The Automatic Stay and Serial Filings:
How the Courts Have Interpreted
§ 362(c)(3) and (4)

Submitted by the Honorable Eugene R. Wedoff

Section 302 of BAPCPA, titled "Discouraging Bad Faith Repeat Filings," seeks to accomplish this purpose by limiting the operation of the automatic stay. Its general operation seems simple enough:

- A new § 362(c)(3) provides that if a Chapter 7, 11, or 13 case is filed within one year of an earlier dismissed case (other than a Chapter 11 or 13 case filed after a § 707(b) dismissal), the automatic stay in the second case terminates 30 days after the filing, unless a party in interest demonstrates that the second case was filed in good faith with respect to the creditor sought to be stayed.

- If a second repeat filing takes place within the one-year period, then, under a new § 362(c)(4), the automatic stay will not go into effect (and the court is required promptly to enter an order confirming the inapplicability of the stay on request of a party in interest). Similar to the situation with § 362(c)(3), a party in interest may obtain imposition of the stay by demonstrating that the third filing is in good faith with respect to any creditor sought to be stayed.

- For both second and third filings within one year, circumstances are described which generate a presumption that the new filing was not made in good faith, and such a presumption must be rebutted by clear and convincing evidence.

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However, the actual language of new provisions has raised a number of questions that the courts have addressed, including the seven outlined here.

1. From what point does the one-year period for either termination or non-application of the stay begin to run?

Answer: From the date of dismissal of the first case, not closing.

Both § 362(c)(3) and (4) use the following phrase to define the previous filing that would affect the operation of the automatic stay in a pending case: a prior case "of the debtor [that] was pending within the preceding 1-year period but was dismissed." Under a "plain meaning" approach, this phrase could be interpreted to apply to a case that was dismissed more than one year before the pending case but had not been closed (and so was still "pending") until some time during the one-year period. However, the courts to consider the question have determined that the one-year period should run from the date of dismissal, not closing. *In re Easthope*, 2006 WL 851829 (Bankr. D. Utah, March 28, 2006); *In re Moore*, 337 B.R. 79, 81 (Bankr. E.D.N.C. 2005) (citing authority for the proposition that courts "routinely equate 'pending' with 'not dismissed'). The decisions also support their conclusion with policy considerations:

> It is also reasonable to conclude from a policy standpoint that a case is no longer "pending" once it has been dismissed. The automatic stay does not protect a debtor after the earlier of dismissal or the closing of the case. 11 U.S.C. § 362(c)(2). The debtor no longer receives the benefit of the automatic stay after dismissal. Further, the debtor has no control over when the case is closed after dismissal (though the debtor may be able to control when a case is dismissed if a voluntary dismissal is filed).

In re Moore, 337 B.R. at 81.

2. What happens in a joint case if only one of the debtors had a prior case dismissed in the year before filing?

Answer: The automatic stay is affected only as to the debtor with the prior case.

This is the holding of *In re Parker*, 336 B.R. 678, 680-81 (Bankr. S.D.N.Y. 2006):

> The fact that Section 362(c)(4) applies to John Parker does not mean that the stay did not go into effect as to joint debtor Luisa Parker. Although Section 362(c)(4) broadly states that where the section applies based on the conduct of one debtor, "the stay under subsection (a) shall not go into effect," that language cannot be read

> to apply to a joint debtor if Section 362(c)(4) would not independently apply to the joint debtor. For example, where Section 362(c)(3) applies, the statute expressly terminates the stay only "with respect to the *debtor*" in question. (emphasis added). Although this phrase is not repeated in Section 362(c)(4), both subsections focus on, and apply to, the acts of a specific debtor rather than joint debtors in the aggregate. This Court concludes that in a joint bankruptcy case, the application of Section 362(c)(3) and (4) to each debtor must be analyzed separately.

The key to this decision is reading the phase "with respect to the debtor" in § 362(c)(3) as distinguishing between one debtor, who has had a prior case dismissed within a year, and another, jointly-filing debtor, who has not.

3. What limitation on the scope of the stay termination under § 362(c)(3) is implied by the phrase "with respect to any action taken"?

