

BROWN BAG LUNCH AND LEARN – Part I
New Limitations on the Automatic Stay and Expanded Dismissal Provisions

NOTES

New Limitations on the Automatic Stay

I. Automatic Stay - Overview of Changes

- A. Stay weakened:
 - 1. 60-day automatic termination of stay;
 - 2. shortening or elimination of stay for repeat filers; and
 - 3. 30 or 45-day termination of stay with regard to personal property secured by PMSI that has not been timely redeemed.
- B. Additional exceptions from stay.

II. 60-day Automatic Termination of Stay

- A. **Section 362(e)(2)** terminates the automatic stay in a chapter 7, 11, or 13 case of an individual debtor within 60 days following a request for relief from the stay, unless (1) the bankruptcy court renders a final decision prior to the expiration of the 60-day time period, (2) such period is extended pursuant to agreement of all parties in interest, or (3) a specific extension of time is required for good cause as described in findings made by the court.

III. Termination of Stay for Repeat Filers

- A. One prior filing → stay limited to 30 days – § 362(c)(3)
 - 1. Stay automatically lifted 30 days after the filing of a case if the debtor had another case dismissed within one year.
 - 2. Court may extend the stay if, after motion by an interested party (including the debtor) and a hearing completed within the first 30 days, the court finds that the second case was filed in good faith.
 - 3. Under § 362(c)(3)(C), there is a presumption of a lack of good faith if:
 - a. the debtor was a debtor in more than one bankruptcy case (any chapter) in the previous year;
 - b. the previous case was dismissed because the debtor failed to file documents in the earlier case, provide adequate protection, perform under a confirmed plan; or
 - c. there has been no substantial change in the debtor's financial or personal affairs since the dismissal of the previous case.

- B. Two previous filings → no stay – § 362(c)(4)
1. The stay will not go into effect at all if the debtor has been a debtor in two or more cases pending within the previous year.
 2. Upon request of a party in interest the court shall promptly enter an order confirming that no stay is in effect.
 3. The court may extend the stay if, after motion by an interested party (including the debtor) and a hearing completed within the first 30 days, the court finds that the third case was filed in good faith.
 4. There is a presumption of a lack of good faith for the same reasons listed in § 362(c)(3).
 5. If the court imposes a stay, it is only effective from the date the order is entered.

IV. Termination of stay with regard to personal property secured by PMSI.

A. Inconsistent Provisions:

1. **Section 521(a)(6)** provides that a failure to redeem (file motion to redeem) within 45 days of meeting of creditors (actual?) results in automatic lifting of stay with regard to property at issue.
2. **Section 362(h)** automatically lifts the stay if the debtor fails to redeem property within the time period set forth in §521(a)(2)(B) – 30 days from the first date set for the meeting of creditors, which period may be extended for cause by timely motion.

B. Statute also does not clarify:

1. whether time period will be stayed while motion to redeem is pending, or
2. whether time period will be tolled following resolution of motion to redeem, *i.e.*, how much time will debtor have to pay creditor redemption amount or to affirm rather than redeem (if debtor is unsatisfied with result of redemption hearing).

V. Exceptions from Stay (*not an exclusive list*):

A. domestic relations proceedings and related collections – § 362(b)(2)

1. proceedings excepted from stay broadened to include those related to child custody, domestic violence, and the dissolution of a marriage (except to extent dissolution proceedings seeks to determine the division of property that is property of the estate) - § 362(b)(2)(A)(i)-(v);
2. acts to collect or punish for non-payment of domestic support obligations, including garnishment and withholding tax refunds – § 362(b)(2)(C)-(G);

3. withholding for amounts due on loans against certain retirement accounts – § 362(b)(19);
4. acts against real property for which the stay had been lifted in a prior case within the 2 years prior to the current filing – § 362(b)(20);
5. acts against real property where:
 - a. the debtor is ineligible to be a debtor under § 109(g) – § 362(b)(21)(A), or
 - b. the case was filed in violation of a bankruptcy court order in a prior case prohibiting the debtor from filing bankruptcy – § 362(b)(21)(B);
6. the continuation of any eviction proceeding in which the landlord obtained a judgment of possession prior to the filing of the petition – § 362(b)(22), but
 - a. § 362(I) allows the debtor to contest the applicability of (b)(22) if the default can be cured under state law within 30 days after the filing of the petition;
7. actions by self-regulatory securities organizations – § 362(b)(25); and
8. setoff of tax refunds by governmental units – § 362(b)(26).

Expanded Dismissal Provisions

I. Dismissal under § 707(a) “for cause,” including:

- A. unreasonable delay by the debtor that is prejudicial to creditors;
- B. nonpayment of any fees or charges required under chapter 123 of title 28; and
- C. failure to of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by *paragraph (1) of section 521*, but only on a motion by the United States Trustee.

