

## **When Dirt Goes To Bankruptcy Court: Changes In The Automatic Stay**

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According to news reports, the number of foreclosures is on the rise. Although the new Bankruptcy Code went into effect almost four years ago, we are only now beginning to see its impact. This article reviews the new legislation's limits on the scope of the automatic stay as these impact real property. In addition, the article includes some practice tips for filing and prosecuting relief from stay motions.

*Single Asset Real Estate Cases.* The new Bankruptcy Code prohibits the single asset real estate debtor from simply languishing behind the protection of the automatic stay. 11 U.S.C. § 362(d)(3) permits granting relief from the automatic stay to a creditor with a claim secured by an interest in such real property unless, within 90 days of the bankruptcy filing, the debtor has filed a plan of reorganization which has a reasonable possibility of being confirmed within a reasonable time *or* the debtor has commenced making monthly payments. The term "single asset real estate" was previously defined as "real property constituting a single property or project, other than residential real property with fewer than 4 residential units, which generates substantially all of the gross income of a debtor and on which no substantial business is being conducted by a debtor other than the business of operating the real property and activities incidental thereto having aggregate non-contingent, liquidated secured debts in an amount no more than \$4,000,000." The new definition of "single asset real estate" specifically excludes family farmers and eliminates the \$4,000,000 cap.

*Serial Filings and Prior Relief from Stay.* One of the primary themes of the bankruptcy reform focused on reducing the number of serial bankruptcies filed to stall foreclosure actions. New 11 U.S.C. § 362(b)(20) excepts from the automatic stay actions to enforce real property liens if within the prior two years, a creditor had obtained relief from the automatic stay based on a finding pursuant to new 11 U.S.C. § 362(d)(4), that the debtor's bankruptcy filing was part of a scheme to delay, hinder, or defraud creditors that involved either an unauthorized transfer of the real property or multiple bankruptcy filings affecting the real property. In order to avoid this exception, the debtor has the burden of showing the subsequent petition was based on changed circumstances or other good cause. In individual cases, if a creditor files a motion for relief from stay and there is no ruling within 60 days of the filing of the motion, then relief from stay is automatically granted. The 60-day time period may be extended by agreement of all parties in interest or by the court for a specific period of time if such extension is based on "cause" as set forth in specific findings to be made by the court. 11 U.S.C. § 362(e).

11 U.S.C. § 362(c) was similarly amended to address the frustration faced when a debtor attempts to thwart a foreclosure by filing serial bankruptcies intended to merely stall the foreclosure. If within one year of the current case, an individual has been a debtor and that prior case was dismissed (other than a case re-filed under a chapter other than Chapter 7 if the dismissal was based on 11 U.S.C. § 707(b)), the automatic stay terminates on the 30th day after the filing of the latter case. A party in interest may petition the court to extend the stay as to any or all of the creditors if it can be demonstrated the case filing was in good faith as to the creditors to whom the stay will remain in effect.

A second bankruptcy filing is presumed to be made in bad faith (rebuttable only by clear and convincing evidence to the contrary) if as to all creditors there were: (a) more than one prior case in the preceding year; (b) the debtor either failed to file or amend its statement of financial affairs or schedules, provide court ordered adequate protection, or perform the terms of a confirmed plan; or (c) there has been no substantial change in the financial or personal affairs of the debtor since the prior filing. With respect to individual creditors, the stay is presumed in bad faith, if as of the dismissal of the prior case, the creditor had obtained relief from the automatic stay or such a motion was pending. If the debtor filed two prior cases within the one-year period, the automatic stay simply does not go into effect with the third filing.

An exception to this serial filing rule is found in 11 U.S.C. § 362(i), when the prior case was dismissed due to the creation of a debt repayment plan, any subsequent case commenced by the debtor shall not be presumed to be filed in bad faith.

*Ineligible Filer Exception.* New 11 U.S.C. § 362(b)(21) excepts from the automatic stay any action to enforce a lien or security interest in real property if the debtor is ineligible under 11 U.S.C. § 109(g) or if the case was filed in violation of a court order prohibiting a debtor from filing bankruptcy.

