HOW AUTOMATIC IS THE AUTOMATIC STAY FOR THE REPEAT FILER?

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I. BAPCPA Amendments to Code § 362

The Bankruptcy Code offers the vast majority of debtors a discharge from most, if not all, of their debts — a "fresh start."[1] To that end, in the typical case an automatic stay arises under Bankruptcy Code § 362(a)[2] upon the filing of a bankruptcy petition that bars creditors from harassing the debtor, obtaining property of the debtor or the bankruptcy estate, or pursuing collection of pre-petition debts outside of the bankruptcy case. For many debtors this means that foreclosure or collection actions are at least stalled for a period of time while the bankruptcy case proceeds.[3] Not infrequently, debtors whose bankruptcy cases did not succeed or achieve the goals they sought will repeatedly file bankruptcy despite the "bankruptcy stigma."[4] For some, bankruptcy may, at least temporarily, still be the only answer to their continued misfortunes.

Since 1898, creditors have argued that repeat filers are abusing and manipulating the bankruptcy process.[5] For example, not long after the passage of the Bankruptcy Act of 1898, Congress amended the Act to restrict debtors from getting more than one discharge every six years.[6] That restriction was later increased to eight years under § 727(a)(8). The continued clamor against perceived abuses of the bankruptcy system spurred Congress to enact the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").

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[1] 11 U.S.C. § 524; *Perez v. Campbell*, 402 U.S. 637, 660 (1971) (*quoting Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549, 554-55 (1915) (describing an aim of the bankruptcy system to "relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes")).

[2] Unless otherwise indicated, the terms "Bankruptcy Code, "Code," "section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq*. as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 37.

[3] *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000).

[4] Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 Emory Bankr. Dev. J, 481, 483 (2006).

[5] Sara Sternberg Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 Am. Bankr. L.J. 241, 242 (2015).

[6] *See* Teresa Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, As We Forgive Our Debtors, 191 (1999).

While there are numerous provisions of BAPCPA designed to curb and redress abusive and manipulative debtor practices, these materials focus on the impact of §§ 362(c)(3) and (c)(4) on the availability of the automatic stay for repeat filers. Before the enactment of BAPCPA, the automatic stay was triggered every time a debtor filed for bankruptcy and "remain[ed] in force" until otherwise ordered by the court or by operation of § 362(c)(1) or (c)(2).[7] The addition of §§ 362(c)(3) and 362(c)(4) changed the landscape fairly dramatically for repeat filers. Debtors who have had one case dismissed within the past year will, under § 362(c)(3), lose the automatic stay protection on the 30th day after their petition is filed unless the stay is extended by the court. Debtors who have had two or more cases dismissed within the past year have no such protection; § 362(c)(4) provides that the automatic stay does not arise upon another case filing within that year period.

I. The Relevant Statutory Provisions

A. Section 362(a)

Section § 362(a) imposes the automatic stay upon the petition filing. The stay is designed to provide debtors a "breathing spell from [their] creditors" and obtain a discharge of their debts--in a chapter 7—or to propose a plan to repay their debts--in a chapter 11 or 13.[8] The automatic stay is actually a series of stays that operate against three broad types of actions: actions against the debtor, actions against property of the debtor, and actions against property of the bankruptcy estate.[9] More specifically, the filing of a bankruptcy case, under most circumstances, automatically stays:

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[7] *Soares v. Brockton Credit Union (In re Soares)*, 107 F.3d 969, 975 (1st Cir. 1997). The automatic stay terminates under § 362(c)(1) when property ceases to be property of the estate and under § 362(c)(2) when the case is closed or dismissed or an individual debtor's discharge enters.

[8] H.R. Rep. 95-595, at 340 (Sept. 8, 1977), *reprinted in* 1978 U.S.C.C.A.N. 6296, 6297.

[9] *See* 11 U.S.C. § 362(a).

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.[10]

Congress recognized that the automatic stay is one of the "fundamental" protections of the Bankruptcy Code.[11] But the protection is not limited to just the debtor; it also protects creditors by stopping the race to the courthouse.[12] The stay furthers the purposes of the Bankruptcy Code by "centraliz[ing] all disputes concerning property of the debtor's estate" [13]

[10] 11 U.S.C. § 362(a).
[11] H.R. Rep. 95-595, at 340 (Sept. 8, 1977), *reprinted* in 1978 U.S.C.C.A.N. 6296, 6297. *See* Donna Renee Tobar, *The Need for a Uniform Void Ab Initio Standard for Violations of the Automatic Stay*, 24 Whittier L. Rev. 3, 3 (2002).
[12] *In re Whitaker*, 341 B.R. 336, 341 (Bankr. S.D. Ga. 2006).
[13] *SEC v. Brennan*, 230 F.3d 65, 75 (2d Cir. 2000) (quoting *U.S. Lines v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re U.S. Lines, Inc.)*, 197 F.3d 631, 640 (2d Cir. 1999)).