Answer: The stay terminates only in connection with a formal judicial or administrative actions commenced before the bankruptcy filing.

The reported decisions have held that by terminating the stay as to "any actions taken," § 342(c)(3) affects only formal "actions" that were "taken" prior to the time of the bankruptcy filing. *In re Harris*, 2006 WL 1195396 at *5 (Bankr. N.D. Ohio, May 01, 2006); *In re Bell*, 2006 WL 1132907 at *2 (Bankr. D. Colo., April 27, 2006); *In re Paschal*, 337 B.R. 274, 280 (Bankr. E.D.N.C. 2006). *In re Paschal* explains the rationale for this holding:

> Based on the usage of the term "action" in § 362(a)(1), §§ 362(b)(1), (2)(A), (4), (8), (14), (15), (16), (22), and (25)(A) and (B), and § 362(c)(3)(C)(ii), the court concludes that the term "action" means a formal action, such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding. Furthermore, the action with respect to which the stay terminates is an "action taken," which means an action in the past, prior

to the filing of the debtor's bankruptcy petition.

A problem with this approach is that none of the cited sections (using "action" in a formal sense) link the noun "action" with the verb "take." In common usage, to "take action" simply means to do something (see Princeton University WordNet 2.0, defining "take" in the phrase "take action" as meaning "carry out"); thus, "taking action" is not limited to bringing formal proceedings. Indeed, in § 362(h)(1)(B), BAPCPA provides for relief from the automatic stay when the debtor fails "to take timely the action" set out in a statement filed under § 521. The possible "actions" under § 521 (redemption of collateral, surrender of collateral or reaffirmation of secured debt) do not involve instituting formal judicial or administrative proceedings, and so, at least in this section, Congress apparently used "take action" in its ordinary sense. And if the phrase is considered ambiguous, resort to legislative history would also reflect that no limitation to formal proceedings was intended. See *In re Paschal*, 337 B.R. at 278 ("The available legislative history . . . suggests that Congress intended that § 362(c)(3)(A) terminate all of the protections of the automatic stay.")

4. What limitation on the scope of the stay termination under § 362(c)(3) is implied by the phrase "with respect to the debtor"?

Answer: The stay is terminated only as to collection activity directed against the debtor personally or property of the debtor; property of the estate continues to be protected even after termination of the stay under § 362(c)(3).

The reported decisions have held that, by terminating the automatic stay "with respect to the debtor," § 362(c)(3) keeps the stay in effect as to property of the estate. *In re Harris*, 2006 WL 1195396 at *5 (Bankr. N.D. Ohio, May 01, 2006) ("Although such an interpretation may not provide much of a benefit to creditors . . . it is an appropriate one given the manner in which Congress chose to draft § 362(c)(3)."); *In re Bell*, 2006 WL 1132907 at *2 (Bankr. D. Colo., April 27, 2006); *In re Jones*, 339 B.R. 360, 363-65 (Bankr. E.D.N.C. 2006); *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006). *In re Jones* sets out both "plain meaning" and policy arguments to support this holding.

Section 362(c)(3)(A) as a whole is not free from ambiguity, but the words, "with respect to the debtor" in that section are entirely plain; a plain reading of those words makes sense and is entirely consistent with other provisions of § 362 and other sections of the Bankruptcy Code. Section 362(c)(3)(A) provides that the stay terminates "with respect to the debtor." How could that be any clearer?

Section 362(a) differentiates between acts against the debtor, against property of the debtor and against property of the estate. Section 362(a)(1) stays actions or proceedings "against the debtor;" § 362(a)(2) stays enforcement of a judgment "against the debtor or against property of the estate;"§ 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate;"§ 362(a)(4) stays "any act to create, perfect, or enforce any lien against property of the estate;"§ 362(a)(5) stays "any act to create, perfect, or enforce against property of the debtor any lien" to the extent it secures a prepetition claim; and § 362(a)(6) stays "any act to collect, assess, or recover a claim against the debtor····"

Section 362(b)(2)(B) permits collection of domestic support obligations from "property that is not property of the estate." In re Baldassaro, 338 B.R. 178, 184-85 (Bankr.D.N.H.2006).

