



AMERICAN
BANKRUPTCY
INSTITUTE

Consumer Practice Extravaganza

Combating the Creative Consecutive Filer

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Hon. Jennifer H. Henderson

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**Combating Consecutive (and Sometimes Creative) Consumer
Bankruptcy Filers**

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2024 CONSUMER PRACTICE EXTRAVAGANZA



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This panel will discuss:

- 1.) Who can actually stop a foreclosure sale with a bankruptcy filing? Spouses, heirs, and other issues.
- 2.) Can a debtor include a property if it has already been sold?
- 3.) Multiple filers, when does a subsequent bankruptcy not apply? Bankruptcy is a federal protection designed to provide relief for the honest individual that has fallen on hard times. However, like many other laws, the bankruptcy process has blind spots that the deceptive individual (or entity) can exploit.



What is the Automatic Stay?

- The automatic stay is an automatic and immediate injunction that exists upon the filing of the bankruptcy case (“Stay”)
- The Stay is the most important event that divides the case timeline into two parts. Events that occur before the case is filed are events that are (“Pre-Petition”) events. Those events that occur after the filing of the case are referred to as (“Post Petition”) events.
- The provisions, governing the length and breadth of the Stay is located in title 11 of the United States Code (the “Code”) Chapter 3 section 362.
- Section 362(a) contains 8 Subsections concerning what is, and who is subject to the Stay. Each case presents multiple different Stays and Stay issues.

**Practice Pointers

- Proceed with caution! There is probably going to be a Stay.
- Know whether the property is property of the Estate.

5



What is the Automatic Stay?

- 362(a) is applicable to all “Entities” (101)(15) which are Stayed from all:
 - (1) judicial, administrative, or other action or proceeding against the debtor;
 - (2) Judgment enforcement against the debtor or against property of the estate;
 - (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;
- In Chapter 13 cases the Debtor is in control of the Estate

6



What is the Automatic Stay?

- All "Entities" (101)(15) are Stayed from:
 - (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
 - (8) the commencement or continuation of a proceeding before the United States Tax Court (not a concern of a Mortgage Creditor)
- In Chapter 13 cases, determining whether the property is Property of the Estate is key. You cannot collect as to Property of the Estate even if your claim against Debtor arises Post Bankruptcy

7



What is the Automatic Stay?

- Who can actually stop a foreclosure sale with a bankruptcy filing?
 - Owners
 - Borrowers
 - Spouses
 - Heirs
 - Tenants
 - Squatters?!?
 - Others...
- Can a debtor include a property if it has already been sold? What is a Certificate of Sale has been issues? Certificate of Title?
- Does this change if in a non-judicial state?

8



What is Property of the Estate?

- Upon filing Bankruptcy, an Estate is created and all of the Debtor's Tangible and Intangible Assets (whether real or personal and no matter where they are located) are PROPERTY OF THE ESTATE.
- This concept's importance cannot be overstated in having a fundamental as well as an advanced grasp on understanding the Automatic Stay.
- Individual Debtors file Schedules in their cases and list those assets that they seek to Exempt from the Bankruptcy Estate.
- Creditors have a right to Object. If no objection is timely filed or where filed, is overruled, the Exemption is allowed, the value of the exemption is no longer property of the Estate. Go back to the different stays under 362(a).

9



11 U.S.C. § 362 (c)(3)

One Strike Rule: 362 (c)(3) also known as “The Sliver of the Stay”

- Debtor has had a prior case pending in the last 12 months
- That prior case has been dismissed
- New case is filed
- There is a Complete Stay in the new case for 30 days

The question is what happens on day 31 if someone has not asked for the stay to be extended? Is the stay as to property of the estate terminated? Is there any property of a Debtor on day 31?

- Majority Position – only the stay as to property of the debtor expires and the stay continues on past day 31 as to property of the estate
- Minority Position – if no one has sought to extend, the stay expires on day 31.

10



11 U.S.C. § 362 (c)(3)

- Majority Position – In successive Chapter 7 case filed by repeat filer, automatic stay terminated 30 days after entry of order for relief **only as to property of debtor and not as to property of estate**; stay continued to protect estate property to allow it to be administered by Chapter 7 trustee. In re Thu Thi Dao, 616 B.R. 103 (Bankr. E.D. Cal. 2020)
- Minority Position – The provision was designed to “Discourag[e] Bankruptcy Abuse,” and in particular, to “Discourag[e] Bad Faith Repeat Filings” -- that is, filing for the benefit of triggering the automatic stay, rather than for some valid reason. Id. This purpose is best achieved by interpreting § 362(c)(3)(A) to terminate the **entire** stay, **including as to estate property**. The portion of the stay that is most valuable to a bankruptcy petitioner, just as to a creditor, is the portion that protects estate property. In re Smith, 910 F.3d 576, 590 (1st Cir. 2018)

11



11 U.S.C. § 362(c)(4)

Two-Strike Rule: 362(c)(4)

- Debtor has had 2 prior cases pending in the last 12 months
- Each of the prior cases has been dismissed
- New case is filed
- On Day 1 there is No Stay in the new case as “the stay under subsection (a) shall not go into effect upon the filing of the later case.”