and ensuring "that assets are distributed according to the order of priorities established by Congress."[14]

After a long lobbying effort by the credit industry,[15] in 2005 Congress enacted BAPCPA "to correct perceived abuses of the bankruptcy system."[16] The report of the National Bankruptcy Review Commission of the House of Representatives summarized the particular concern raised by abusive repeat filings in chapter 13 cases:

> Some debtors file for Chapter 13 only to obtain access to the special tools offered in Chapter 13. . . . By filing, they get the benefit of the automatic stay, negotiate with that one creditor, and then allow their cases to be dismissed. If the negotiated deal does not work, they file again to obtain another automatic stay to repeat the negotiation process. The lack of discharge accompanying dismissal enables these debtors to file again, potentially for the same reasons.
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> Others file on the eve of a foreclosure or eviction for the sole purpose of delaying the state legal process. When the threat passes, they dismiss their case, only to file again when the mortgagee or landlord brings another legal action to seize control of the property. The ability to file repeatedly for Chapter 13 relief increases a debtor's leverage in negotiations with creditors. In regions where this problem is particularly acute, judges have devoted significant time and resources to developing tools to address this problem.[17]

But Congress's concern about abusive use of the automatic stay by repeat filers was broader. The amendments to § 362 apply to individuals who repeatedly file bankruptcy.

B. Sections 362(c)(3) and (c)(4)

The aim of §§ 362(c)(3) and (c)(4) is to disincentivize repeat filing by limiting the effect of the automatic stay when debtors attempt to invoke it for the second or third time within a year of their last prior case. In their entirety, subsections (c)(3)(A) and (c)(4)(A)(i) state:

> **(c)** Except as provided in subsections (d), (e), (f), and (h) of this section—

[14] *In re Whitaker*, 341 B.R. at 341.
[15] *See* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. Ill. L. Rev. 375, 376 (noting the extensive benefits gained by the credit industry as a result of its lobbying efforts).
[16] *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 231-32 (2010).
[17] Nat'l Bankr. Review Comm'n, Report of the National Bankruptcy Review Commission § 1.5.5, p. 278-79 (footnotes omitted) (Oct. 20, 1997), available at http://govinfo.library.unt.edu/nbrc/reportcont.html.

. . .

> **(3)** if 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, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
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> **(A)** the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
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> . . .
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> **(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 a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case. . . .[18]

Each subsection is discussed in greater detail below.

II. Section 362(c)(3)

To prevent termination of the stay (at least as to the debtor) 30 days after the petition filing, a party in interest may move to extend the stay but must adhere to the requirements of § 362(c)(3)(B). Subsection (c)(3) is triggered if four conditions are met: (1) a single or joint case is filed by or against an individual under Chapter 7, 11, or 13; (2) that same individual had one bankruptcy case pending within the preceding 1-year period; (3) the prior case was dismissed; and (4) the prior case was not dismissed under § 707(b).[19] If all these conditions are present, the automatic stay will terminate by operation of law "with respect to the debtor" on the 30th day

[18] 11 U.S.C. § 362(c)(3) and (c)(4). (Section 707(b) generally relates to a consumer chapter 7 case dismissed on a finding of abuse of the bankruptcy process because of income that is enough to pay a meaningful dividend to creditors under a chapter 13 plan).
[19] *See* 11 U.S.C. § 362(c)(3).

after filing for bankruptcy, unless the court extends the stay.[20] Not only must the party seeking such extension file the motion prior to the expiration of the 30-day period, *the court must hear the matter and enter an order extending the stay within such period*.[21] To succeed, § 362(c)(3)(B) requires the moving party to establish that the present case was filed "in good faith as to the creditor or creditors to be stayed."[22] This same requirement applies to debtors seeking to impose the stay as to any creditor under § 362(c)(4), and will be discussed later.

A. If the Stay Expires, What Is the Extent of Such Termination?

Unfortunately, the statute is not a paradigm of clarity. It is awkwardly worded, and courts have struggled to interpret § 362(c)(3)(A). The primary issue that has flummoxed the courts when § 362(c)(3) is applicable is whether by virtue of subsection (A) the stay terminates entirely or only as to the debtor and the debtor's property. A split in the circuit courts recently arose. The First Circuit, following the minority view, concluded that the stay terminates completely under this provision at the end of the 30-day period.[23] The Fifth Circuit, following the majority view, found just the opposite and concluded that the stay terminates as to the debtor and property of the debtor, but remains in full force as to property of the estate.[24]

The stumbling block for courts is the meaning of the redundant phrase in § 362(c)(3)(A): "with respect to the debtor." Most courts view this provision unambiguous, albeit poorly worded. They focus on the terms in this subsection "with respect to a debt or property securing such debt or with respect to any lease" and "with respect to the debtor," and construe the language literally as applying only to the debtor and the debtor's property.[25] A minority of courts, including the

[20] *In re Radson*, 462 B.R. 911, 913 (Bankr. S.D. Fla. 2011) (citing *In re Garrett*, 357 B.R. 128, 131 (Bankr. C.D. Ill. 2006)).
[21] *Id.*
[22] *See* 11 U.S.C. § 362(c)(3)(B).
[23] *In re Smith*, 910 F.3d 576, 578 (1st Cir. 2018).
[24] *Rose v. Select Portfolio Servicing, Inc.*, 945 F.3d 226, 231 (5th Cir. 2019).
[25] *See Abernathy, LLC v. Smith*, 2014 WL 4925654, *4 (N.D. Ga. Sept. 30, 2014).

