

Consumer Session: Part II: Real Estate Issues in 7s and 13s (Foreclosure Cornucopia: Pending Foreclosure Actions, Serial Filers, Case Dismissals, Proofs of Claim, Principal Residences, Escrow Determination and Analysis)

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 11-11352
Non-Argument Calendar

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT MAY 11, 2012 JOHN LEY CLERK

D. C. Docket Nos. 1:10-cv-01612-TCB; 09-BKC-78173-PWB

In Re:

LORRAINE MCNEAL,

Debtor.

LORRAINE MCNEAL,

Plaintiff-Appellant,

versus

GMAC MORTGAGE, LLC,
HOMECOMINGS FINANCIAL, LLC,
a GMAC company,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(May 11, 2012)

Before TJOFLAT, EDMONDSON, and CARNES, Circuit Judges.

PER CURIAM:

Lorraine McNeal appeals the district court's affirmance of the bankruptcy court's denial of McNeal's "Motion to Determine the Secured Status of Claim." In her motion, McNeal sought to "strip off"¹ a second priority lien on her home, pursuant to 11 U.S.C. § 506(a) and (d). Reversible error has been shown; we reverse and remand for additional proceedings.

McNeal filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. In her petition, McNeal reported that her home was subject to two mortgage liens: a first priority lien in the amount of \$176,413 held by HSBC and a second priority lien in the amount of \$44,444 held by Homecomings Financial, LLC, a subsidiary of GMAC Mortgage, LLC (collectively, "GMAC").

¹In bankruptcy terms, a "strip down" of an undersecured lien reduces the lien to the value of the collateral to which it attaches and a "strip off" removes a wholly unsecured lien in its entirety.

McNeal also reported that her home's fair market value was \$141,416. The parties do not dispute these factual allegations.

McNeal then sought to "strip off" GMAC's second priority lien, pursuant to sections 506(a) and 506(d). McNeal contended that, because the senior lien exceeded the home's fair market value, GMAC's junior lien was wholly unsecured and, thus, void under section 506(d). The bankruptcy court denied the motion, concluding that section 506(d) did not permit a Chapter 7 debtor to "strip off" a wholly unsecured lien. The district court affirmed.

When the district court affirms the bankruptcy court's order, we review only the bankruptcy court's decision on appeal. Educ. Credit Mgmt. Corp. v. Mosley, 494 F.3d 1320, 1324 (11th Cir. 2007). And we review the bankruptcy court's legal conclusions de novo. Hemar Ins. Corp. of Am. v. Cox, 338 F.3d 1238, 1241 (11th Cir. 2003).

That GMAC's junior lien is both "allowed" under 11 U.S.C. § 502 and wholly unsecured pursuant to section 506(a) is undisputed.² To determine whether

²11 U.S.C. § 506(a) provides in pertinent part:

An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

such an allowed -- but wholly unsecured -- claim is voidable, we must then look to section 506(d), which provides that “[t]o the extent that a lien secures a claim against a debtor that is not an allowed secured claim, such lien is void.” See 11 U.S.C. § 506(d).

Several courts have determined that the United States Supreme Court’s decision in Dewsnup v. Timm, 112 S. Ct. 773 (1992) -- which concluded that a Chapter 7 debtor could not “strip down” a partially secured lien under section 506(d) -- also precludes a Chapter 7 debtor from “stripping off” a wholly unsecured junior lien such as the lien at issue in this appeal. See, e.g., Ryan v. Homecomings Fin. Network, 253 F.3d 778 (4th Cir. 2001); Talbert v. City Mortg. Serv., 344 F.3d 555 (6th Cir. 2003); Laskin v. First Nat’l Bank of Keystone, 222 B.R. 872 (B.A.P. 9th Cir. 1998). But the present controlling precedent in the Eleventh Circuit remains our decision in Folendore v. United States Small Bus. Admin., 862 F.2d 1537 (11th Cir. 1989). In Folendore, we concluded that an allowed claim that was wholly unsecured -- just as GMAC’s claim is here -- was voidable under the plain language of section 506(d).³ 862 F.2d at 1538-39.

³Although Folendore addressed the 1978 version of the Bankruptcy Code, the 1984 amendments to the Code did not alter the pertinent language in section 506(a) or (d).

A few bankruptcy court decisions within our circuit -- including the decision underlying this appeal -- have treated Folendore as abrogated by Dewsnup. See, e.g., In re McNeal, No. A09-78173, 2010 Bankr. LEXIS 1350, at *9-12 (Bankr. N.D. Ga. Apr. 9, 2010); In re Swafford, 160 B.R. 246, 249 (Bankr. N.D. Ga. 1993); In re Windham, 136 B.R. 878, 882 n.6 (Bankr. M.D. Fla. 1992). But Folendore -- not Dewsnup -- controls in this case.

“Under our prior panel precedent rule, a later panel may depart from an earlier panel’s decision only when the intervening Supreme Court decision is ‘clearly on point.’” Atl. Sounding Co., Inc. v. Townsend, 496 F.3d 1282, 1284 (11th Cir. 2007). Because Dewsnup disallowed only a “strip down” of a partially secured mortgage lien and did not address a “strip off” of a wholly unsecured lien, it is not “clearly on point” with the facts in Folendore or with the facts at issue in this appeal.

Although the Supreme Court’s reasoning in Dewsnup seems to reject the plain language analysis that we used in Folendore, “[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding.” Atl. Sounding Co., Inc., 496 F.3d at 1284 (citing Crawford-El v. Britton, 118 S. Ct. 1584, 1590 (1998)). “[T]hat the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel

to depart from our prior decision.” Id. “As we have stated, ‘[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing.” Id. In fact, the Supreme Court -- noting the ambiguities in the bankruptcy code and the “the difficulty of interpreting the statute in a single opinion that would apply to all possible fact situations” -- limited its Dewsnup decision expressly to the precise issue raised by the facts of the case. 112 S. Ct. at 778.

Because -- under Folendore -- GMAC’s lien is voidable under section 506(d), we reverse and remand for additional proceedings consistent with this decision.

REVERSED AND REMANDED.

Mortgage Modification Strategies
Debtor's Counsel Perspective
Jessie Molnar

Steps to Completing a Successful Mediation

Pre-Filing Loan Modification Counseling

1. Look to see if numbers work- look at income, amortize principal with arrears plus fees.
2. Explain process thoroughly. Set realistic expectations and results.
3. Calculate 31% of the client's gross income to determine adequate protection payments in the Chapter 13 Plan (note: review carefully to determine if current mortgage payment is less than 31%). Use current mortgage statement or foreclosure documents to get accurate mortgage balance, fees and escrow shortages.

Getting Process Started

1. File Motion for Referral after 341 meeting.
2. Once you receive the order, start mediation file. Include proof of claim, property appraiser value and notice of appearance.
3. Contact counsel (if Notice of Appearance has been filed) or claimant (if no NOA but claim has been filed) and request a loan modification package.

Completing the Loan Modification Package

1. Set up an appointment for the client to come in with all supporting documentation (i.e. bank statements, pay stubs, HOA proof, utility bills, etc.).
2. Fill out paperwork with the client and make sure all supporting documentation is complete.
3. If it is not possible to meet with the client, provide them with the loan modification package and set up a deadline for when it needs to be returned.
4. Scan and send completed package in to creditor's counsel.
5. Print out emails and attachments for record keeping purposes.
6. Email creditor's counsel in a separate email to confirm receipt of all documents.

Selection of Mediator and Mediation Date

1. Select a mutually agreed upon mediator.
2. Agree on a date for mediation (if modification package is complete, 45 days is usually a good time frame).
3. File Notice of Mediation and Selection of Mediator with the Court.

Preparing for Mediation

1. Follow up with creditor's counsel every two weeks for additional information and document requests.
2. Follow up with the client on any document requests.
3. Send in updated bank statements and pay stubs every month.
4. Request and collect mediation fee of \$175 from the client to give to the mediator.
5. Request conference call number in advance.

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Mediation

1. Ask the client to arrive one hour before mediation. Give them an update of mediation status and procedure.
2. Be prepared- have all documentation and proof of emails with attachments ready so you can refer back to them if need be.
3. Ask questions- what type of loan does the client have, what type of modification is the loan being reviewed for, is there a possibility for a principal reduction, etc.
4. If the first mediation is continued (most of them are), set up: 1) a deadline to turn in additional documents (usually 2 weeks); 2) a conciliation call with creditor's counsel (30 days from document deadline) and 3) follow up mediation (two weeks after conciliation call).