In order for there to be a stay in the new case someone has to ask the Court to impose a Stay and make that request within 30 days of the case filing.

The Question is, who is likely to seek imposition of the stay? Debtor? Trustee?

What is the Test and who has the burden?

12



Motions to Extend or Reimpose the Stay

Timing - The motion must be filed within 30 days of the new case filing date.

Good faith - The motion must demonstrate that the new case was filed in good faith.

Hearing - What type of evidence should be presented? This changes based on local practice and preference. Does Debtor need to appear?

Notice - The motion must be served on the creditors, trustee, and U.S. Trustee.

Substantial change - The motion must demonstrate a substantial change in the debtor's financial or personal affairs since the dismissal of the previous case.

13



11 U.S.C. § 1301 – Stay of action against codebtor

- Co-debtor stay

§ 1301(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor **from any individual that is liable on such debt with the debtor**, or that secured such debt.

What happens if the debtor does not have an automatic stay because of §362(c)(4)? Can a co-debtor stay actually exist, if the *actual* debtor does not have a stay?

- The code is very clear that the co-debtor stay imposed under 1301(c) is separate and independent from the stay imposed under § 362(a) (In re Oppong, 655 B.R. 552)

14



11 U.S.C. § 362(d)

How can a creditor end the stay early?

- (d)(1) For Cause
- (d)(2) No Equity in Collateral and not necessary to an effective reorganization
- (d)(3) Single Asset Real Estate
- (d)(4) Petition was filed as a results from a scheme to delay, hinder and defraud creditors, with multiple bankruptcy cases impacting the same real estate. (“In rem relief”)

15



11 U.S.C. § 362(d)(4)

In rem relief

- “scheme to delay, hinder and defraud creditors, with multiple bankruptcy cases impacting the same real estate.”
- Court may enter an “*in rem*” injunction against any entity that may claim to have an interest in the subject real property whether by, through, under, etc., via some sort of legal or equitable interest in the subject property from the debtor.
- In order to obtain a benefit from the Statute, the Creditor must get a certified copy of the entered Order and then have it recorded in the public records for the County in which the real property lies situate.

Communication between the Bankruptcy and Foreclosure departments are key!

16



11 U.S.C. § 362(d)(4)

***In rem* relief**

- Common schemes include:
 - where the real estate has been the subject of fractional transfers and multiple bankruptcies to avoid the foreclosure.
 - Ping-point cases between spouses to avoid triggering 362(c)(4)
 - Creation of a new entities and using such entities to file bankruptcy to further a scheme to hinder, delay and defraud under 362(d)(4)(B)
 - Identity theft (and/or “hijacking” a bankruptcy)

17



Annuling the Automatic Stay

- Under certain circumstances, the Code permits a Court to annul the stay back to a prior date to validate or ratify actions that occurred in violation of the stay and such actions will be rendered legitimate and be accorded full force and effect.
 - When determining whether to annul the stay, courts balance the equities and consider numerous factors including:
 - i) *whether creditor was aware of the bankruptcy petition;*
 - ii) *whether the debtor engaged in unreasonable or inequitable conduct and whether the petition was filed in good faith; and*
 - iii) *what prejudice would result to creditor by failing to retroactively annul the stay.*
- See *In re Williams*, 323 B.R. 691, 700 (9th Cir. BAP. 2005).

18



Practice Pointers

- **Be collaborative.** The decision by a court to enter an *in-rem* order is often the final step in putting an end to a bad faith scheme. However, this also likely means the debtor will lose his/her home. Sometimes, it is helpful to the court to propose a “win-win” resolution. For example, the case may proceed in ordinary course (with the stay), however, if dismissed, Creditor may submit an *in-rem* prospective relief order.
- **Always better to Ask for Permission than Forgiveness.** Seek comfort orders if there is any question.
- **Everything is a negotiation point.**

19

Faculty

Jeffrey S. Fraser is a partner with ALAW in Fort Lauderdale, Fla., and presides over the firm’s Bankruptcy Practice. In this pivotal role, he works closely with each state’s managing attorneys to develop legal strategies and provide comprehensive training. Mr. Fraser is actively involved in the Southern District of Florida’s Bankruptcy Bar. He chaired the Local Rule Committee from 2019-20 and was a founding member of the district’s Lawyer Advisory Committee (LAC). He served as the LAC chair in 2020 and 2021. Originally from Jamaica, Mr. Fraser is also a former Jamaican-American Bar Association President. He was listed in Super Lawyers as a Florida Rising Star from 2019-23. He also was honored as a Blackshear Fellow by the National Conference of Bankruptcy Judges (NCBJ) in 2017, and he was honored in 2020 as one of ABI’s “40 Under 40.” Mr. Fraser has published articles on consumer bankruptcy issues in the *American Legal & Finance Network* and *Default Servicing News*. He also holds the highest rating by Martindale-Hubbell. Mr. Fraser received his B.A. in 2007 from the University of Miami and his J.D. in 2010 from the University of Miami School of Law.