First Circuit, view the subsection ambiguous and turn to legislative history and purpose of BAPCPA to discern its proper interpretation, concluding that the legislative intent is that the stay terminate entirely.[26] This split has been apparent even within bankruptcy court districts.[27] As a third approach, one bankruptcy court concluded that the stay terminates in its entirety as to a particular creditor if that creditor had previously taken "any action . . . with respect to a debt or property securing such debt or with respect to any lease."[28]

i. The majority approach

Relying on principles of textualism, the Fifth Circuit found § 362(c)(3)(A) to be unambiguous. The plain meaning of the subsection in its use of the words "with respect to the debtor," the court opined, is that the stay terminates only as to proceedings against the debtor and "property of the debtor."[29] "It is an axiom of statutory interpretation that the plain meaning of an unambiguous statute governs, barring exceptional circumstances."[30] And to determine a statute's

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[26] *See In re Smith*, 910 F.3d at 591.

[27] *See In re Jones*, 339 B.R. 360 (Bankr. E.D.N.C.2006) (holding that the stay terminates as to "the debtor" and "property of the debtor," but not as to "property of the estate"); *but see In re Dev*, 593 B.R. 435 (Bankr. E.D.N.C. 2018) (holding that the stay terminates in its entirety).

[28] *See In re Bender*, 562 B.R. 578, 585 (Bankr. E.D.N.Y. 2016); 11 U.S.C. § 362(c)(3)(A).

[29] *See Rose,* 945 F.3d 226. *See also* lower courts adopting the majority approach: *Abernathy, LLC,* 2014 WL 4925654; *Chekroun v. Weil (In re Weil)*, 2013 WL 1798898, (D. Conn. Apr. 29, 2013); *U.S. Bank Nat'l Assoc. v. Mortimore (In re Mortimore)*, 2011 WL 6717680, (D.N.J. Dec. 21, 2011); *Witkowski v. Knight (In re Witkowski)*, 523 B.R. 291 (1st Cir. B.A.P. 2014); *Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813 (10th Cir. B.A.P. 2008); *Jumpp v. Chase Home Fin., LLC (In re Jumpp)*, 356 B.R. 789 (1st Cir. B.A.P. 2006); *In re Roach*, 555 B.R. 840 (Bankr. M.D. Ala. 2016); *In re Daux*, 2016 Bankr. LEXIS 2696 (Bankr. D.N.J. Jul. 22, 2016); *In re Hale*, 535 B.R. 520 (Bankr. E.D.N.Y.2015); *In re Williford*, 2013 WL 3772840, (Bankr. N.D. Tex. Jul. 17, 2013); *In re Rodriguez*, 487 B.R. 275 (Bankr. D. N.M. 2013); *In re Scott–Hood*, 473 B.R. 133 (Bankr. W.D.Tex.2012); *In re Rueth*, 2012 Bankr. LEXIS 5249 (Bankr. N.D. Ind. Nov. 8, 2012); *Rinard v. Positive Investments, Inc. (In re Rinard)*, 451 B.R. 12 (Bankr. C.D. Cal. 2011); *In re Alvarez*, 432 B.R. 839 (Bankr. S.D. Cal. 2010); *In re Dowden*, 429 B.R. 894 (Bankr. S.D. Ohio 2010); *In re Robinson*, 427 B.R. 412 (Bankr. W.D. Mich. 2010); *In re Graham*, 2008 WL 4628444 (Bankr. D. Or. Oct. 17, 2008); *Independent Dealers Advantage, LLC v. Milledge (In re Milledge)*, 2008 WL 7866897 (Bankr. N.D. Ga. Apr. 10, 2008); *In re Stanford*, 373 B.R. 890 (Bankr. E.D. Ark. 2007); *In re Ajaka*, 370 B.R. 426 (Bankr. N.D. Ga. 2007); *In re Tubman*, 364 B.R. 574 (Bankr. D. Md. 2007); *In re McFeeley*, 362 B.R. 121 (Bankr. D. Vt. 2007); *In re Simonson*, 2007 WL 703542, (Bankr. D.N.J. Mar. 2, 2007); *In re Rice*, 392 B.R. 35 (Bankr. W.D.N.Y. 2006); *In re Pope*, 351 B.R. 14 (Bankr. D.R.I. 2006); *In re Murray*, 350 B.R. 408 (Bankr. S.D. Ohio 2006); *In re Brandon*, 349 B.R. 130 (Bankr. M.D.N.C. 2006); *Bankers Trust Co. of Cal. v. Gillcrese (In re Gillcrese)*, 346 B.R. 373 (Bankr. W.D. Pa. 2006); *In re Williams*, 346 B.R. 361 (Bankr. E.D. Pa. 2006); *In re Harris*, 342 B.R. 274 (Bankr. N.D. Ohio 2006); *In re Jones*, 339 B.R. 360; *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio 2006); *In re Johnson*, 335 B.R. 805 (Bankr. W.D.Tenn.2006).