Trial Loan Modification Approval

1. Receive a letter in writing with trial loan modification terms including payment amounts and due dates.
2. Meet with the client and go over terms, payments and deadlines in great detail.
3. File an Amended Chapter 13 Plan to pay the mortgage directly.
4. File a Motion to Approve the Trial Loan Modification.
5. File your Fee Application for the mortgage modification process.

Trial Loan Modification Denial

1. Receive a letter in writing that the client has been denied for modification.
2. Go forward with the second mediation because at that time you can make sure numbers are accurate; the client can ask any questions they still have; reason for denial can be discussed in more detail and non-retention options can also be discussed. Main thing here is do not give up on your client. Get all the facts and all the options. Sometimes a denial can turn into an approval simply by getting a roommate/rental income, reducing expenses, surrendering a high vehicle payment, etc.
3. File an Amended Chapter 13 Plan to surrender the property.
4. File your Fee Application for the mortgage modification process.

What to do when a Creditor is Unresponsive?

1. If a Notice of Appearance or claim is filed, try and contact that person directly- phone, email, letter, etc.
2. If there is not a Notice of Appearance or claim filed, keep checking the docket every 1-2 weeks until the claims bar date.
3. Reach out to creditor attorneys to see whether they have been assigned the case or whether they can find out who is assigned. Contact foreclosure attorney for information on who is representing the creditor in the mediation process.
4. Send a letter requesting contact for mortgage modification mediation the same way you would serve an order (certified mail to bank president, regular mail to registered agent, claimant and counsel).

**Mortgage Modification Strategies
Debtor's Counsel Perspective
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5. File a Motion to Compel and for Sanctions. Keep in mind sanctions should always be a last resort after exhausting all other reasonable attempts to communicate/resolve issues with the creditor. Be selective on sanction requests since you need the creditor to cooperate and offer good terms.

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Tips for Completing a Successful Mediation

1. Create a separate file for mediation.
2. Keep detailed time records from the inception in the event it becomes necessary to file a fee application requesting fees greater than the standard "no look" mediation fee.
3. Create a separate mediation calendar. Set reminders for when to follow up with clients, creditor's counsel, check on dockets, etc.
4. Try to be very detail oriented when assisting the client with filling out the loan modification package.
Common mistakes:
 - RMA: not checking all the boxes; leaving lines blank; not tallying up columns for income, expenses and assets
 - 4506T: line 5- cannot be left blank- must have the name and address where the IRS transcripts should be sent; line 6- must state "1040"; line 6, box "a"- must be checked; line 9- must be in mm/dd/yyyy format (for example- if requesting the 2012 tax return, the correct format would be 12/31/2012)
 - Hardship letter: should have a date when the hardship began and also include a handwritten signature and date.
5. Make sure all supporting documentation is complete:
 - Pay stubs should be consecutive.
 - Bank statements should have all pages. Bank statements should be the full statement with the bank letterhead on it, not just a print out.
 - Tax returns should be signed and dated.
 - Utility bill needs to be in the Debtor's name.
6. Keep in communication with creditor's counsel. If a document request from your client is taking longer than requested, keep creditor's counsel in the loop. If there is a request from the bank that you do not understand or is ambiguous, ask for clarification rather than ignore it or risk inaccurately complying with it. This will save so much time and prevent fruitless mediations.

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Questions and Documentation Needed to Complete a Loan Modification Package

Questions for Completing the Loan Modification Package

1. Does the client have an HOA? If yes, need name and address of HOA along with proof the client is current.
2. How many months is the client delinquent?
3. When did the client's hardship begin?
4. What was the reason for the client's hardship?
5. Is the client a service member?
6. How many people are currently living in the client's household?
7. What was the hire date for the client's job?

Documentation for Completing the Loan Modification Package

1. Income
 - Last 60 days of pay stubs (for W2 employees)
 - AND/OR
 - Last 6 months profit & loss (for 1099 employees)
 - AND/OR
 - Current benefit letter (SSI, Disability, Pension)
2. Bank Statements
 - Last 60 days
 - Must be official bank statements with bank letterhead/logo. They cannot be a print out. All pages must be submitted, even if a page is blank.
3. Tax Returns
 - Two most recent years. Must be signed and dated.
4. Utility Bill
 - Electric and water with client's name and address.
5. HOA Proof (if applicable)
 - Statement which provides the amount and frequency of the HOA dues and that the client is current.

Miscellaneous Documentation

1. If the client is divorced, final divorce decree is needed. Additionally, if the ex-spouse was also on the mortgage with the client, than a quit claim deed will also need to be provided.

timely filed if it is filed not later than 180 days after the date of the order for relief. A proof of claim filed by a governmental unit for a claim resulting from a tax return filed under §1308 is timely filed if it is filed no later than 180 days after the date of the order for relief or 60 days after the date of the filing of the tax return. The court may, for cause, enlarge the time for a governmental unit to file a proof of claim only upon motion of the governmental unit made before expiration of the period for filing a timely proof of claim.

(2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract or unexpired lease of the debtor may be filed within such time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors under Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall give at least 90 days' notice by mail to creditors of that fact and of the date by which proofs of claim must be filed.

(6) If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, on motion filed by the creditor before or after the expiration of the time, the court may extend the time by not more than 60 days if the court finds that the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim.

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 23, 1996, eff. Dec. 1, 1996; Apr. 23, 2008, eff. Dec. 1, 2008.)

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) **IN GENERAL.** This rule applies in a chapter 13 case to claims that are (1) secured by a security interest in the debtor's principal residence, and (2) provided for under §1322(b)(5) of the Code in the debtor's plan.

(b) **NOTICE OF PAYMENT CHANGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment, no later than 21 days before a payment in the new amount is due.

(c) **NOTICE OF FEES, EXPENSES, AND CHARGES.** The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice itemizing all fees, expenses, or charges (1) that

were incurred in connection with the claim after the bankruptcy case was filed, and (2) that the holder asserts are recoverable against the debtor or against the debtor's principal residence. The notice shall be served within 180 days after the date on which the fees, expenses, or charges are incurred.

(d) **FORM AND CONTENT.** A notice filed and served under subdivision (b) or (c) of this rule shall be prepared as prescribed by the appropriate Official Form, and filed as a supplement to the holder's proof of claim. The notice is not subject to Rule 3001(f).

(e) **DETERMINATION OF FEES, EXPENSES, OR CHARGES.** On motion of the debtor or trustee filed within one year after service of a notice under subdivision (c) of this rule, the court shall, after notice and hearing, determine whether payment of any claimed fee, expense, or charge is required by the underlying agreement and applicable nonbankruptcy law to cure a default or maintain payments in accordance with §1322(b)(5) of the Code.

(f) **NOTICE OF FINAL CURE PAYMENT.** Within 30 days after the debtor completes all payments under the plan, the trustee shall file and serve on the holder of the claim, the debtor, and debtor's counsel a notice stating that the debtor has paid in full the amount required to cure any default on the claim. The notice shall also inform the holder of its obligation to file and serve a response under subdivision (g). If the debtor contends that final cure payment has been made and all plan payments have been completed, and the trustee does not timely file and serve the notice required by this subdivision, the debtor may file and serve the notice.

(g) **RESPONSE TO NOTICE OF FINAL CURE PAYMENT.** Within 21 days after service of the notice under subdivision (f) of this rule, the holder shall file and serve on the debtor, debtor's counsel, and the trustee a statement indicating (1) whether it agrees that the debtor has paid in full the amount required to cure the default on the claim, and (2) whether the debtor is otherwise current on all payments consistent with §1322(b)(5) of the Code. The statement shall itemize the required cure or postpetition amounts, if any, that the holder contends remain unpaid as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim and is not subject to Rule 3001(f).

(h) **DETERMINATION OF FINAL CURE AND PAYMENT.** On motion of the debtor or trustee filed within 21 days after service of the statement under subdivision (g) of this rule, the court shall, after notice and hearing, determine whether the debtor has cured the default and paid all required postpetition amounts.