Section 362(c) also distinguishes between the stay of acts against property of the estate and the stay of any other acts. Section 362(c)(1) provides that "the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate," and § 362(c)(2) provides for the termination of the stay of "any other act" prohibited by § 362(a).

Section 521 of the Bankruptcy Code also distinguishes between property of the estate and property of the debtor. Section 521(a)(6) provides that the automatic stay is terminated "with respect to the personal property of the estate or of the debtor" if the debtor does not reaffirm or

> redeem property within 45 days after the first meeting of creditors. If Congress had intended that the automatic stay would terminate under § 362(c)(3)(A) as to property of the estate, it would have specifically said so, as it did in § 521(a)(6).
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> In *Paschal*, the court observed that the language of § 362(c)(3)(A) is very different than that of § 362(c)(4)(A)(i) and was persuaded that the difference meant that the scope of the stay termination under § 362(c)(3)(A) is different and more limited than the stay termination in § 362(c)(4)(A)(i). *Paschal* at 278-79. That analysis also applies to the issue now before the court.

In re Jones, 339 B.R. at 363-64.

> [T]his interpretation also makes sense from a policy perspective. It is important in chapter 13 cases to protect property of the estate from automatic termination under § 362(c)(3)(A), because estate property may be needed to consummate the debtor's chapter 13 plan. It is even more important to protect property of the estate in chapter 7 cases, to which § 362(c)(3)(A) also applies. 11 U.S.C. § 103(c). In a chapter 7 case, the chapter 7 trustee has the duty to administer the assets of the bankruptcy estate. 11 U.S.C. § 704(a)(1). Keeping the stay in place with respect to property of the estate, even in cases where there has been a dismissal in the prior year, is an important protection for creditors.

Id. at 365.

A problem with the *Jones* interpretation of § 363(c)(3) is that it provides no meaningful relief to creditors in Chapter 13 cases, the situation in which bad faith repeat filings is most relevant. (In Chapter 13, as opposed to Chapter 7, debtors remain in possession of estate property and have an absolute right to dismiss the case. 11 U.S.C. §§ 1306(b), 1307(b).) Under this interpretation, creditors in a Chapter 13 case, filed in bad faith within a year of the dismissal of an earlier bankruptcy case could take no action against property that the debtor owned at the time the case is commenced, because it is property of the estate

under § 541(a)(1), and they could take no action against property that the debtor acquired after filing the case because that would be estate property under § 1306(a). They could take a judgment against the debtor personally (creating some tension with the claims allowance process in bankruptcy), but they would be unable to collect that judgment.

To avoid this problematic outcome, the phrase "with respect to the debtor" could be treated as surplusage—an error in drafting—such as has been found in connection with the phrase "as a result of electing" in § 522(p). *See In re Kane*, 336 B.R. 477, 489 (Bankr. D.Nev. 2006) (concluding that the insertion of the "result of electing" phrase was a "scrivener's error"). Alternatively, "with respect to the debtor" could limit termination of the automatic stay in the context of a joint case, applying termination only to a joint debtor who had filed an earlier case, as discussed above. *See In re Parker*, 336 B.R. 678, 680-81 (Bankr. S.D.N.Y. 2006). If the meaning of "with respect to the debtor" is ambiguous, the legislative history—reflecting no exception for estate property—would be relevant.

The policy argument made in *Jones*—that limiting stay termination to the debtor and debtor's property protects estate administration—is also problematic. The apparent reason for allowing a party in interest—not just the debtor—to seek an extension of the automatic stay in a case subject to § 362(c)(3) is to allow for administration of property in the bankruptcy case that would otherwise be taken by a secured creditor when the stay no longer applied. Property of the estate, subject to collection activity after termination of the stay under § 362(c)(3), can thus be protected by a timely motion of the trustee or other party in interest, and there is no need to exclude it from otherwise applicable stay termination. Indeed, for a party other than the debtor to have any reason to file a motion to continue the stay, property of the estate would have to be subject to stay termination. *Jones* itself acknowledges that "if § 362(c)(3)(A) only applies with respect to the debtor, it is unlikely that anyone other than the debtor would seek an extension." 339 B.R. at 364.