[30] *Wachovia Bank, N.A. v. Schmidt*, 388 F.3d 414, 416 (4th Cir. 2004) (*rev'd on other grounds)*.

plain meaning, courts must look at "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."[31]

The Fifth Circuit's interpretation aligns with that of the majority approach. The court noted that the phraseology in the subsection is similar to that used in other subsections of § 362 which distinguish between "the debtor," "property of the debtor," and "property of the estate." By way of example, the court highlighted the language contained in § 362(a)(1) which stays actions "against the debtor," § 362(a)(2) which stays enforcement of a judgment "against the debtor or against property of the estate," § 362(a)(3) which stays "any act to obtain possession of property of the estate," § 362(a)(4) which stays "any act to create, perfect, or enforce any lien against property of the estate," § 362(a)(5) which stays "any act to create, perfect, or enforce against property of the debtor any lien" securing a prepetition claim, and § 362(a)(6) which stays "any act to collect, assess, or recover a claim against the debtor. . . ."[32] The court turned to the general principles of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[33] The Fifth Circuit reasoned that by stating that the stay terminates only "with respect to the debtor," Congress implied that the stay continues for actions against the property of the estate. Indeed, if Congress intended to terminate the stay in its entirety on the 30th day, it could have simply deleted the phrase "with respect to the debtor."[34] Further, Congress knew how to terminate the automatic stay in its

[31] *Robinson v. Shell Oil Co*., 519 U.S. 337, 341 (1997).
[32] *See* 11 U.S.C. § 362(a)(1), (2), (3), (4), (5), and (6).
[33] *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotation marks, brackets, and ellipsis omitted).
[34] *Rose,* 945 F.3d at 231.

entirety because subsection (c)(4) states that for debtors with two or more cases "the stay under subsection (a) shall not go into effect upon the filing of the later case."[35]

The majority approach determines that a literal interpretation of subsection (c)(3) is not "at odds with the intentions of its drafters."[36] Indeed, the Fifth Circuit concluded that this interpretation of § 362(c)(3) does not substantially harm creditors and is not inconsistent with BAPCPA.[37]

ii. The minority approach

The minority view interprets § 362(c)(3) as fully terminating the stay for all parties and to all property of the debtor and the estate unless the debtor or a "party in interest" successfully obtains an extension. These courts criticize the majority approach because it "largely eviscerates the provision," since "[i]t would be a very rare instance when an individual debtor would need to seek an extension of the stay under § 362(c)(3)(B) because all of the property of the estate would continue to be protected without doing so."[38] Adopting this construct of subsection (c)(3), the First Circuit rejected the rationale that "with respect to the debtor" could encompass only property of the debtor, but not property of the estate.[39] It noted that no court has ever read this subsection to terminate the stay only "with respect to the debtor." Rather, most courts have concluded that the stay terminates with respect to both the debtor and property of the debtor.[40] Given that the phrase "with respect to the debtor" is construed as including property of the debtor, the court explained, there is no reason why it should not also encompass property of the

[35] 11 U.S.C. § 362(c)(4).
[36] *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).
[37] *Rose*, 945 F.3d at 231.
[38] *In re Alvarez*, 432 B.R. 839, 841 (Bankr. S.D. Cal. 2010).
[39] *In re Smith*, 910 F.3d at 583.
[40] *Supra* at 29.

estate; "the bankruptcy estate is as much a 'matter[ ] relating to th[e] subject' of the debtor as is the debtor's property."[41]

Nor was the First Circuit persuaded by the argument that the canon of statutory construction, "expressio unius est exclusio alterius," ("expressing one item of an associated group excludes another left unmentioned"[42])—here the debtor and property securing such debt—implies that Congress intended to exclude the omitted item, "property of the estate." This argument, the First Circuit explained, would have been more persuasive if subsection (c)(3)(A) mirrored the language of § 362(a) and stated that the stay terminated as "against the debtor" and "against property of the debtor," but left out "property of the estate."[43] Hence, the court did not find the omission of a reference to "property of the estate" to be significant; the phrase "with respect to the debtor," the court reasoned, could still encompass property of the estate. In fact, the court continued, subsection (c)(3) was so poorly worded that canons like "expressio unius," which assume that Congress "has been able to choose each word and to crafted each phrase with precision, and with technical rules like the canons in mind" – an assumption that "does not hold for § 362" – were not helpful.[44]