(i) **FAILURE TO NOTIFY.** If the holder of a claim fails to provide any information as required by subdivision (b), (c), or (g) of this rule, the court may, after notice and hearing, take either or both of the following actions:

- (1) preclude the holder from presenting the omitted information, in any form, as evidence in any contested matter or adversary proceeding in the case, unless the court determines that the failure was substantially justified or is harmless; or
- (2) award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

(Added Apr. 26, 2011, eff. Dec. 1, 2011.)



552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

§ 362. Automatic stay

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of—

(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.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a)—

(A) of the commencement or continuation of a civil action or proceeding—

(i) for the establishment of paternity;

(ii) for the establishment or modification of an order for domestic support obligations;

(iii) concerning child custody or visitation;

(iv) for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate; or

(v) regarding domestic violence;

(B) of the collection of a domestic support obligation from property that is not property of the estate;

(C) with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute;

(D) of the withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, under State law, as specified in section 466(a)(16) of the Social Security Act;

(E) of the reporting of overdue support owed by a parent to any consumer reporting agency as specified in section 466(a)(7) of the Social Security Act;

(F) of the interception of a tax refund, as specified in sections 464 and 466(a)(3) of the Social Security Act or under an analogous State law; or

(G) of the enforcement of a medical obligation, as specified under title IV of the Social Security Act;

(3) under subsection (a) of this section, of any act to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;

[(5) Repealed. Pub. L. 105-277, div. I, title VI, § 603(1), Oct. 21, 1998, 112 Stat. 2681-866.]

(6) under subsection (a) of this section, of the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any contractual right (as defined in section 555 or 556) under any security agreement or arrangement or other credit enhancement forming a part of or related to any commodity contract, forward contract or securities contract, or of any contractual right (as defined in section 555 or 556) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such contracts, including any master agreement for such contracts;

(7) under subsection (a) of this section, of the exercise by a repo participant or financial participant of any contractual right (as defined in section 559) under any security agreement or arrangement or other credit enhance-

ment forming a part of or related to any repurchase agreement, or of any contractual right (as defined in section 559) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a), of—

(A) an audit by a governmental unit to determine tax liability;

(B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(C) a demand for tax returns; or

(D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property;

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under chapter 537 of title 46 or section 109(h) of title 49, or under applicable State law;

(13) under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under section 31325 of title 46 (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or a mortgage, deed of trust, or other security interest in a fishing fa-

cility held by the Secretary of Commerce under chapter 537 of title 46;

(14) under subsection (a) of this section, of any action by an accrediting agency regarding the accreditation status of the debtor as an educational institution;

(15) under subsection (a) of this section, of any action by a State licensing body regarding the licensure of the debtor as an educational institution;

(16) under subsection (a) of this section, of any action by a guaranty agency, as defined in section 435(j) of the Higher Education Act of 1965 or the Secretary of Education regarding the eligibility of the debtor to participate in programs authorized under such Act;

(17) under subsection (a) of this section, of the exercise by a swap participant or financial participant of any contractual right (as defined in section 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any swap agreement, or of any contractual right (as defined in section 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such agreements, including any master agreement for such agreements;

(18) under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax, or a special tax or special assessment on real property whether or not ad valorem, imposed by a governmental unit, if such tax or assessment comes due after the date of the filing of the petition;

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457, or 501(c) of the Internal Revenue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor, or predecessor of such employer—

(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or

(B) a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;

but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

(20) under subsection (a), of any act to enforce any lien against or security interest in real property following entry of the order under subsection (d)(4) as to such real property in any prior case under this title, for a period of 2 years after the date of the entry of such an order, except that the debtor, in a subse-

quent case under this title, may move for relief from such order based upon changed circumstances or for other good cause shown, after notice and a hearing;

(21) under subsection (a), of any act to enforce any lien against or security interest in real property—

(A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or

(B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title;

(22) subject to subsection (l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor;

(23) subject to subsection (m), under subsection (a)(3), of an eviction action that seeks possession of the residential property in which the debtor resides as a tenant under a lease or rental agreement based on endangerment of such property or the illegal use of controlled substances on such property, but only if the lessor files with the court, and serves upon the debtor, a certification under penalty of perjury that such an eviction action has been filed, or that the debtor, during the 30-day period preceding the date of the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property;

(24) under subsection (a), of any transfer that is not avoidable under section 544 and that is not avoidable under section 549;

(25) under subsection (a), of—

(A) the commencement or continuation of an investigation or action by a securities self regulatory organization to enforce such organization's regulatory power;

(B) the enforcement of an order or decision, other than for monetary sanctions, obtained in an action by such securities self regulatory organization to enforce such organization's regulatory power; or

(C) any act taken by such securities self regulatory organization to delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements;

(26) under subsection (a), of the setoff under applicable nonbankruptcy law of an income tax refund, by a governmental unit, with respect to a taxable period that ended before the date of the order for relief against an income tax liability for a taxable period that also ended before the date of the order for relief, except that in any case in which the setoff of an income tax refund is not permitted under applicable nonbankruptcy law because of a pending action to determine the amount or legality of a tax liability, the governmental unit

may hold the refund pending the resolution of the action, unless the court, on the motion of the trustee and after notice and a hearing, grants the taxing authority adequate protection (within the meaning of section 361) for the secured claim of such authority in the setoff under section 506(a);

(27) under subsection (a) of this section, of the exercise by a master netting agreement participant of any contractual right (as defined in section 555, 556, 559, or 560) under any security agreement or arrangement or other credit enhancement forming a part of or related to any master netting agreement, or of any contractual right (as defined in section 555, 556, 559, or 560) to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with 1 or more such master netting agreements to the extent that such participant is eligible to exercise such rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and

(28) under subsection (a), of the exclusion by the Secretary of Health and Human Services of the debtor from participation in the medicare program or any other Federal health care program (as defined in section 1128B(f) of the Social Security Act pursuant to title XI or XVIII of such Act).

The provisions of paragraphs (12) and (13) of this subsection shall apply with respect to any such petition filed on or before December 31, 1989.

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

(1) 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;

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied;

(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)—

(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;

(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; and

(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; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, 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;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(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

(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.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate; or

(4) with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—

(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or

(B) multiple bankruptcy filings affecting such real property.

If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

(e)(1) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

(2) Notwithstanding paragraph (1), in a case under chapter 7, 11, or 13 in which the debtor is

an individual, the stay under subsection (a) shall terminate on the date that is 60 days after a request is made by a party in interest under subsection (d), unless—

(A) a final decision is rendered by the court during the 60-day period beginning on the date of the request; or

(B) such 60-day period is extended—

(i) by agreement of all parties in interest; or

(ii) by the court for such specific period of time as the court finds is required for good cause, as described in findings made by the court.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section—

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

(2) Paragraph (1) does not apply if the court determines, on the motion of the trustee filed before the expiration of the applicable time set by section 521(a)(2), after notice and a hearing, that such personal property is of consequential value or benefit to the estate, and orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee. If the court does not so determine, the stay provided by subsection (a) shall terminate upon the conclusion of the hearing on the motion.

(i) If a case commenced under chapter 7, 11, or 13 is dismissed due to the creation of a debt repayment plan, for purposes of subsection (c)(3), any subsequent case commenced by the debtor under any such chapter shall not be presumed to be filed not in good faith.

(j) On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.

(k)(1) Except as provided in paragraph (2), an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

(2) If such violation is based on an action taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

(l)(1) Except as otherwise provided in this subsection, subsection (b)(22) shall apply on the date that is 30 days after the date on which the bankruptcy petition is filed, if the debtor files with the petition and serves upon the lessor a certification under penalty of perjury that—

(A) under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment for possession was entered; and

(B) the debtor (or an adult dependent of the debtor) has deposited with the clerk of the court, any rent that would become due during the 30-day period after the filing of the bankruptcy petition.

(2) If, within the 30-day period after the filing of the bankruptcy petition, the debtor (or an adult dependent of the debtor) complies with paragraph (1) and files with the court and serves upon the lessor a further certification under penalty of perjury that the debtor (or an adult dependent of the debtor) has cured, under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought by the lessor, subsection (b)(22) shall not apply, unless ordered to apply by the court under paragraph (3).

(3)(A) If the lessor files an objection to any certification filed by the debtor under paragraph (1) or (2), and serves such objection upon the debtor, the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the certification filed by the debtor under paragraph (1) or (2) is true.