The drafters of the act apparently failed to update § 707 to reconcile with the changes made to § 521, because the “paragraph (1) of section § 521” referred to in § 707(a) no longer exists. The drafters revised the numbering of the first level of subsections of § 521 from (1)-(5) to (a) - (j), thus eliminating § 521(1). The substance of former § 521(1), which required the debtor to file bankruptcy schedules and a statement of affairs, has been transposed, with modification, to § 521(a)(1).

II. Dismissal under § 707(b) for “abuse”

- A. The famed (infamous) “means testing” provisions - a topic covered in the next brown bag discussion.
- B. In a nutshell –
 - 1. abuse is presumed if
 - a. current monthly income (average of previous 6 months’ income) *minus*
 - b. allowed expenses:
 - (1) Food, housing, transportation (determined generally by IRS standards);
 - (2) Secured debt (1/60 of 5-yr payments) *and arrearages included for “critical property” (primary residence, motor vehicle, or other property necessary for the support of the debtor);*
 - (3) Priority debt (1/60 of 5-yr payments);
 - (4) Charitable donations (up to 15% gross); and
 - (5) Ch. 13 fees (up to 10% of payments).
 - c. *equals*:
 - (1) \$166.67 or more, abuse is presumed;
 - (2) \$100 to \$166.66, abuse may be presumed— if enough to pay 25% of general unsecured claims over 5 years (so, claims of \$24 - 40,000);
 - (3) \$99.99 or less, not presumed abusive
 - 2. If abuse not presumed under means test:
 - a. abuse may be shown where
 - (1) petition filed in bad faith, or
 - (2) totality of circumstances of the debtor’s financial situation demonstrates abuse

III. Dismissal for failure to file documents.

- A. Failure to file documents listed in § 521(a)(1) (listed below) results in automatic dismissal after 45 days (which period may be extended an additional 45 days for cause):¹
 - 1. list of creditors;
 - 2. schedule of assets and liabilities;
 - 3. schedule of current income and current expenditures;
 - 4. schedule of the debtor’s financial affairs;
 - 5. § 342(b) certificate;

¹11 U.S.C. § 521(I)

6. copies of all payment advices (paychecks) received within 60 days before the filing of the petition;
 7. a statement of monthly net income, itemized to show how the amount is calculated; and
 - a. “monthly net income” is not defined, but, presumably, is the figure used in the means test (current income minus allowable expenses)
 8. a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition.
- B. Failure to provide copy of most recent tax returns to trustee or requesting creditor – § 521(e)(2)
1. Debtor must provide to trustee, not later than 7 days before the date first set for the meeting of creditors, a copy of the Federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed. – § 521(e)(2)(A)(I).
 2. Debtor must provide same to creditors who “timely” request tax returns. – § 521(e)(2)(A)(ii)
 - a. statute is unclear whether creditor may request tax return after 7 days prior to the first date set for the meeting of creditors.
 3. Debtor may avoid dismissal if he can demonstrate that his failure to comply with § 521(e)(2)(A) is due to circumstances beyond his control.

IV. Likely Grounds for Dismissal (although no specific provision requires dismissal)

- A. Failure to Obtain Credit “briefing” – Individual cannot be a debtor without receiving briefing required under § 521(b).
1. Credit counseling required for all individual debtors.
 - a. **Section 109(h)(1)** requires that individual debtors receive a “briefing” from an approved nonprofit budget and credit counseling agency within 180 days of filing the petition.
 - b. Counseling may be accomplished by telephone or internet.
 - c. Clerk will have list of counseling agencies, once they are approved by UST.
 - d. If counseling agencies charge a fee, fee must be reasonable, and agency must provide services without regard to ability to pay fee.
 - (1) Unclear if this means that counseling agencies must provide services for free.

- (2) Exceptions to briefing requirement:
 - (a) UST has determined that agencies in district are not reasonably able to provide adequate services to the individuals seeking such counseling;
 - (b) The debtor is mentally incompetent, incapable, disabled, or away on military duty; or
 - (c) The debtor makes a showing of exigent circumstances.
 - i) Certificate explaining exigent circumstances must include statement that debtor requested counseling from an approved provider but was unable to obtain the services within 5 days following the request.

*** the exigent circumstances exception above expires after 30 days, which period can only be extended by 15 days by the court***

- B. Failure to Provide Other Documents Required Under § 521 (for which dismissal is not explicitly required).
 - 1. a certificate from the credit counseling agency that provided the services to the debtor describing the services provided, and a copy of the debt repayment plan (if any) developed by the credit counseling agency. – **§ 521(b)(1) and (2)**
 - 2. a record of any interest that a debtor has in an “education individual retirement account”² – **§ 521(c)**

² The statute apparently has a typo. The statute most likely intended to read, educational or individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986) or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).