The court then turned to the statutory context and congressional purpose.[45] Focusing on the application of the automatic stay for first time filers and the absence of the stay for debtors filing two or more petitions within a year of the dismissal of a prior case, the court found that the statutory context of § 362 proposed a system of "progressive protection." So, protection for second-time filers fell "in the middle" of the continuum—a stay for 30 days that expires in its

[41] *In re Smith*, 910 F.3d at 583.
[42] *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 73 (2002).
[43] *In re Smith*, 910 F.3d at 583.
[44] *Id.* at 584.
[45] *Id.* at 585-86.

entirety once that period expires.[46] The majority's approach, the court concluded, does not explain why "Congress would have 'draw[n] such seemingly arbitrary distinctions' between second-time and other repeat filers."[47]

Finally, the First Circuit relied on the report of the House Judiciary Committee[48] and determined that its purpose is "best achieved by interpreting § 362(c)(3)(A) to terminate the entire stay, including as to estate property," because "[t]he portion of the stay that is most valuable to a bankruptcy petitioner, just as to a creditor, is the portion that protects estate property.[49]

iii. The alternative approach

For the sake of completeness, we briefly mention a somewhat hybrid approach taken by the Bankruptcy Court for the Eastern District of New York. That court interpreted § 362(c)(3)(A) to terminate the stay as to proceedings commenced prepetition that concerned a "debt," "or property securing such debt," or "any lease"—regardless of whether the collateral or lease is property of the debtor or property of the estate.[50] In its view, the last referenced phrase in the subsection "with respect to the debtor," did not exclude property of the estate, but merely clarified that "in cases jointly filed by a married couple the stay is only terminated" as to the repeat filer.[51] Congress, the court observed, meant "to protect the secured creditor or lessor seeking to continue judicial, administrative or other proceedings commenced prepetition with respect to debts, property securing such debts or leases."[52]

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[46] *Id*.
[47] *Id*. at 587 (quoting *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S.Ct. 1752, 1761(2018)).
[48] H.R. Rep. No. 109-31(I), at 69 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 138.
[49] *In re Smith*, 910 F.3d at 590.
[50] *In re Bender*, 562 B.R. at 583.
[51] *Id*. at 585.
[52] *Id.*. at 580.

The *Bender* court's interpretation has been criticized for its emphasis on the words "any action" to conclude that the stay terminates relative to pre-petition filed actions.[53] As one court stated, when the phrase "action taken," is read in the context of the entire section, "its application is not limited to creditors that have taken action prior to the pendency of the current case."[54]

III. Bankruptcy Code § 362(c)(4)

With BACPCA's addition of § 362(c)(4), Congress sought to prevent abuse of the bankruptcy system by serious repeat filers (debtors with three or more cases pending within a year) who intend to take advantage of the automatic stay, typically to stall a foreclosure sale or an eviction action. This amendment provides that the automatic stay does not go into effect upon the filing of the third (or more) case within a one year period.[55] Subsection (c)(4) is triggered if four conditions are met: (1) a single or joint case is filed by or against an individual under Chapter 7, 11, 12, or 13; (2) that same individual had two or more bankruptcy cases pending within the preceding one year period; (3) the prior cases were dismissed; and (4) the later filed case is not a Chapter 11, 12, or 13 case that is being refiled after dismissal pursuant to § 707(b).[56] Further aiding creditors, any party in interest may request that the court enter an "order confirming that no stay is in effect."[57]

A debtor for whom the stay does not arise upon the petition filing is not without a remedy. Under § 362(c)(4)(B), the debtor or other party in interest may request that the court impose the stay as to a particular creditor or all creditors. The request, however, must be made within 30 days of the petition filing.[58] But unlike subsection (c)(3), the court does not need to act

[53] *In re Goodrich*, 587 B.R. 829, 848 (Bankr. D. Vt. 2018) (rejecting *Bender*'s interpretation and holding that neither the text, nor Congressional intent support the *Bender* view).
[54] *In re James*, 358 B.R. 816, 819 (Bankr. S.D. Ga. 2007).
[55] *See* 11 U.S.C. § 362(c)(4).
[56] *Id*.
[57] 11 U.S.C. § 362(c)(4)(A)(ii).
[58] *See* 11 U.S.C. § 362(c)(4)(B).

on the motion within the 30-day period.[59] However, the application of the stay is not retroactive; it becomes effective on the date of the court order imposing the stay.[60]

IV. The Good Faith Requirement

Both §§ 362(c)(3)(B) and (c)(4)(B) have a good faith mandate. The stay cannot be extended or imposed unless the moving party establishes that the pending case was filed in good faith.