(B) If the court upholds the objection of the lessor filed under subparagraph (A)—

(i) subsection (b)(22) shall apply immediately and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's objection.

(4) If a debtor, in accordance with paragraph (5), indicates on the petition that there was a

judgment for possession of the residential rental property in which the debtor resides and does not file a certification under paragraph (1) or (2)—

(A) subsection (b)(22) shall apply immediately upon failure to file such certification, and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating the absence of a filed certification and the applicability of the exception to the stay under subsection (b)(22).

(5)(A) Where a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition and on any certification filed under this subsection.

(B) The form of certification filed with the petition, as specified in this subsection, shall provide for the debtor to certify, and the debtor shall certify—

(i) whether a judgment for possession of residential rental housing in which the debtor resides has been obtained against the debtor before the date of the filing of the petition; and

(ii) whether the debtor is claiming under paragraph (1) that under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after that judgment of possession was entered, and has made the appropriate deposit with the court.

(C) The standard forms (electronic and otherwise) used in a bankruptcy proceeding shall be amended to reflect the requirements of this subsection.

(D) The clerk of the court shall arrange for the prompt transmittal of the rent deposited in accordance with paragraph (1)(B) to the lessor.

(m)(1) Except as otherwise provided in this subsection, subsection (b)(23) shall apply on the date that is 15 days after the date on which the lessor files and serves a certification described in subsection (b)(23).

(2)(A) If the debtor files with the court an objection to the truth or legal sufficiency of the certification described in subsection (b)(23) and serves such objection upon the lessor, subsection (b)(23) shall not apply, unless ordered to apply by the court under this subsection.

(B) If the debtor files and serves the objection under subparagraph (A), the court shall hold a hearing within 10 days after the filing and service of such objection to determine if the situation giving rise to the lessor's certification under paragraph (1) existed or has been remedied.

(C) If the debtor can demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph

(1) did not exist or has been remedied, the stay provided under subsection (a)(3) shall remain in effect until the termination of the stay under this section.

(D) If the debtor cannot demonstrate to the satisfaction of the court that the situation giving rise to the lessor's certification under paragraph (1) did not exist or has been remedied—

(i) relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to proceed with the eviction; and

(ii) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the court's order upholding the lessor's certification.

(3) If the debtor fails to file, within 15 days, an objection under paragraph (2)(A)—

(A) subsection (b)(23) shall apply immediately upon such failure and relief from the stay provided under subsection (a)(3) shall not be required to enable the lessor to complete the process to recover full possession of the property; and

(B) the clerk of the court shall immediately serve upon the lessor and the debtor a certified copy of the docket indicating such failure.

(n)(1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

(2) Paragraph (1) does not apply—

(A) to an involuntary case involving no collocation by the debtor with creditors; or

(B) to the filing of a petition if—

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

(o) The exercise of rights not subject to the stay arising under subsection (a) pursuant to paragraph (6), (7), (17), or (27) of subsection (b) shall not be stayed by any order of a court or administrative agency in any proceeding under this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2570; Pub. L. 97-222, § 3, July 27, 1982, 96 Stat. 235; Pub. L. 98-353, title III, §§ 304, 363(b), 392, 441, July 10, 1984, 98 Stat. 352, 363, 365, 371; Pub. L. 99-509, title V, § 5001(a), Oct. 21, 1986, 100 Stat. 1911; Pub. L. 99-554, title II, §§ 257(j), 283(d), Oct. 27, 1986, 100 Stat. 3115, 3116; Pub. L. 101-311, title I, § 102, title II, § 202, June 25, 1990, 104 Stat. 267, 269; Pub. L. 101-508, title III, § 3007(a)(1), Nov. 5, 1990, 104 Stat. 1388-28; Pub. L. 103-394, title I, §§ 101, 116, title II, §§ 204(a), 218(b), title III, § 304(b), title IV, § 401, title V, § 501(b)(2), (d)(7), Oct. 22, 1994, 108 Stat. 4107, 4119, 4122, 4128, 4132, 4141, 4142, 4144; Pub. L. 105-277, div. I, title VI, § 603, Oct. 21, 1998, 112 Stat. 2681-886; Pub. L. 109-8, title I, § 106(f), title II, §§ 214, 224(b), title III, §§ 302, 303, 305(1), 311, 320, title IV, §§ 401(b), 441, 444, title VII, §§ 709, 718, title IX, § 907(d), (o)(1), (2), title XI, § 1106, title XII, § 1225, Apr. 20, 2005, 119 Stat. 41, 54, 64, 75, 77, 79, 84, 94, 104, 114, 117, 127, 131, 176, 181, 182, 192, 199; Pub. L. 109-304, § 17(b)(1), Oct. 6, 2006, 120 Stat. 1706; Pub. L. 109-390, § 5(a)(2), Dec. 12, 2006, 120 Stat. 2696; Pub. L. 111-327, § 2(a)(12), Dec. 22, 2010, 124 Stat. 3558.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining the commencement or continuation of a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case. The provision is beneficial and interacts with section 362(a)(6), which also covers assessment, to prevent harassment of the debtor with respect to pre-petition claims.

Section 362(a)(7) contains a provision contained in H.R. 8200 as passed by the House. The differing provision in the Senate amendment was rejected. It is not possible that a debt owing to the debtor may be offset against an interest in the debtor.

Section 362(a)(8) is new. The provision stays the commencement or continuation of any proceeding concerning the debtor before the U.S. Tax Court.

Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

Section 362(b)(6) of the House amendment adopts a provision contained in the Senate amendment restricting the exception to the automatic stay with respect to setoffs to permit only the setoff of mutual debts and claims. Traditionally, the right of setoff has been limited to mutual debts and claims and the lack of the clarifying term "mutual" in H.R. 8200 as passed by the House created an unintentional ambiguity. Section 362(b)(7) of the House amendment permits the issuance of a notice of tax deficiency. The House amendment rejects section 362(b)(7) in the Senate amendment. It would have permitted a particular governmental unit to obtain a pecuniary advantage without a hearing on the merits contrary to the exceptions contained in sections 362(b)(4) and (5).

Section 362(d) of the House amendment represents a compromise between comparable provisions in the House bill and Senate amendment. Under section 362(d)(1) of the House amendment, the court may terminate, annul, modify, or condition the automatic stay for cause, including lack of adequate protection of an interest in property of a secured party. It is anticipated

that the Rules of Bankruptcy Procedure will provide that those hearings will receive priority on the calendar. Under section 362(d)(2) the court may alternatively terminate, annul, modify, or condition the automatic stay for cause including inadequate protection for the creditor. The court shall grant relief from the stay if there is no equity and it is not necessary to an effective reorganization of the debtor.

The latter requirement is contained in section 362(d)(2). This section is intended to solve the problem of real property mortgage foreclosures of property where the bankruptcy petition is filed on the eve of foreclosure. The section is not intended to apply if the business of the debtor is managing or leasing real property, such as a hotel operation, even though the debtor has no equity if the property is necessary to an effective reorganization of the debtor. Similarly, if the debtor does have an equity in the property, there is no requirement that the property be sold under section 363 of title 11 as would have been required by the Senate amendment.

Section 362(e) of the House amendment represents a modification of provisions in H.R. 8200 as passed by the House and the Senate amendment to make clear that a final hearing must be commenced within 30 days after a preliminary hearing is held to determine whether a creditor will be entitled to relief from the automatic stay. In order to insure that those hearings will in fact occur within such 30-day period, it is anticipated that the rules of bankruptcy procedure provide that such final hearings receive priority on the court calendar.

Section 362(g) places the burden of proof on the issue of the debtor's equity in collateral on the party requesting relief from the automatic stay and the burden on other issues on the debtor.

An amendment has been made to section 362(b) to permit the Secretary of the Department of Housing and Urban Development to commence an action to foreclose a mortgage or deed of trust. The commencement of such an action is necessary for tax purposes. The section is not intended to permit the continuation of such an action after it is commenced nor is the section to be construed to entitle the Secretary to take possession in lieu of foreclosure.

