

# Bankruptcy Stays and the Chap 13 Repeat Filer

*Recent decision helps debtors who neglect to reinstate stay*

By Craig D. Robins

Before Congress drastically modified the Bankruptcy Code in 2005, a number of debtors abused the bankruptcy system by filing serial Chapter 13 cases, always on the eve of foreclosure, to stay the foreclosure sale.

This placed the burden on the lender to bring a motion for relief from the stay. However, some debtors learned that they could game the system by filing again and again, causing great anguish to the lenders, some of whom had to wait years to get relief.

BAPCPA addressed this problem by shifting the burden to the debtor when there are repeat filings. Now, pursuant to section 362(c)(3), if a debtor files a second Chapter 13 petition within a year, the automatic stay only lasts for 30 days. The debtor then has the burden of bringing a motion to extend the automatic stay and must demonstrate to the court that he or she is entitled to have the stay continued.

However, the requirements for successfully bringing this motion can be quite tricky, and many a practitioner has learned this the hard way. If counsel does not bring the application correctly, then the stay will not be extended.

In order to extend the 30-day stay, section 362(c)(3)(B) requires the debtor to bring a motion, which is heard and granted before the expiration of the 30-day period.

If the debtor neglects to do that, then according to the statute, the stay automatically terminates *with respect to the debtor* on the 30th day after filing. As will be seen, these highlighted words have great significance.

The statute creates tremendous pressure on debtor's counsel, who must essentially file such a motion within days of filing the petition. In addition, counsel must obtain a hearing date that is within the 30-day period, and cannot adjourn the hearing date unless the new date is also within that 30-day period.

At the hearing, counsel must demonstrate that the debtor filed the current bankruptcy in good faith. This usually involves showing that there has been a change in circumstances such that the debtor has overcome whatever the problems were that caused the prior case to be dismissed.

If the debtor does not bring the 30-day motion in a timely manner, even if it is unopposed, the court will not grant the requested relief. That was the lesson that counsel recently learned in a pending Central Islip Bankruptcy Court case. Counsel must have been most upset – if there is no stay, then a

foreclosing mortgagee can continue a foreclosure proceeding and the bankruptcy becomes for naught.

However, it was not the end of the world, as counsel saw in the written decision from Judge Louis A. Scarcella, sitting in the Central Islip Bankruptcy Court, who decided that motion. *In re Hale*, (U.S.B.C. E.D.N.Y., Case No. 15-71021-las, August 3, 2015).

In the *Hale* case, the debtor had a previous Chapter 13 petition dismissed in the one-year period prior to filing. Debtor's counsel filed his motion to extend the stay about six weeks after filing. This was clearly two weeks too late. Thus, the automatic stay had already expired on the 30th day after the petition was filed.

Accordingly, Judge Scarcella denied the motion because it was not filed nor heard within the 30-day period.

Yet all was not lost. Judge Scarcella pointed out that there is controversy, based on the wording of section 362(c)(3)(A), whether termination of the stay applies to property of the estate as well as to the debtor. He found that the automatic stay only terminates with respect to the debtor and his property, but not property of the estate.

Consequently, a mortgagee would still be required to bring a motion for relief from the stay, as a debtor's home is property of the estate.

In reaching this holding, Judge Scarcella noted that even though the Second Circuit has not yet addressed this issue, there is an emerging majority view that termination of the automatic stay under section 362(c)(3) does not extend to actions against the property of the estate, which, as a practical matter, encompasses the lion's share of assets in play.

This is all due to the wording of the statute, which states, "the stay automatically terminates *with respect to the debtor* on the 30th day after filing.

Judge Scarcella and other judges analyzing this statutory language find this wording clear, plain and unambiguous. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there ..."

This flies in the face of the minority view, which seeks to preserve the congressional intent behind the statute of deterring and preventing abusive serial filings.

However, Judge Scarcella commented that at first blush, the minority view has some appeal, given the objectives



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of the 2005 Amendments to abusive serial filings. However, he observes that BAPCPA's drafting was inartful and the framework labyrinthine. Accordingly, he went with the view that places greater importance upon the plain meaning of the statutory language.

The decision is clearly a win for debtors as it essentially preserves the stay regardless of whether counsel brings the 30-day motion properly and perhaps acts as an indictment of the poorly worded BAPCPA statute.

Thus, in *Hale*, even though counsel failed to bring the 30-day motion in a

timely manner, there is still a stay against property of the estate, which effectively prevents a mortgagee from continuing a foreclosure proceeding without first bringing a motion for relief.

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