A. Extending the Stay Under § 362(c)(3)

Four elements must be satisfied for the court to grant an extension of the stay: (1) the motion to extend the stay is filed within 30 days of the petition filing date; (2) there is notice and a hearing on the motion; (3) the moving party demonstrates that the pending case was filed in good faith as to the creditor or creditors to be stayed; and (4) the matter is heard and the order is entered extending the stay within the 30-day period.[61]

In considering a motion to extend the stay, it is necessary for the court to determine if a presumption of bad faith filing is activated under the provisions of subsection (c)(3)(C). If it is not, the evidentiary standard to establish good faith filing is a preponderance of the evidence. But in cases where the presumption of bad faith is activated, the moving party must rebut the presumption by clear and convincing evidence.[62] Because the good faith filing element is fact specific, an evidentiary hearing is often necessary, particularly if a party objects. This presents especially constrained time frames for the moving party because the hearing must be completed and the order granting the stay extension must be entered before the 30-day period lapses.

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[59] *See In re Clark*, No. 19-10698-JDW, 2019 WL 2488146, *3 (Bankr. N.D. Miss. May 9, 2019).
[60] *See* 11 U.S.C. § 362(c)(4)(C).
[61] 11 U.S.C. § 362(c)(3)(B).
[62] *See* 11 U.S.C. § 362(c)(3)(C).

Expeditious filing of the motion seeking stay extension is critical. The relevant statutory text reads:

> **(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. . . . [63]

B. Imposing the Stay Under § 362(c)(4)

A presumption of bad faith always arises when § 362(c)(4) applies.[64] The provision states that a case is presumptively filed in bad faith if the debtor has two or more cases pending within one year, which is exactly what triggers subsection (c)(4). This section provides:

> **(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 the 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

[63] 11 U.S.C. § 362(c)(3)(B), (C).
[64] *See* 11 U.S.C. § 362(c)(4)(D).

> **(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.[65]

C. The Good Faith Analysis

The Bankruptcy Code does not define "good faith." To fill this void, courts have turned to common law and proposed various nonexclusive tests to determine if the good faith mandate has been satisfied. Under the case law, the general framework courts utilize to determine if the current bankruptcy case has been filed in good faith has both an objective and subjective component.[66]

Under the objective component, courts analyze whether the case is likely to result in a discharge.[67] This analysis is important because, as one court observed:

> [T]he Court has difficulty conceiving of a case that could be filed in good faith without a reasonable probability of success. Put simply, it cannot be good faith to attempt to stay a creditor from proceeding if the debtor does not have a meaningful chance of success in the bankruptcy case. Second, the Court is influenced by the language contained in § 362(c)(3)(C)(i)(III)(aa)-(bb), which requires an analysis of the likelihood of success on the merits of the new case. Third, § 362(c)(3) and (c)(4) were apparently adopted to address a problem that posed significant concern under the prior version of the Bankruptcy Code…. By adopting § 362(c)(3) and (c)(4), Congress appears to have chosen to limit the stay in repeat cases to those with a meaningful chance of success.[68]

In Chapter 13 cases where the extension or imposition of the stay is most meaningful, courts have generally adopted the test for good faith required for confirmation of a plan in §1325(a)(3)—considering the likelihood that the plan will be successful.[69] Finding that there has

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[65] *Id*.
[66] *See In re Charles*, 334 B.R. 207, 218 (Bankr. S.D. Tex. 2005).
[67] *Id*.
[68] *Id*. at 218-19.
[69] *See, e.g., In re Scipio*, 2015 WL 1014557, *2 (Bankr. M.D.N.C. Mar. 2, 2015) (considering the likelihood that the debtor will have a steady income and be able to complete the plan and get a discharge); *In re* Carr, 344 B.R. 776, 781 (Bankr. N.D. W.Va. 2006) (considering the reasonable probability of success).

not been a substantial change in circumstances since the debtor's last dismissed case or that there is not a reasonable probability that the plan in the pending case will be successfully completed is adequate grounds for a court to decline to extend or impose the stay.[70] However, even if a court declines to extend or impose the stay, a debtor can still achieve subsequent confirmation of a plan if the court finds that the specific plan is feasible and filed in good faith.[71]

For the subjective good faith component, courts undertake a "totality of the circumstances" analysis.[72] The case law has developed a laundry list of non-exhaustive factors that courts may consider in undertaking this analysis, which include:

- Whether the debtor's circumstances have changed since the prior dismissal and the likelihood that the debtor will be able to properly fund a plan;[73]
- Whether the case trustee or creditors object to the motion to extend;[74]
- The nature of the debts;[75]
- The nature of any collateral;[76]
- Why the debtor's prior case was dismissed, including the debtor's conduct in that case;[77]
- The debtor's conduct in the present case;[78]

[70] *See In re Thornes*, 386 B.R. 910-11 (Bankr. S.D. Ga. 2007) (holding that even though the attorney was partly at fault, the debtor did not prove by clear and convincing evidence that there has been a substantial change in circumstances and that the plan had reasonable probability of success).
[71] *In re Dyer*, 489 B.R. 637, *7 (6th Cir. B.A.P. 2013) (holding that the Bankruptcy Code does not "require[] the Debtors to extend the automatic stay, and case law has confirmed that the extension of the stay is not a *per se* requirement for the confirmation of the Debtors' Chapter 13 plan and the continuation of the Debtors' case.").
[72] *See In re Muhammad*, 536 B.R. 469, 475 (Bankr. M.D. Ala. 2015).
[73] *See In re Baldassaro¸* 338 B.R. 178, 188 (Bankr. D.N.H. 2006).
[74] *Id*.
[75] *See In re Charles*, 334 B.R. at 219.
[76] *Id*.
[77] *See In re Baldassaro¸* 338 B.R. at 188.
[78] *See In re Charles*, 334 B.R. at 219.