Automatic stay: Sections 362(b)(8) and (9) contained in the Senate amendment are largely deleted in the House amendment. Those provisions add to the list of actions not stayed (a) jeopardy assessments, (b) other assessments, and (c) the issuance of deficiency notices. In the House amendment, jeopardy assessments against property which ceases to be property of the estate is already authorized by section 362(c)(1). Other assessments are specifically stayed under section 362(a)(6), while the issuance of a deficiency notice is specifically permitted. Stay of the assessment and the permission to issue a statutory notice of a tax deficiency will permit the debtor to take his personal tax case to the Tax Court, if the bankruptcy judge authorizes him to do so (as explained more fully in the discussion of section 505).

SENATE REPORT NO. 95-989

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

The action commenced by the party seeking relief from the stay is referred to as a motion to make it clear that at the expedited hearing under subsection (e), and at hearings on relief from the stay, the only issue will be the lack of adequate protection, the debtor's equity in the property, and the necessity of the property to an effective reorganization of the debtor, or the existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against

the creditor, which, although relevant to the question of the amount of the debt, concern largely collateral or unrelated matters. This approach is consistent with that taken in cases such as *In re Esser Properties, Ltd.*, 430 F.Supp. 1112 (N.D.Cal.1977), that an action seeking relief from the stay is not the assertion of a claim which would give rise to the right or obligation to assert counterclaims. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustee to recover property of the estate or to object to the allowance of a claim. However, this would not preclude the party seeking continuance of the stay from presenting evidence on the existence of claims which the court may consider in exercising its discretion. What is precluded is a determination of such collateral claims on the merits at the hearing.

HOUSE REPORT NO. 95-595

Paragraph (7) [of subsec. (a)] stays setoffs of mutual debts and credits between the debtor and creditors. As with all other paragraphs of subsection (a), this paragraph does not affect the right of creditors. It simply stays its enforcement pending an orderly examination of the debtor's and creditors' rights.

Subsection (c) governs automatic termination of the stay. Subsections (d) through (g) govern termination of the stay by the court on the request of a party in interest. Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such as by terminating, annulling, modifying, or conditioning the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. For example, a divorce or child custody proceeding involving the debtor may bear no relation to the bankruptcy case. In that case, it should not be stayed. A probate proceeding in which the debtor is the executor or administrator of another's estate usually will not be related to the bankruptcy case, and should not be stayed. Generally, proceedings in which the debtor is a fiduciary, or involving postpetition activities of the debtor, need not be stayed because they bear no relationship to the purpose of the automatic stay, which is debtor protection from his creditors. The facts of each request will determine whether relief is appropriate under the circumstances.

Subsection (e) provides a protection for secured creditors that is not available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided of the secured creditor's interest. If the court does not rule within 30 days from a request for relief from the stay, the stay is automatically terminated with respect to the property in question. In order to accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order is similar to a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g) leaves that burden on the party opposing relief from

the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection.

At the expedited hearing under subsection (e), and at all hearings on relief from the stay, the only issue will be the claim of the creditor and the lack of adequate protection or existence of other cause for relief from the stay. This hearing will not be the appropriate time at which to bring in other issues, such as counterclaims against the creditor on largely unrelated matters. Those counterclaims are not to be handled in the summary fashion that the preliminary hearing under this provision will be. Rather, they will be the subject of more complete proceedings by the trustees to recover property of the estate or to object to the allowance of a claim.

REFERENCES IN TEXT

Section 5(a)(3) of the Securities Investor Protection Act of 1970, referred to in subsecs. (a) and (b), is classified to section 78eee(a)(3) of Title 15, Commerce and Trade.

The Social Security Act, referred to in subsec. (b)(2)(D) to (G), (28), is act Aug. 14, 1935, ch. 531, 49 Stat. 620, as amended. Titles IV, XI, and XVIII of the Act are classified generally to subchapters IV (§601 et seq.), XI (§1301 et seq.), and XVIII (§1395 et seq.), respectively, of chapter 7 of Title 42, The Public Health and Welfare. Sections 464, 466, and 1128B of the Act are classified to sections 664, 666, and 1320a-7b, respectively, of Title 42. For complete classification of this Act to the Code, see section 1305 of Title 42 and Tables.

The National Housing Act, referred to in subsec. (b)(8), is act June 27, 1934, ch. 847, 48 Stat. 1246, as amended, which is classified principally to chapter 13 (§1701 et seq.) of Title 12, Banks and Banking. For complete classification of this Act to the Code, see section 1701 of Title 12 and Tables.

The Higher Education Act of 1965, referred to in subsec. (b)(16), is Pub. L. 89-329, Nov. 8, 1965, 79 Stat. 1219, which is classified generally to chapter 28 (§1001 et seq.) of Title 20, Education, and part C (§2751 et seq.) of subchapter I of chapter 34 of Title 42, The Public Health and Welfare. Section 435(j) of the Act is classified to section 1085(j) of Title 20. For complete classification of this Act to the Code, see Short Title note set out under section 1001 of Title 20 and Tables.

The Internal Revenue Code of 1986, referred to in subsec. (b)(19), is classified generally to Title 26, Internal Revenue Code.

Section 408(b)(1) of the Employee Retirement Income Security Act of 1974, referred to in subsec. (b)(19)(A), is classified to section 1108(b)(1) of Title 29, Labor.

AMENDMENTS

2010—Subsec. (a)(8). Pub. L. 111-327, §2(a)(12)(A), substituted “tax liability of a debtor that is a corporation” for “corporate debtor’s tax liability”.

Subsec. (c)(3). Pub. L. 111-327, §2(a)(12)(B)(i), inserted “a” after “against” in introductory provisions.

Subsec. (c)(4)(A)(i). Pub. L. 111-327, §2(a)(12)(B)(ii), inserted “under a chapter other than chapter 7 after dismissal” after “refiled”.

Subsec. (d)(4). Pub. L. 111-327, §2(a)(12)(C), substituted “hinder, or” for “hinder, and” in introductory provisions.

Subsec. (f)(2). Pub. L. 111-327, §2(a)(12)(D), substituted “nonbankruptcy” for “nonbankruptcy”.

2006—Subsec. (b)(6), (7). Pub. L. 109-390, §5(a)(2)(A), added pars. (6) and (7) and struck out former pars. (6) and (7) which read as follows:

“(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761 of this title, forward contracts, or securities contracts, as defined in section 741 of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in

section 101, 741, or 761 of this title, or settlement payment, as defined in section 101 or 741 of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by, pledged to, under the control of, or due from such commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

“(7) under subsection (a) of this section, of the setoff by a repo participant or financial participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741 or 761 of this title, or settlement payment, as defined in section 741 of this title, arising out of repurchase agreements against cash, securities, or other property held by, pledged to, under the control of, or due from such repo participant or financial participant to margin, guarantee, secure or settle repurchase agreements;”

Subsec. (b)(12). Pub. L. 109-304, §17(b)(1)(A), substituted “chapter 537 of title 46 or section 109(h) of title 49” for “section 207 or title XI of the Merchant Marine Act, 1936”.

Subsec. (b)(13). Pub. L. 109-304, §17(b)(1)(B), substituted “chapter 537 of title 46” for “section 207 or title XI of the Merchant Marine Act, 1936”.

Subsec. (b)(17). Pub. L. 109-390, §5(a)(2)(B), added par. (17) and struck out former par. (17) which read as follows: “under subsection (a), of the setoff by a swap participant or financial participant of a mutual debt and claim under or in connection with one or more swap agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant or financial participant under or in connection with any swap agreement or against cash, securities, or other property held by, pledged to, under the control of, or due from such swap participant or financial participant to margin, guarantee, secure, or settle any swap agreement;”

Subsec. (b)(27). Pub. L. 109-390, §5(a)(2)(C), added par. (27) and struck out former par. (27) which read as follows: “under subsection (a), of the setoff by a master netting agreement participant of a mutual debt and claim under or in connection with one or more master netting agreements or any contract or agreement subject to such agreements that constitutes the setoff of a claim against the debtor for any payment or other transfer of property due from the debtor under or in connection with such agreements or any contract or agreement subject to such agreements against any payment due to the debtor from such master netting agreement participant under or in connection with such agreements or any contract or agreement subject to such agreements or against cash, securities, or other property held by, pledged to, under the control of, or due from such master netting agreement participant to margin, guarantee, secure, or settle such agreements or any contract or agreement subject to such agreements, to the extent that such participant is eligible to exercise such offset rights under paragraph (6), (7), or (17) for each individual contract covered by the master netting agreement in issue; and”

2005—Subsec. (a)(8). Pub. L. 109-8, §709, substituted “a corporate debtor’s tax liability 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” for “the debtor”.

