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"Moving for Relief From an Automatic Stay in Bankruptcy"

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Here's How and When to Do It

ACTION GUIDE

September 2006

Moving for Relief From an Automatic Stay in Bankruptcy

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CONTINUING EDUCATION OF THE BAR ■ CALIFORNIA
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Moving for Relief From an Automatic Stay in Bankruptcy

by David Brian Lally and Laura Palazzolo

CONSIDERATIONS BEFORE MOVING FOR RELIEF FROM STAY

STEP 1. REVIEW GENERAL RULES CREATING AUTOMATIC STAY

REVIEW STATUTES AND RULES

Bankruptcy law is comprised of:

- a. An extensive federal statutory framework contained in Title 11 of the United States Code (Bankruptcy Code); and
- b. A set of procedural rules, the Federal Rules of Bankruptcy Procedure (Fed R Bankr P 1001–9036).

Understand Specialized Nature of Proceeding

Bankruptcy is a very specialized area of law. It is critical to be familiar with the bankruptcy laws and rules before moving for relief from stay in a bankruptcy case filed by a debtor. Knowledge of local bankruptcy rules and practice is essential. The United States Bankruptcy Courts for the four districts in California each have their own local rules governing relief from stay and related bankruptcy procedures, which are available on the courts' websites at:

- a. <http://www.cacb.uscourts.gov/> (central district);
- b. <http://www.canb.uscourts.gov/> (northern district);
- c. <http://www.casb.uscourts.gov/> (southern district); and
- d. <http://www.caeb.uscourts.gov/> (eastern district).

See step 14, below.

Filing Bankruptcy Petition

The filing of a bankruptcy petition (generally under either Chapter 7 (liquidation; 11 USC §§701–707), Chapter 11 (reorganization; 11 USC §§1101–1146) or Chapter 13 (individual reorganization; 11 USC §§1301–1330)), or an involuntary petition filed against the debtor (see 11 USC §303)) triggers:

- a. The formation of the bankruptcy estate comprised of the debtor's property (11 USC §541(a)); and
- b. The imposition of the automatic stay (11 USC §362(a)).

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA):

- a. Became effective generally for bankruptcy cases commenced on or after October 17, 2005; and
- b. Was enacted to correct certain perceived abuses by debtors.

NOTE

This Action Guide incorporates substantial changes made to bankruptcy laws and practice by BAPCPA as they pertain to the automatic stay of 11 USC §362.

OPERATION OF AUTOMATIC STAY

The automatic stay of 11 USC §362:

Stays Acts

Prevents commencement or continuation of any act against debtor (see step 2, below) or property of debtor's estate (see step 3, below). 11 USC §362(a).

Is Self-Executing

Is self-executing and effective on filing the petition (*Gruntz v Los Angeles (In re Gruntz)* (9th Cir 2000) 202 F3d 1074, 1081), and applies even if the bankruptcy petition is ultra vires or a sham. See *Wekell v U.S.* (9th Cir 1994) 14 F3d 32; step 2, below.

Purpose of Stay

The automatic stay is a fundamental protection afforded debtors under the bankruptcy laws. The stay:

- a. Creates a "breathing spell" (see *Barnett v Lewis* (1985) 170 CA3d 1079, 1088, 217 CR 80) to allow a debtor to formulate a repayment or reorganization plan according to provisions of the Bankruptcy Code, without interference from creditors;
- b. Benefits creditors by preventing a race to the courthouse by creditors; and
- c. Evens the playing field among unsecured creditors (whose debts are not secured by liens on debtor's property) by preventing any single creditor from taking a disproportionate share of estate property to the detriment of other similarly situated creditors.

EXCEPTIONS TO STAY

There are many statutory exceptions to the automatic stay, including, but not limited to:

- a. Criminal proceedings (11 USC §362(b)(1));
- b. Certain family law matters (11 USC §362(b)(2)); and
- c. Public health and safety proceedings (11 USC §362(b)(4), (b)(23), (b)(28)). See step 5, below.

LIMITATIONS ON STAY

BAPCPA dramatically altered the stay protection afforded debtors by imposing several limitations on the creation and duration of the automatic stay under certain circumstances. The limitations added by BAPCPA are summarized below. For discussion of limitations on stay, see step 4, below.

Prior Filings

The automatic stay is limited when a debtor has filed multiple bankruptcy petitions, *e.g.*:

- a. Stay is limited to 30 days when the debtor previously filed a bankruptcy petition that was dismissed within 1 year of the current case, other than under 11 USC §707(b) (11 USC §362(c)(3)); and

- b. No stay goes into effect when the debtor previously filed two cases that were dismissed within 1 year of the current case (11 USC §362(c)(4)); however, the stay may be extended or reinstated by debtor's motion demonstrating that the current case was filed in good faith (see 11 USC §362(c)(3)(B), (c)(4)(B); step 4, below);

NOTE

It is presumed that a multiple filing was made in bad faith if certain conditions are met, including that there has been no "substantial change" in the debtor's financial condition since the prior filing. See 11 USC §362(c)(3)(C), (c)(4)(D); step 4, below.

60-day Limitation

The stay terminates as to bankruptcy cases generally after 60 days unless (11 USC §362(e)(2)):

- a. Final decision is rendered during the 60-day period;
- b. The 60-day period is extended by agreement of all parties; or
- c. The 60-day period is extended by the court for a specified time period as required for "good cause." See steps 4, 10, below.

In Rem Relief

With respect to real property, under new 11 USC §362(d)(4), a creditor may now obtain an in rem order for relief from stay:

- a. When certain conditions are met, including the existence of multiple bankruptcy filings concerning the real property (11 USC §362(d)(4)(B)); and
- b. If the relief from stay order is properly recorded according to state law:
 - (1) The order becomes an exception to the stay (see 11 USC §362(b)(20));
 - (2) Thus, no stay is created for 2 years in any subsequent bankruptcy case by the debtor (11 USC §362(b)(20)). See step 4, below.

STEP 2. DETERMINE WHETHER YOUR PROPOSED ACT IS SUBJECT TO STAY**ASSUME STAY APPLIES**

Because the stay is meant to protect the debtor, some judges take a very strong and harsh approach to violations of the automatic stay. See step 7, below; 11 USC §362(k). Thus, when representing creditors, if you are unclear whether there is a stay, or there is no clear authority demonstrating that the stay does not apply:

- a. The wise approach is simply to file a motion for relief from stay and obtain an order from the court;
- b. The time frame to obtain an order terminating the stay is worth the wait compared to the alternative, *i.e.*, opposing a motion for sanctions for violating the stay.

SCOPE OF STAY IS BROAD

The scope of the stay is *very* broad and serves as one of the most important protections of bankruptcy law. See *Eskanos & Adler, P.C., v Leetien* (9th Cir 2002) 309 F3d 1210; *Chugach Timber Corp. v Northern Stevedoring &*