- Reasons why the debtor wishes to extend the stay, and whether the Bankruptcy Code is being unfairly manipulated;[79]
- The debtor's history of filings and dismissals;[80]
- The period of time that elapsed between the debtor's filings;[81]
- The debtor's pre-petition behavior;[82] and
- The effect of the debtor's repeated filings on creditors.[83]

V. Imposing the Stay After the 30-day Period

Although some courts will not allow an end-run against the time limits of subsections (c)(3)(B) and (c)(4)(B),[84] a number of courts will still permit a debtor who has missed the 30-day window under these subsections to seek a stay. There is some disagreement among the courts on the procedure and the standards that apply. Before the Supreme Court decided *Law v. Siegel*,[85] some courts invoked their equitable powers under Code § 105(a) to impose the stay.[86] However, relaying on the court's equitable powers to impose the stay is questionable after the Supreme Court's rebuke in *Law v. Siegel* against the use of § 105(a) "to override explicit mandates of other sections of the Bankruptcy Code." [87] There the Court warned that "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[88] Acknowledging the limitations of the courts' § 105(a) equitable

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[79] *See In re Baldassaro¸* 338 B.R. at 188; *In re Charles*, 334 B.R. at 219.
[80] *See In re Ajunwa*, No. 11-11363 (ALG), 2012 WL 3820638, *4 (Bankr. S.D.N.Y. Sept. 4, 2012).
[81] *See In re Twiggs*, 2007 Bankr. LEXIS 2378, at *5 (Bankr. D.S.C. Mar. 28, 2007); *In re Baldassaro¸* 338 B.R. at 188.
[82] *See In re Twiggs*, 2007 Bankr. LEXIS 2378, *5.
[83] *Id.*; *In re Baldassaro¸* 338 B.R. at 188.
[84] *See In re Clark,* 2019 WL 2488146, *3.
[85] 571 U.S. 415 (2014).
[86] *See In re Whitaker*, 341 B.R. 336, 348 (Bankr. S.D. Ga. 2006) (holding that the automatic stay had terminated by operation of law under § 362(c)(3) and employing § 105(a) to reimpose the stay as to all creditors); *In re Franzese*, No. 07-14518-BKC-RBR, 2007 WL 2083650, *4 (Bankr. S.D. Fla. July 19, 2007) (holding that the automatic stay, although terminated by § 362(c)(3), can be imposed after the 30-day period under § 105(a)).
[87] *Law*, 571 U.S. at 421.
[88] *Id.* (internal citations omitted).

powers, one court concluded that "[u]sing § 105(a) to extend the clear statutory deadline or to impose a different yet identical stay, would provide relief directly contrary to the clear text of § 362(c)(3)(A) and § 362(c)(3)(B). It simply cannot be done."[89]

Other courts permit a moving party to seek imposition of the stay beyond the 30-day time constraints through the commencement of an adversary proceeding in accordance with Rule 7001(7) of the Federal Rules of Bankruptcy Proceedings and only where all grounds for injunctive relief have been satisfied.[90] While a deeper dive into the complex issues implicated for injunctive relief is beyond the scope of these materials, the standards governing such relief are fairly rigorous.

[89] *In re Martinez*, 515 B.R. 383, 386 (Bankr. S.D. Fla. 2014).

[90] *See State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1079 (10th Cir. 1996) ("Courts have uniformly held that a request to reimpose the automatic stay under [§] 105(a) constitutes 'a proceeding to obtain an injunction or other equitable relief' under [Bankruptcy] Rule 7001(7), which requires the filing of an adversary proceeding.") (citing cases); *In re Bora Bora Inc.*, 424 B.R. 17, 24 (Bankr. D.P.R. 2010) ("A request for injunctive relief [under § 105(a)] must be brought by adversary proceeding.") (citations omitted); *In re Jarman*, No. 03–22430, 2004 Bankr. LEXIS 984, *3 (Bankr. E.D. Ky. July 21, 2004) (ruling that a request for the imposition of a new automatic stay "requires the initiation of an adversary proceeding [pursuant to Bankruptcy Rule] 7001(7), and a showing as to the prerequisites to the entry of an injunction"); *Nasco P.R., Inc. v. Chemical Bank (In re Nasco P.R., Inc.)*, 117 B.R. 35, 38 (Bankr. D.P.R. 1990) ("A party wishing to invoke the Court's injunctive power under [§] 105(a) must file an adversary proceeding . . . and must follow the traditional standards for the issuance of an injunction."); *but see In re Simonson*, No. 06-22833 (MBK), 2007 WL 703542, at *3 n.1 (Bankr. D.N.J. Mar. 2, 2007) ("The Court does not suggest that the filing of an adversary proceeding will always be required to reinstate the automatic stay, and notes that the Court may waive such a requirement when the facts and circumstances so warrant.") (citing cases). *See also In re Flynn*, 582 B.R. 25, 30-32 (1st Cir. B.A.P. 2018) (discussing case law on the standards for seeking to impose the stay after the statutory time deadlines have lapsed).