Subsec. (b)(2). Pub. L. 109-8, §214, added par. (2) and struck out former par. (2) which read as follows: “under subsection (a) of this section—

“(A) of the commencement or continuation of an action or proceeding for—

“(i) the establishment of paternity; or

“(ii) the establishment or modification of an order for alimony, maintenance, or support; or

- “(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;”.
- Subsec. (b)(6). Pub. L. 109-8, §907(d)(1)(A), (o)(1), substituted “financial institution, financial participant,” for “financial institutions,” in two places and inserted “, pledged to, under the control of,” after “held by”.
- Subsec. (b)(7). Pub. L. 109-8, §907(d)(1)(B), (o)(2), inserted “or financial participant” after “repo participant” in two places and “, pledged to, under the control of,” after “held by”.
- Subsec. (b)(17). Pub. L. 109-8, §907(d)(1)(C), added par. (17) and struck out former par. (17) which read as follows: “under subsection (a) of this section, of the setoff by a swap participant, of any mutual debt and claim under or in connection with any swap agreement that constitutes the setoff of a claim against the debtor for any payment due from the debtor under or in connection with any swap agreement against any payment due to the debtor from the swap participant under or in connection with any swap agreement or against cash, securities, or other property of the debtor held by or due from such swap participant to guarantee, secure or settle any swap agreement;”.
- Subsec. (b)(18). Pub. L. 109-8, §1225, amended par. (18) generally. Prior to amendment, par. (18) read as follows: “under subsection (a) of the creation or perfection of a statutory lien for an ad valorem property tax imposed by the District of Columbia, or a political subdivision of a State, if such tax comes due after the filing of the petition;”.
- Subsec. (b)(19). Pub. L. 109-8, §224(b), added par. (19).
- Subsec. (b)(20), (21). Pub. L. 109-8, §303(b), added pars. (20) and (21).
- Subsec. (b)(22) to (24). Pub. L. 109-8, §311(a), added pars. (22) to (24).
- Subsec. (b)(25). Pub. L. 109-8, §401(b), added par. (25).
- Subsec. (b)(26). Pub. L. 109-8, §718, added par. (26).
- Subsec. (b)(27). Pub. L. 109-8, §907(d)(1)(D), added par. (27).
- Subsec. (b)(28). Pub. L. 109-8, §1106, added par. (28).
- Subsec. (c). Pub. L. 109-8, §305(1)(A), substituted “(e), (f), and (h)” for “(e), and (f)” in introductory provisions.
- Subsec. (c)(3), (4). Pub. L. 109-8, §302, added pars. (3) and (4).
- Subsec. (d). Pub. L. 109-8, §303(a), added par. (4) and concluding provisions.
- Subsec. (d)(3). Pub. L. 109-8, §444(1), inserted “or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later” after “90-day period)” in introductory provisions.
- Subsec. (d)(3)(B). Pub. L. 109-8, §444(2), added subpar. (B) and struck out former subpar. (B) which read as follows: “the debtor has commenced monthly payments to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien), which payments are in an amount equal to interest at a current fair market rate on the value of the creditor’s interest in the real estate; or”.
- Subsec. (e). Pub. L. 109-8, §320, designated existing provisions as par. (1) and added par. (2).
- Subsec. (h). Pub. L. 109-8, §305(1)(C), added subsec. (h). Former subsec. (h) redesignated (k).
- Subsecs. (i), (j). Pub. L. 109-8, §106(f), added subsecs. (i) and (j).
- Subsec. (k). Pub. L. 109-8, §441(1), designated existing provisions as par. (1), substituted “Except as provided in paragraph (2), an” for “An”, and added par. (2).
- Pub. L. 109-8, §305(1)(B), redesignated subsec. (h) as (k).
- Subsecs. (l), (m). Pub. L. 109-8, §311(b), added subsecs. (l) and (m).
- Subsec. (n). Pub. L. 109-8, §441(2), added subsec. (n).
- Subsec. (o). Pub. L. 109-8, §907(d)(2), added subsec. (o).
- 1998—Subsec. (b)(4), (5). Pub. L. 105-277 added par. (4) and struck out former pars. (4) and (5) which read as follows:
- “(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power;
- “(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power;”.
- 1994—Subsecs. (a), (b). Pub. L. 103-394, §501(d)(7)(A), (B)(1), struck out “(15 U.S.C. 78eee(a)(3))” after “Act of 1970” in introductory provisions.
- Subsec. (b)(2). Pub. L. 103-394, §304(b), amended par. (2) generally. Prior to amendment, par. (2) read as follows: “under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;”.
- Subsec. (b)(3). Pub. L. 103-394, §204(a), inserted “, or to maintain or continue the perfection of,” after “to perfect”.
- Subsec. (b)(6). Pub. L. 103-394, §501(b)(2)(A), substituted “section 761” for “section 761(4)”, “section 741” for “section 741(7)”, “section 101, 741, or 761” for “section 101(34), 741(5), or 761(15)”, and “section 101 or 741” for “section 101(35) or 741(8)”.
- Subsec. (b)(7). Pub. L. 103-394, §501(b)(2)(B), substituted “section 741 or 761” for “section 741(5) or 761(15)” and “section 741” for “section 741(8)”.
- Subsec. (b)(9). Pub. L. 103-394, §116, amended par. (9) generally. Prior to amendment, par. (9) read as follows: “under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;”.
- Subsec. (b)(10). Pub. L. 103-394, §501(d)(7)(B)(ii), struck out “or” at end.
- Subsec. (b)(12). Pub. L. 103-394, §501(d)(7)(B)(iii), substituted “section 31325 of title 46” for “the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)” and struck out “(46 App. U.S.C. 1117 and 1271 et seq., respectively)” after “Act, 1936”.
- Subsec. (b)(13). Pub. L. 103-394, §501(d)(7)(B)(iv), substituted “section 31325 of title 46” for “the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.)” and struck out “(46 App. U.S.C. 1117 and 1271 et seq., respectively)” after “Act, 1936” and “or” at end.
- Subsec. (b)(14). Pub. L. 103-394, §501(d)(7)(B)(vii), amended par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement by substituting “; or” for period at end, redesignating par. (14) as (17), and inserting it after par. (16).
- Subsec. (b)(15). Pub. L. 103-394, §501(d)(7)(B)(v), struck out “or” at end.
- Subsec. (b)(16). Pub. L. 103-394, §501(d)(7)(B)(vi), struck out “(20 U.S.C. 1001 et seq.)” after “Act of 1965” and substituted semicolon for period at end.
- Subsec. (b)(17). Pub. L. 103-394, §501(d)(7)(B)(vii)(II), (III), redesignated par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement as (17) and inserted it after par. (16).
- Subsec. (b)(18). Pub. L. 103-394, §401, added par. (18).
- Subsec. (d)(3). Pub. L. 103-394, §218(b), added par. (3).
- Subsec. (e). Pub. L. 103-394, §101, in last sentence substituted “concluded” for “commenced” and inserted before period at end “, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances”.
- 1990—Subsec. (b)(6). Pub. L. 101-311, §202, inserted reference to sections 101(34) and 101(35) of this title.
- Subsec. (b)(12). Pub. L. 101-508, §3007(a)(1)(A), which directed the striking of “or” after “State law;”, could not be executed because of a prior amendment by Pub. L. 101-311. See below.
- Pub. L. 101-311, §102(1), struck out “or” after “State law;”.
- Subsec. (b)(13). Pub. L. 101-508, §3007(a)(1)(B), which directed the substitution of a semicolon for period at end, could not be executed because of a prior amendment by Pub. L. 101-311. See below.
- Pub. L. 101-311, §102(2), substituted “; or” for period at end.

Subsec. (b)(14) to (16). Pub. L. 101-508, §3007(a)(1)(C), added pars. (14) to (16). Notwithstanding directory language adding pars. (14) to (16) immediately following par. (13), pars. (14) to (16) were added after par. (14), as added by Pub. L. 101-311, to reflect the probable intent of Congress.

Pub. L. 101-311, §102(3), added par. (14) relating to the setoff by a swap participant of any mutual debt and claim under or in connection with a swap agreement. Notwithstanding directory language adding par. (14) at end of subsec. (b), par. (14) was added after par. (13) to reflect the probable intent of Congress.

