified period of time). Third, the prior case was dismissed, and fourth, the later case is not refiled in Chapter 11 or 13 after being dismissed under section 707(b). If these conditions are met, section 362(c)(3)(A) provides that the automatic stay “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.” (italics supplied).

The scope of section 362(c)(3) is not entirely clear. Instead of simply providing that the automatic stay would terminate thirty days after the filing, this section provides that the stay terminates “with respect to the debtor.” It would appear, therefore, that the stay would remain in effect as to “property of the estate,” which certainly weakens the deterrent effect of the provision. Also, because the 2005 amendments do not place any express or implied limitations on section 1301, it would appear that section 362(c)(3) does not prevent the application of the stay provided under section 1301 as to any consumer debt of the debtor with respect to actions taken against a codebtor on the debt.

New section 362(c)(3)(B) provides that a party in interest may move to keep the stay in effect if a motion is filed within thirty days after the filing of the current case, and if the moving party can show that the current case was filed in good faith. A number of courts have considered what constitutes “good faith” in the context of successive bankruptcy filings, and they generally have examined the totality of the circumstances surrounding the bankruptcy filing. Citing numerous cases, one writer has observed:

Factors considered include the debtor’s pre-petition conduct towards creditors; whether the debtor has any debts that could be nondischargeable in a Chapter 7 case; the amount of proposed payments to creditors through a plan of rehabilitation, the number of prior bankruptcy filings by the debtor and the ultimate disposition of those prior cases; the accuracy and completeness of the debtor’s schedules and “special circumstances” such as a debtor’s inordinate medical expenses. See Napoli at 768.

BAPCPA adds section 362(c)(3)(C) which provides that there is a presumption that the current case was filed in bad faith if the prior case was dismissed due to the debtor’s failure to file required documents or otherwise comply with a court order, or if the debtor failed in the first case to provide adequate protection as ordered by the court, or if the debtor failed to perform plan terms, and there has not been a substantial change in circumstances or any other reason to conclude that the debtor will carry the current case through to discharge. This presumption can

be overcome by “clear and convincing evidence to the contrary” which evidence would, presumably, include those factors considered by courts pre-BAPCPA. The presumption does not apply if the prior case was dismissed because the debtor entered into a debt repayment plan. See Section 362(i).

2. Section 362(c)(4)

Section 362(c)(4) prevents the automatic stay from taking effect in a case filed by a debtor who had two or more prior cases dismissed within the year. More specifically, this section applies when: (1) a single or joint case is filed by or against an individual under Chapter 7, 11, 12 or 13 (unlike section 362(c)(3), this section does apply to a subsequent case filed under Chapter 12); (2) that individual had two or more single or joint bankruptcy cases that were pending within the previous year; (3) those prior cases were dismissed; and (4) the later case is not refiled under Chapter 11, 12, or 13 after dismissal under section 707(b). If these conditions exist, the automatic stay does not go into effect upon the filing of the later case, and “on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect.” It appears that this requires the court to verify, without the benefit of a hearing, that the request for such an order was based upon the correct facts. As is true under section 362(c)(3), section 362(c)(4) permits a party in interest to request that the court order that the stay take effect, but that party has the burden of showing that the latest filing was in good faith, and must overcome any presumption of bad faith.

IV. BAPCPA and Relief from the Automatic Stay

A. *In Rem* Relief

BAPCPA adds section 362(b)(20), which excludes from the automatic stay actions to enforce liens or security interests in real property following entry of an *in rem* order as provided for in new 362(d)(4). Section 362(d)(4) provides that, upon the request of a creditor whose claim is secured by an interest in real property, the court may grant *in rem* relief from the automatic

stay if the court finds that the bankruptcy case was filed as part of a “scheme to delay, hinder, and defraud creditors,” either by the transfer of all or part of an interest in the realty without the secured party’s consent, or by multiple bankruptcy filings that affect the property (e.g., stopping foreclosure actions). Provided that the order is recorded in accordance with state real estate noticing laws, relief from the stay will have a binding effect in any other bankruptcy case that might be filed within two years of the entry of the order. Federal or state governmental units must accept a certified copy of the *in rem* order for indexing and recording. Sections 326(b)(20) and 326(d)(4) both provide that a debtor in a subsequent case may move for relief from such *in rem* order based on changed circumstances or for other good cause shown, after notice and a hearing.

Even prior to the 2005 Amendments, some courts were willing to issue *in rem* relief from the automatic stay under certain circumstances. In 1996, Chief Judge Geraldine Mund of the United States Bankruptcy Court for the Central District of California formed the Bankruptcy Foreclosure Scam Task Force to investigate abuses of the bankruptcy system occurring in the Central District, and to recommend various solutions to combat such abuses nationally. See “Final Report of the Bankruptcy Foreclosure Scam Task Force,” 32 Loyola L.A. L. Rev. 1063 (1999). The task force identified five foreclosure scams:

The first scam is the fractional interest transfer scam, where a borrower who is facing foreclosure transfers a percentage interest in his or her property to several other potential bankruptcy debtors. Each of these debtors successively files for bankruptcy upon the expiration of the prior party’s petition, thus invoking the automatic stay and delaying foreclosure indefinitely. The second scam is the serial filings by related debtors scam, where related individuals who have an interest in the property file several cases consecutively in order to delay foreclosure. The third scam involves voluntary dismissals of serial chapter 13 cases. In this scam the debtor asks the court to dismiss his or her case without prejudice. This voluntary dismissal avoids the 180-day re-filing bar imposed by section 109(g) of the Bankruptcy Code and allows the debtor to re-file

immediately, thus renewing the automatic stay. The fourth scam is the involuntary petition scam, which occurs when the debtor facing foreclosure pays a company to file an involuntary bankruptcy petition against the debtor, thus invoking the automatic stay. The fifth scam occurs when the bankruptcy petition is amended to add an alias name of the debtor, when in fact the name added is that of a person unrelated to the petition or the petitioner. The amended petition is subsequently recorded or otherwise used to stop foreclosure proceedings for the unrelated person. By using this scam, the persons added to the amended petition avoid having to pay for filing a bankruptcy petition and having their credit affected, because their social security number is not on the petition. See Pourakis, “Note: Final Report of the Bankruptcy Foreclosure Scam Task Force,” 7 Am. Bankr. Inst. L. Rev. 341, 342 (1999).

In order to help combat these scams, some courts prior to BAPCPA were willing to issue *in rem* relief orders. See, e.g., In re Golden State Capital Corp., 317 B.R. 144, 149 (Bankr. E.D. Cal. 2004) (the automatic stay should not be viewed as a “right” but more as a “privilege” which may be denied to those who abuse it; it is appropriate for the court to “implement an appropriate order to prevent the continuing abuse of the bankruptcy process” pursuant to 11 U.S.C. § 105(a)) Others, though, refused to issue *in rem* orders, finding that they had neither the authority (in *rem* relief was not mentioned anywhere in the Code) nor the jurisdiction (the judge is affecting the rights of parties not before her) to do so. See, e.g., In re Cherokee New York Investments, 1995 WL 458182 (Bankr. E.D.N.Y.) (“I can find no authority for my affecting prospective transferees of the subject property nor am I aware of my jurisdiction to do so.”) New section 362(d)(4) now clearly authorizes the issuance of *in rem* orders.