KEY TAKEAWAYS: STAY EXTENSION AND STAY IMPOSITION

a. **Is Your Client a Repeat Filer?** Always ask your client if he/she has filed bankruptcy before, and verify via PACER any prior cases and the dates of each filing and dismissal.

b. **Promptly File Motion for Stay Extension or Imposition of Stay.** Best practice is to file such motion, to the extent warranted, with the filing of the petition as the court must act on the motion (in the case of an extension) within 30 days of the petition filing. Be mindful of the standard objection period; and if the usual objection deadline (14 days plus 3 additional days for service by mail) will not enable sufficient time for both objections and a hearing, ask for emergency or expedited consideration as appropriate.

c. **Apprise Court of Critical Dates**. Motion to extend stay should inform court of the date the stay will otherwise expire, the date by which action on the motion needs to be taken (if requesting an extension of the stay).

d. **Consult Court's Local Rules and Practice Orders.** Be sure to review your court's local rules and administrative and procedure orders for any that are applicable to motions to extend or impose the stay.

e. **Appropriate Service of Motions Is Important.** Due to the shortened time frame, take extra care in serving motions to extend or impose the stay; don't serve secured creditors through a P.O. box unless that is the creditors' official BNC notice address; if possible use secured creditors' headquarters as the service address and address to a named officer. If a federally insured financial depository institution is a secured creditor in the case, serve the creditor in accordance with

Fed. Rule Bankr. P. 7004 and on its registered agent. A court will be more comfortable entering an order in your favor with such service if the creditor does not respond to the motion.

f. **Use Expedited Service Method.** If you seek to shorten the objection period or file a motion to extend/impose stay on an emergency or expedited basis, serve secured creditors and governmental agencies by overnight mail; regular mail may not be timely.

g. **Is There a Presumption of Abuse?** Review § 362(c)(3)(C) if seeking to extend the stay to determine if a presumption of abuse arises. Remember, the presumption of abuse always arises under § 362(c)(4)(D) for a debtor who has filed more than one case within the prior year. The standard to rebut the presumption is clear and convincing evidence. In a chapter 13 case, the focus is on a debtor's change in financial circumstances or personal affairs such that it is probable that the plan proposed is feasible, confirmable, and will be completed.

h. **Creditors: Request a Comfort Order or Promptly Seek Stay Relief If Applicable.** Take advantage of § 362(j) to request a comfort order where no stay arises upon the petition filing or it has expired under § 362(c)(3)(A). Also, determine if your court follows the majority or minority rule as to whether the stay expires entirely 30 days after the petition date or considers the stay still in effect for the estate after such time period. In jurisdictions that follow the majority rule, that the stay only terminates as to the debtor and property of the debtor, promptly seek stay relief as to the estate if it has expired as to the debtor or will expire under § 362(c)(3).

i. **Know the Law in Your Jurisdiction on Stay Imposition if 30-Day Period Has Lapsed.** Some courts will not permit an end-run around the 30-day time period in §§ 362(c)(3)B) and 362(c)(4)(B) and will not grant an extension of the stay or impose the stay after the time period has run. Other courts will consider such relief, but the vast majority of them require the filing of an adversary proceeding and satisfaction of injunctive relief standards.

j. **Chapter 13 Cases-Know the Contents the Plan, Confirmation Order and/or Law in Your Jurisdiction As to the Effect of Vesting under § 1327(b).** If the issue of the applicability of the stay after 30 days depends on whether assets are estate property and you represent a debtor, it may be advantageous to defer vesting of assets until the discharge is entered under § 1322(b)(9). If the plan and confirmation order has already entered, then you will need to review both to determine if the assets are property of the bankruptcy estate. If the confirmed plan or confirmation order do not address the issue, then it is important to know the approach taken by the court in your jurisdiction about vesting of assets at the time of confirmation. Courts have taken four general approaches to the effect of confirmation on assets of the bankruptcy estate: 1. Estate termination; 2. Estate replenishment; 3. Estate preservation; Estate transformation. Under the estate termination and replenishment approaches, assets owned pre-confirmation cease to be estate property upon confirmation. Under the estate preservation approach, assets owned pre-confirmation will remain estate property throughout the case. Under the transformation approach, those assets necessary for a debtor's performance under the plan will remain estate property throughout the case.