1986—Subsec. (b). Pub. L. 99-509 inserted sentence at end.

Subsec. (b)(6). Pub. L. 99-554, §283(d)(1), substituted “, financial institutions” for “financial institution,” in two places.

Subsec. (b)(9). Pub. L. 99-554, §283(d)(2), (3), struck out “or” at end of first par. (9) and redesignated as par. (10) the second par. (9) relating to leases of nonresidential property, which was added by section 363(b) of Pub. L. 98-353.

Subsec. (b)(10). Pub. L. 99-554, §283(d)(3), (4), redesignated as par. (10) the second par. (9) relating to leases of nonresidential property, added by section 363(b) of Pub. L. 98-353, and substituted “property; or” for “property.” Former par. (10) redesignated (11).

Subsec. (b)(11). Pub. L. 99-554, §283(d)(3), redesignated former par. (10) as (11).

Subsec. (b)(12), (13). Pub. L. 99-509 added pars. (12) and (13).

Subsec. (c)(2)(C). Pub. L. 99-554, §257(j), inserted reference to chapter 12 of this title.

1984—Subsec. (a)(1). Pub. L. 98-353, §441(a)(1), inserted “action or” after “other”.

Subsec. (a)(3). Pub. L. 98-353, §441(a)(2), inserted “or to exercise control over property of the estate”.

Subsec. (b)(3). Pub. L. 98-353, §441(b)(1), inserted “or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title”.

Subsec. (b)(6). Pub. L. 98-353, §441(b)(2), inserted “or due from” after “held by” and “financial institution,” after “stockbroker” in two places, and substituted “secure, or settle commodity contracts” for “or secure commodity contracts”.

Subsec. (b)(7) to (9). Pub. L. 98-353, §441(b)(3), (4), in par. (8) as redesignated by Pub. L. 98-353, §392, substituted “the” for “said” and struck out “or” the last place it appeared which probably meant “or” after “units;” that was struck out by Pub. L. 98-353, §363(b)(1); and, in par. (9), relating to notices of deficiencies, as redesignated by Pub. L. 98-353, §392, substituted a semicolon for the period.

Pub. L. 98-353, §392, added par. (7) and redesignated former pars. (7) and (8) as (8) and (9), respectively.

Pub. L. 98-353, §363(b), struck out “or” at end of par. (7), substituted “; or” for the period at end of par. (8), and added par. (9) relating to leases of nonresidential property.

Subsec. (b)(10). Pub. L. 98-353, §441(b)(5), added par. (10).

Subsec. (c)(2)(B). Pub. L. 98-353, §441(c), substituted “or” for “and”.

Subsec. (d)(2). Pub. L. 98-353, §441(d), inserted “under subsection (a) of this section” after “property”.

Subsec. (e). Pub. L. 98-353, §441(e), inserted “the conclusion of” after “pending” and substituted “The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.” for “If the hearing under this subsection is a preliminary hearing—

“(1) the court shall order such stay so continued if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the final hearing under subsection (d) of this section; and

“(2) such final hearing shall be commenced within thirty days after such preliminary hearing.”

Subsec. (f). Pub. L. 98-353, §441(f), substituted “Upon request of a party in interest, the court, with or” for “The court,”.

Subsec. (h). Pub. L. 98-353, §304, added subsec. (h).

1982—Subsec. (a). Pub. L. 97-222, §3(a), inserted “, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)),” after “this title” in provisions preceding par. (1).

Subsec. (b). Pub. L. 97-222, §3(b), inserted “, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)),” after “this title” in provisions preceding par. (1).

Subsec. (b)(6). Pub. L. 97-222, §3(c), substituted provisions that the filing of a bankruptcy petition would not operate as a stay, under subsec. (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, or securities clearing agency of any mutual debt and claim under or in connection with commodity, forward, or securities contracts that constitutes the setoff of a claim against the debtor for a margin or settlement payment arising out of commodity, forward, or securities contracts against cash, securities, or other property held by any of the above agents to margin, guarantee, or secure commodity, forward, or securities contracts, for provisions that such filing would not operate as a stay under subsection (a)(7) of this section, of the setoff of any mutual debt and claim that are commodity futures contracts, forward commodity contracts, leverage transactions, options, warrants, rights to purchase or sell commodity futures contracts or securities, or options to purchase or sell commodities or securities.

EFFECTIVE DATE OF 2006 AMENDMENT

Amendment by Pub. L. 109-390 not applicable to any cases commenced under this title or to appointments made under any Federal or State law, before Dec. 12, 2006, see section 7 of Pub. L. 109-390, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109-8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109-8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1990 AMENDMENT

Section 3007(a)(3) of Pub. L. 101-508 provided that: “The amendments made by this subsection [amending this section and section 541 of this title] shall be effective upon date of enactment of this Act [Nov. 5, 1990].”

Section 3008 of Pub. L. 101-508, provided that the amendments made by subtitle A (§§3001-3008) of title III of Pub. L. 101-508, amending this section, sections 541 and 1328 of this title, and sections 1078, 1078-1, 1078-7, 1085, 1088, and 1091 of Title 20, Education, and provisions set out as a note under section 1078-1 of Title 20, were to cease to be effective Oct. 1, 1996, prior to repeal by Pub. L. 102-325, title XV, §1558, July 23, 1992, 106 Stat. 841.

EFFECTIVE DATE OF 1986 AMENDMENTS

Amendment by section 257 of Pub. L. 99-554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99-554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

Amendment by section 283 of Pub. L. 99-554 effective 30 days after Oct. 27, 1986, see section 302(a) of Pub. L. 99-554.

Section 5001(b) of Pub. L. 99-509 provided that: "The amendments made by subsection (a) of this section [amending this section] shall apply only to petitions filed under section 362 of title 11, United States Code, which are made after August 1, 1986."

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

REPORT TO CONGRESSIONAL COMMITTEES

Section 5001(a) of Pub. L. 99-509 directed Secretary of Transportation and Secretary of Commerce, before July 1, 1989, to submit reports to Congress on the effects of amendments to 11 U.S.C. 362 by this subsection.

§ 363. Use, sale, or lease of property

(a) In this section, "cash collateral" means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest and includes the proceeds, products, offspring, rents, or profits of property and the fees, charges, accounts or other payments for the use or occupancy of rooms and other public facilities in hotels, motels, or other lodging properties subject to a security interest as provided in section 552(b) of this title, whether existing before or after the commencement of a case under this title.

(b)(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or

(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

(2) If notification is required under subsection (a) of section 7A of the Clayton Act in the case of a transaction under this subsection, then—

(A) notwithstanding subsection (a) of such section, the notification required by such subsection to be given by the debtor shall be given by the trustee; and

(B) notwithstanding subsection (b) of such section, the required waiting period shall end on the 15th day after the date of the receipt, by the Federal Trade Commission and the Assistant Attorney General in charge of the

Antitrust Division of the Department of Justice, of the notification required under such subsection (a), unless such waiting period is extended—

(1) pursuant to subsection (e)(2) of such section, in the same manner as such subsection (e)(2) applies to a cash tender offer;

(ii) pursuant to subsection (g)(2) of such section; or

(iii) by the court after notice and a hearing.

(c)(1) If the business of the debtor is authorized to be operated under section 721, 1108, 1203, 1204, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this subsection unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.

(d) The trustee may use, sell, or lease property under subsection (b) or (c) of this section—

(1) in the case of a debtor that is a corporation or trust that is not a moneyed business, commercial corporation, or trust, only in accordance with nonbankruptcy law applicable to the transfer of property by a debtor that is such a corporation or trust; and

(2) only to the extent not inconsistent with any relief granted under subsection (c), (d), (e), or (f) of section 362.

(e) Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest. This subsection also applies to property that is subject to any unexpired lease of personal property (to the exclusion of such property being subject to an order to grant relief from the stay under section 362).

(f) The trustee may sell property under subsection (b) or (c) of this section free and clear of



ception of claims specified in proposed 11 U.S.C. 503(b) (administrative expenses), preconversion claims are treated the same as prepetition claims.

Subsection (e) provides that conversion of a case terminates the service of any trustee serving in the case prior to conversion.