5. When must a party file a motion to extend the stay under § 362(c)(3)(B) or put the stay in effect under § 362(c)(4)(B)?

Answer: The debtor must file and serve a motion under § 362(c)(3)(B) so as to allow the court to enter an order granting the motion within 30 days of the case filing. The debtor must file a motion under § 362(c)(4)(B) within 30 days of case filing, but the court may rule on the motion after that 30-day period has expired. Failure to file timely under § 362(c)(3)(B) or (4)(B) may not preclude the debtor from seeking imposition of a non-automatic stay under § 105.

Decisions applying § 362(c)(3)(B) are uniform in requiring the debtor to file and serve a motion to extend the automatic stay so as to allow ruling by the court within 30 days after the filing of the bankruptcy case. If required by local rule, the debtor may have to provide as much as 20 days' notice of the motion, thus requiring that the motion be filed promptly after case filing. *In re Harris*, 2006 WL 1195396 at *1 (Bankr. N.D. Ohio, May 01, 2006); *In re Berry*, 2006 WL 1015963 at *2 (Bankr. M.D.Ala., April 14, 2006) ("As motions to extend the automatic stay under 362(c)(3)(B) and motions to impose an a stay pursuant to § 362(c)(4)(B), both contain thirty-day periods of limitation, this strongly suggests that motions filed after the thirty-day period has expired are not timely."); *In re Moon*, 339 B.R. 668, 670 (Bankr. N.D. Ohio 2006) ("[T]he Court may extend the automatic stay only after notice and a hearing completed before the expiration of the thirty day period after the filing of the later case. If the notice and hearing are not completed within this period, the automatic stay terminates by operation of § 362(c)(3)(A)."); *In re Wright*, 339 B.R. 474 (Bankr. E.D. Ark. 2006); *In re Ziolkowski*, 338 B.R. 543, 546 (Bankr. D. Conn. 2006) (motion timely filed, but debtors failed "to insure that the Motion was timely scheduled"); *In re Thomas*, 2006 WL 278544 (Bankr. E.D.Mich., February 2, 2006) (motion denied for failure to comply with local rule requiring filing within seven days of case filing); *In re Taylor*, 334 B.R. 660, 663 (Bankr. D. Minn. 2005) (motion denied for failure to comply with local rule requiring motion to "be filed and delivered not later than ten days, or mailed not later than fourteen days before the hearing date"); *In re Wilson*, 336 B.R. 338, 347 (Bankr. E.D. Tenn. 2005) (motion denied for failure to comply with local rule requiring 20 days' notice of hearing); *In re Collins*, 334 B.R. 655 , 659(Bankr.D. Minn. 2005) (motion denied for failure to serve parties affected by extension of the stay).

Although § 362(c)(4)(B) requires that a motion to impose the automatic stay be filed within 30 days of case filing, it does not require the court to rule on the motion within that period. At least two decisions have held that a motion to impose the stay under § 362(c)(4)(B) can be considered by the court, after the 30-day period has expired, in a case that is only subject to 30-day stay termination under § 362(c)(3)(A), rather than to the non-application of the stay under § 362(c)(4)(A). *In re Beasley*, 339 B.R. 472 (Bankr. E.D. Ark. 2006); *In re Hernan Toro-Arcila*, 334 B.R. 224 (Bankr. S.D.Tex.2005).

One decision holds that a debtor may seek imposition of a stay under § 105(a) after the 30-day deadline imposed by § 362(c)(3)(B) and (4)(B). *In re Whitaker*, 2006 WL 1071776 at *7 (Bankr. S.D.Ga., April 20, 2006).

6. What must be alleged in a motion to extend the stay under § 362(c)(3)(B)?

Answer: The motion must allege good faith in the new filing and facts sufficient to rebut any presumption of bad faith; some courts may require evidentiary material to be submitted with the motion.

Fed. R. Bankr. P. 9013 requires all motions to "state with particularity the grounds therefor." One court, commenting on motions brought under § 362(c)(3)(B), discussed the particularity required for such motions as follows:

> [T[he moving papers must establish the nonexistence of presumptive bad faith, or the moving papers must admit and rebut the presumption, even though the burden of proof technically rests upon the opponent and the motion may be unopposed.