*Eviction Exceptions.* Two new provisions address the impact of the automatic stay within the context of eviction actions of *residential* real property: 11 U.S.C. §§ 362(b)(22) and (b)(23). New 11 U.S.C. § 362(b)(22) excepts from the automatic stay a landlord's continuation of eviction proceedings where pre-petition, the landlord obtained an order of possession against the debtor/tenant. The application of the exception may be stayed for 30 days if at the time the debtor files bankruptcy, the debtor files with the court and serves on the landlord, a certification stating, under penalty of perjury, that under non-bankruptcy law, there exist circumstances pursuant to which the debtor would be permitted to cure the entire monetary default and that the debtor has deposited with the court any rent due in the initial 30-day period. 11 U.S.C. § 362(l). If the landlord objects to the certification, then the court must hold a hearing within ten days. To maintain the stay, the debtor must then cure all monetary defaults in that 30-day time frame.

New 11 U.S.C. § 362(b)(23) excepts from the automatic stay a residential landlord's eviction efforts based on the debtor/tenant's endangerment of the leased property or the debtor/tenant's illegal use of controlled substances on the property. In this instance, the landlord must file and serve on the debtor, a certification made under penalty of perjury setting forth that either an eviction proceeding had been instituted or that within 30 days of the bankruptcy filing, the debtor had endangered the property or illegally used or allowed to be used a controlled substance on the property. If there is no response from the debtor within 15 days, the lessor may complete the process to obtain possession of the property. If the debtor objects, then a hearing is held within 10 days of the debtor's objection being filed. If the debtor is able to demonstrate that the grounds set forth in the landlord's certification either never existed or have been remedied, then the automatic stay will remain in place. If not, then the landlord may continue its efforts to regain possession of the real property.

*Procedures for Obtaining Relief from Stay.* The procedures for obtaining relief from stay are found in Fed.R.Bankr.P. 4001, Local Bankruptcy Rule 401 and General Procedural Order 2005-2. In addition, one should review the presiding judge's webpage to determine if he or she has additional requirements or strong suggestions. For example, Judge Sidney B. Brooks webpage includes his Standing Order 2006-1-SBB which applies to motion for relief practice in his courtroom; similarly, Judge Elizabeth E. Brown's webpage provides tips for prosecuting motions for relief from stay before her court.

Relief from stay is commenced by filing a motion accompanied by a filing fee, presently \$150. If the debtor is an individual, the motion must be accompanied by an affidavit showing why the provisions of the Servicemembers Civil Relief Act of 2003 are inapplicable. G.P.O. 2005-2. To verify a debtor is not currently on active duty, search the debtor's name and social security number on the following webpage: [www.dmdc.osd.mil/scra/owa/home](http://www.dmdc.osd.mil/scra/owa/home). In addition, when seeking relief from stay on grounds that involve the value of the collateral, several of the Colorado judges require the movant to include a basis for such valuation. This may require obtaining an appraisal before filing the motion. Service of the motion is governed by Fed.R.Bankr.P. 4001(a) and L.B.R. 401, which require service upon the debtor, the debtor's counsel, the trustee, any committees appointed and on such other entities as the court may direct. Service must also be made upon all lien holders.

The bankruptcy court is required to hold a hearing on the motion within 30 days. 11 U.S.C. § 362(e). In Colorado, the party seeking relief from stay must obtain the hearing time and date prior to filing the motion and must serve notice of the hearing of the motion. L.B.R. 401(a). If the moving party fails to comply with these local rules, or sets the hearing outside the 30-day period, it is deemed to have waived the protections of 11 U.S.C. § 362(e). Objections to the motion must be filed no later than five *court* days prior to the scheduled preliminary hearing date. L.B.R. 401(a)(3).

If objections are filed, the parties must exchange witness lists and exhibits, including expert reports, *before* the preliminary hearing. L.B.R. 401(c)(3). This may require sending the exhibits to the other side if the hearing is to be conducted telephonically. At the preliminary hearing, no witnesses will be examined and no testimony will be taken. L.B.R. 401(c)(1). In lieu thereof, parties shall make offers of proof "in sufficient detail to enable the court to make specific findings based thereon." The parties must also identify any expert witnesses and provide written summaries of the expert's qualifications and opinions. L.B.R. 401(c)(5). Based upon the declarations, exhibits and arguments, the court may treat the hearing as final and grant or deny the motion; alternatively the court may treat it as a preliminary hearing and set the matter over for a final hearing. If the court elects to treat the hearing as preliminary, the court must find the debtor has a reasonable likelihood of prevailing at the final hearing in order to continue the stay. 11 U.S.C. § 362(e).

The final hearing must be conducted not more than 30 days after conclusion of the preliminary hearing. 11 U.S.C. § 362(e). This 30-day period may be extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances. The final hearing is conducted with live testimony.