AMENDMENTS

2010—Subsec. (b). Pub. L. 111-327, §2(a)(11)(A), struck out “728(a), 728(b),” after “727(b),” and “1146(a), 1146(b),” after “1141(d)(4),”.

Subsec. (f)(1)(C)(i). Pub. L. 111-327, §2(a)(11)(B), which directed insertion of “of the filing” after “date”, was executed by making the insertion after “date” the first time appearing to reflect the probable intent of Congress.

2006—Subsec. (f)(1)(B). Pub. L. 109-8, §309(a)(2)(A), substituted “only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12” for “in the converted case, with allowed secured claims”.

Subsec. (f)(1)(C). Pub. L. 109-8, §309(a)(1), (2)(B), (3), added subpar. (C).

Subsec. (f)(2). Pub. L. 109-8, §1207, inserted “of the estate” after “bad faith, the property”.

1994—Subsec. (b). Pub. L. 103-394, §501(d)(5), substituted “1201(a), 1221, 1228(a), 1301(a), and 1305(a)” for “1301(a), 1305(a), 1201(a), 1221, and 1228(a)” and “1208, or 1307” for “1307, or 1208”.

Subsecs. (c) to (e). Pub. L. 103-394, §501(d)(5)(B), substituted “1208, or 1307” for “1307, or 1208”.

Subsec. (f). Pub. L. 103-394, §311, added subsec. (f).

1986—Subsec. (b). Pub. L. 99-554, §257(1)(1), substituted references to sections 1201(a), 1221, and 1228(a) of this title for reference to section 1328(a) of this title, and inserted reference to section 1208 of this title.

Subsecs. (c) to (e). Pub. L. 99-554, §257(1)(2), (3), inserted reference to section 1208 of this title.

EFFECTIVE DATE OF 2005 AMENDMENT

Amendment by Pub. L. 109-8 effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109-8, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Amendment by Pub. L. 99-554 effective 30 days after Oct. 27, 1986, but not applicable to cases commenced under this title before that date, see section 302(a), (c)(1) of Pub. L. 99-554, set out as a note under section 581 of Title 28, Judiciary and Judicial Procedure.

§ 349. Effect of dismissal

(a) Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

(b) Unless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title—

(1) reinstates—

(A) any proceeding or custodianship superseded under section 543 of this title;

(B) any transfer avoided under section 522, 544, 545, 547, 548, 549, or 724(a) of this title, or preserved under section 510(c)(2), 522(i)(2), or 551 of this title; and

(C) any lien voided under section 506(d) of this title;

(2) vacates any order, judgment, or transfer ordered, under section 522(1)(1), 542, 550, or 553 of this title; and

(3) reverts the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2569; Pub. L. 98-353, title III, §303, July 10, 1984, 98 Stat. 352; Pub. L. 103-394, title V, §501(d)(6), Oct. 22, 1994, 108 Stat. 4144.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 349(b)(2) of the House amendment adds a cross reference to section 553 to reflect the new right of recovery of setoffs created under that section. Corresponding changes are made throughout the House amendment.

SENATE REPORT NO. 95-989

Subsection (a) specifies that unless the court for cause orders otherwise, the dismissal of a case is without prejudice. The debtor is not barred from receiving a discharge in a later case of debts that were dischargeable in the case dismissed. Of course, this subsection refers only to pre-discharge dismissals. If the debtor has already received a discharge and it is not revoked, then the debtor would be barred under section 727(a) from receiving a discharge in a subsequent liquidation case for six years. Dismissal of an involuntary on the merits will generally not give rise to adequate cause so as to bar the debtor from further relief.

Subsection (b) specifies that the dismissal reinstates proceedings or custodianships that were superseded by the bankruptcy case, reinstates avoided transfers, reinstates voided liens, vacates any order, judgment, or transfer ordered as a result of the avoidance of a transfer, and reverts the property of the estate in the entity in which the property was vested at the commencement of the case. The court is permitted to order a different result for cause. The basic purpose of the subsection is to undo the bankruptcy case, as far as practicable, and to restore all property rights to the position in which they were found at the commencement of the case. This does not necessarily encompass undoing sales of property from the estate to a good faith purchaser. Where there is a question over the scope of the subsection, the court will make the appropriate orders to protect rights acquired in reliance on the bankruptcy case.

AMENDMENTS

1994—Subsec. (a). Pub. L. 103-394 substituted “109(g)” for “109(f)”.

1984—Subsec. (a). Pub. L. 98-353 inserted “; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(f) of this title”.

EFFECTIVE DATE OF 1994 AMENDMENT

Amendment by Pub. L. 103-394 effective Oct. 22, 1994, and not applicable with respect to cases commenced under this title before Oct. 22, 1994, see section 702 of Pub. L. 103-394, set out as a note under section 101 of this title.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section

552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

§ 350. Closing and reopening cases

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2569; Pub. L. 98-353, title III, § 439, July 10, 1984, 98 Stat. 370.)

HISTORICAL AND REVISION NOTES

SENATE REPORT NO. 95-989

Subsection (a) requires the court to close a bankruptcy case after the estate is fully administered and the trustee discharged. The Rules of Bankruptcy Procedure will provide the procedure for case closing. Subsection (b) permits reopening of the case to administer assets, to accord relief to the debtor, or for other cause. Though the court may permit reopening of a case so that the trustee may exercise an avoiding power, laches may constitute a bar to an action that has been delayed too long. The case may be reopened in the court in which it was closed. The rules will prescribe the procedure by which a case is reopened and how it will be conducted after reopening.

AMENDMENTS

1984—Subsec. (b). Pub. L. 98-353 substituted “A” for “a”.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98-353 effective with respect to cases filed 90 days after July 10, 1984, see section 552(a) of Pub. L. 98-353, set out as a note under section 101 of this title.

§ 351. Disposal of patient records

If a health care business commences a case under chapter 7, 9, or 11, and the trustee does not have a sufficient amount of funds to pay for the storage of patient records in the manner required under applicable Federal or State law, the following requirements shall apply:

(1) The trustee shall—

(A) promptly publish notice, in 1 or more appropriate newspapers, that if patient records are not claimed by the patient or an insurance provider (if applicable law permits the insurance provider to make that claim) by the date that is 365 days after the date of that notification, the trustee will destroy the patient records; and

(B) during the first 180 days of the 365-day period described in subparagraph (A), promptly attempt to notify directly each patient that is the subject of the patient records and appropriate insurance carrier concerning the patient records by mailing to the most recent known address of that patient, or a family member or contact person for that patient, and to the appropriate insurance carrier an appropriate notice regarding the claiming or disposing of patient records.

(2) If, after providing the notification under paragraph (1), patient records are not claimed during the 365-day period described under that paragraph, the trustee shall mail, by certified

mail, at the end of such 365-day period a written request to each appropriate Federal agency to request permission from that agency to deposit the patient records with that agency, except that no Federal agency is required to accept patient records under this paragraph.

(3) If, following the 365-day period described in paragraph (2) and after providing the notification under paragraph (1), patient records are not claimed by a patient or insurance provider, or request is not granted by a Federal agency to deposit such records with that agency, the trustee shall destroy those records by—

(A) if the records are written, shredding or burning the records; or

(B) if the records are magnetic, optical, or other electronic records, by otherwise destroying those records so that those records cannot be retrieved.

(Added Pub. L. 109-8, title XI, § 1102(a), Apr. 20, 2005, 119 Stat. 189.)

EFFECTIVE DATE

Section effective 180 days after Apr. 20, 2005, and not applicable with respect to cases commenced under this title before such effective date, except as otherwise provided, see section 1501 of Pub. L. 109-8, set out as an Effective Date of 2005 Amendment note under section 101 of this title.

SUBCHAPTER IV—ADMINISTRATIVE POWERS

§ 361. Adequate protection

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by—

(1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sale, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

(2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity's interest in such property; or

(3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.

(Pub. L. 95-598, Nov. 6, 1978, 92 Stat. 2569; Pub. L. 98-353, title III, § 440, July 10, 1984, 98 Stat. 370.)

HISTORICAL AND REVISION NOTES

LEGISLATIVE STATEMENTS

Section 361 of the House amendment represents a compromise between H.R. 8200 as passed by the House and the Senate amendment regarding the issue of “adequate protection” of a secured party. The House amendment deletes the provision found in section 361(3) of H.R. 8200 as passed by the House. It would have permitted adequate protection to be provided by giving