Aleksandra K. Fugate is an associate with Woods Oviatt Gilman LLP in Rochester, N.Y., and the supervising attorney for Bankruptcy and Evictions within the firm’s Default Servicing Group. She concentrates her practice in bankruptcy matters, including loss mitigation and evictions matters. Ms. Fugate is a member of the New York State and Monroe County Bar Associations. She received her B.S. from State University of New York at Buffalo and her J.D. from State University of New York at Buffalo Law School.

Hon. Jennifer H. Henderson is Chief U.S. Bankruptcy Judge for the Northern District of Alabama in Tuscaloosa, initially sworn in on Feb. 16, 2015, and named Chief Judge on Oct. 1, 2022. Previously, she was a partner with Bradley Arant Boult Cummings LLP’s Bankruptcy, Restructuring and Distressed Investing Practice Group in Birmingham, Ala., where she represented debtors and creditors in bankruptcy cases, out-of-court workouts and restructurings and bankruptcy-related litigation. Judge Henderson clerked for Hon. Thomas B. Bennet and is listed as a 2014 Alabama Super Lawyers “Rising Star.” She received her B.A. *magna cum laude* from Birmingham-Southern College in 2001 and her J.D. *summa cum laude* from the University of Alabama School of Law in 2004, where she was a member of the Order of the Coif and a special works editor for the *Alabama Law Review*.

Nicole Mariani Noel is a shareholder at Kass Shuler, P.A. in Tampa, Fla., where she has been practicing in the fields of bankruptcy, creditors’ rights and insolvency, real estate, consumer and business litigation since 2009. She heads the Bankruptcy practice group for the firm and handles cases throughout the state of Florida in all districts, as well as District of Colorado, Eastern and Southern District of Texas, all three Districts in Tennessee, and the Northern and Southern Districts of Illinois. Ms. Noel is the president of the Tampa Bay Bankruptcy Bar Association (TBBBA) for the 2024-25 bar year. She formerly chaired the Bankruptcy Practice Group for the American Legal and Financial Network (ALFN) and the Case Law Update Subcommittee for the Real Property Finance and Lending Committee of the Real Property Probate and Trust Law Section of the Florida Bar. She also recently authored a chapter on bankruptcy in *Florida Foreclosure Law*, published by Fastcase. Ms. Noel is active in the community and is an adjunct professor at Stetson University College of Law, St. Petersburg College and Hillsborough Community

College, teaching bankruptcy, real property finance, business law and civil litigation. She participated in the 2016 NextGeneration program, held during the National Conference of Bankruptcy Judges (NCBJ), and she was honored to become a Fellow for the Florida Bar Leadership Academy. In addition, she has been named one of ALFN's Junior Professionals and Executives Group (JPEG)'s standout young professionals to watch in 2016 and most recently received the 2023 Industry Achievement Award for the ALFN. Ms. Noel received her undergraduate degree from Florida State University and her M.B.A. and J.D. from Stetson University School of Business Administration and Stetson University College of Law, respectively.

Kristin A. Zilberstein is an attorney with ZBS Law, LLP in Irvine, Calif., and the firm's Bankruptcy manager. She has 15 years of experience in the default industry, more specifically within the bankruptcy court representing mortgage-servicers, commercial lenders and auto lenders. Ms. Zilberstein has specialized in the litigation side of the bankruptcy court, including adversaries, motions for relief, objections to claims, appeals and chapter 11 cases. In addition, she has written several articles and participated in numerous webinars and seminars. Prior to entering the default industry, Ms. Zilberstein began her 26-year career in general liability insurance defense, specifically personal injury and construction defect. She is licensed to practice in all state and federal courts in California, Washington, Texas and Colorado, the District Court of Nebraska, and the Ninth Circuit BAP and Ninth Circuit. Ms. Zilberstein has been a member of the ALFN Bankruptcy Practice Group since 2014 and currently serves as its secretary. She is rated AV-Preeminent by Martindale Hubbell and was named by *Angle Magazine* as one of "16 Women Who Rocked 2016." In January 2021, Ms. Zilberstein was one of DS News' Top 25 Women of Law, and in February 2021 DS News included her in its Honoring Excellence Among Female Legal Minds edition. She received her B.A. in economics from the University of California San Diego in 1995 and her J.D. from California Western School of Law in 1998.