In re Montoya, 2006 WL 1134486 at *3 (Bankr. S.D.Cal., April 12, 2006).

Although the statute does not require any evidence to accompany the motion, one court has determined that the motion must be accompanied by an affidavit.

> In order to satisfy the clear and convincing evidence standard, each motion requesting an extension of the automatic stay under § 362(c)(3)(B),

> together with the supporting affidavit, should contain certain minimal information as follows: (1) whether the extension is sought as to all creditors or a single creditor; (2) the case number as well as the commencement and dismissal dates of the debtor's case pending within the previous year; (3) the § 362(c)(3)(C) reason or reasons giving rise to the presumption that the current case was "filed not in good faith"; and (4) the change in the financial or personal affairs of the debtor subsequent to the dismissal of the previous case or any other reason that will support the debtor's contention that the present case will be concluded with a discharge if filed under Chapter 7 or, if filed under Chapter 11 or 13, will be concluded with a confirmed plan that will be fully performed. Any additional information or evidence that the debtor or party in interest believes is significant or supports his or her motion may also be included. Any motion to extend the automatic stay filed without containing these minimum requirements and evidentiary proof may be denied.

In re Wilson, 336 B.R. 338, 348 (Bankr. E.D. Tenn. 2005).

7. What are the standards for ruling on a motion under §362(c)(3)(B)?

Answer: Good faith as to a creditor—the standard under § 362(c)(3)(B) and (4)(B)—is not identical to good faith for purposes of confirmation under § 1325(a)(7) or dismissal under § 1307(c), but may include factors developed under those paragraphs. Where a presumption of bad faith is present and the motion is contested, the debtor must rebut the presumption by clear and convincing evidence. A presumption based on failure to complete payments in a prior Chapter 13 case may be rebutted by proof of changed circumstances indicating that the later case is likely to succeed. An uncontested motion, setting out facts justifying relief, may be granted without a hearing.

A number of decisions dealing with motions brought under § 362(c)(3)(B) have considered the factors involved in establishing the debtor's good faith in filing the bankruptcy case. Most include a consideration of factors used to determine good faith under §§ 1325(a)(7) and 1307(c),

but do not consider those factors entirely applicable. *See, e.g., In re Ball*, 336 B.R. 268, 274 (Bankr. M.D.N.C. 2006); *In re Galanis*, 334 B.R. 685, 691 (Bankr.D.Utah 2005); *In re Montoya*, 333 B.R. 449 (Bankr.D.Utah 2005). In re Galanis listed the relevant factors as follows:

> 1) the timing of the petition; 2) how the debt(s) arose; 3) the debtor's motive in filing the petition; 4) how the debtor's actions affected creditors; 5) why the debtor's prior case was dismissed; 6) the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to properly fund a plan; and 7) whether the Trustee or creditors object to the debtor's motion.

334 B.R. at 693 (footnote omitted).

In a Chapter 13 case (the type in which § 362(c)(3) is most likely to arise), the central question is often the likelihood of a successful plan, which in turn depends on whether the debtor can show changed circumstances from a prior failed case. *See, e.g., In re Whitaker*, 2006 WL 1071776 at *5 (Bankr. S.D.Ga., April 20, 2006) ("[T]he chief means of rebutting the presumption of bad faith requires the movant to establish 'a substantial change in the financial or personal affairs of the debtor . . . or any other reason to conclude' that the instant case will be successful.") (citation omitted); *In re Baldassaro*, 338 B.R. 178, 190-91 (Bankr. D.N.H. 2006) (finding good faith based on changed circumstances); *In re Charles,* 334 B.R. 207, 219 (Bankr. S.D. Tex. 2005) ("[A] debtor fails to sustain her burden of demonstrating good faith as to the creditors to be stayed if the case lacks a reasonable likelihood of success.").

At least two decisions have noted that a motion to extend the stay under § 362(c)(3)(B) may be granted without hearing if the motion itself contains adequate information to justify relief. *In re Phillips*, 336 B.R. 818, 820 (Bankr. E.D. Okla. 2006); *In re Charles*, 332 B.R. 538, 542 (Bankr. S.D. Tex. 2005).