

Revisions to the Automatic Stay

- I) The Automatic Stay
 - A) Domestic Stay Exceptions: 11 USC §362(b)(2):
 - 1) Stay no longer stops actions:
 - (a) concerning child custody or visitation
 - (b) for dissolution of marriage, except to the extent that such proceeding seeks to determine division of property that is property of the estate
 - (c) regarding domestic violence
 - (d) with respect to 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
 - (e) 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
 - (f) 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
 - (g) 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;
 - (h) or of the enforcement of a medical obligation, as specified under title IV of the Social Security Act
 - B) Stay no longer stops withholding from wages the collection of loan amounts due as a result of the debtor's borrowing from a pension, profit-sharing, stock bonus, or other tax exempt plans recognized by the IRS. 11 USC §362(b)(19).
 - C) In Rem Orders (11 USC §362(b)(20) and 11 USC §362(d)(4):
 - 1) 11 USC §362(d)(4): if the court finds that the case was filed as a part of a scheme to delay hinder, and defraud creditors, either by the transfer of all or part of an interest in real property without the creditor's consent ("due on sale" clauses), or by multiple filings that affect the real property (not necessarily by the *same* debtor), the court may grant in rem relief from the stay.
 - (a) Order is binding immediately upon parties with notice like any other order.
 - (b) Such an order is binding on any subsequent case filed within 2 years of the entry of the order if the order is recorded in compliance with state real estate noticing laws (MCLA 565.1, et. seq).
 - (c) Government units must accept a certified copy of the order for "indexing and recording."
 - 2) 11 USC §362(b)(20): No stay of actions to enforce liens or security interests following an "in rem order" described in §362(d)(4) *unless* the debtor in the new case successfully moves for relief from the in rem order.
 - (a) debtor must demonstrate change of circumstances since entry of order, or
 - (b) "other good cause."

- D) Ineligible filing exception (11 USC §362(b)(21):
- 1) excludes from the stay any action taken to enforce a lien or security interest if
 - (a) the debtor is ineligible to file under 11 USC §109(g) OR
 - (b) the case was filed in violation of a bankruptcy court order prohibiting the debtor from being a debtor under title 11.
- E) Eviction Exceptions (11 USC §362(b)(22) and (23); 11 USC §362(l) and (m):
- 1) (22) excludes from the stay the “continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor of residential property where a prebankruptcy judgment for possession has been obtained.
 - (a) If the debtor indicates in his petition there was a pre-filing judgment and does not file the certification (provided below), the exclusion applies immediately and 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.
 - (b) the stay *will* apply for 30 days after filing *if* the debtor files, with the petition, a certification under penalty of perjury that
 - (i) there are circumstances recognized under applicable nonbankruptcy law that would permit the debtor to cure “the entire monetary default that gave rise to the judgment for possession,” and
 - (ii) the debtor deposits with the clerk of the court sufficient money to pay any rent becoming due during that 30 day period. The clerk of the court shall arrange for the prompt (as opposed to immediate) transmittal of the rent deposited.
 - (c) landlord may object to the certification, in which case the court must hold a hearing within 10 days of the landlord’s objection, to determine if the debtor’s certification is true.
 - (i) if the court upholds the lessor’s objection, 11 USC §362(b)(22) applies immediately and the *clerk of the court* must *immediately* serve a *certified* copy of the court’s order upholding the lessor’s objection on the lessor and the debtor.
 - (ii) if the objection is overruled, presumably the 30 day stay will apply.
 - (d) If the debtor has complied with the requirements under subsection (a) above and within the 30 day period the debtor both pays the judgment and files a further certification that he has complied with the judgment, then 11 USC §362(b)(22) does not apply and enforcement of the judgment is stayed.
 - (e) the “standard” forms used in a bankruptcy proceeding shall be revised to reflect the requirements of this new provision.
 - 2) If the landlord files a certification (provided below), 11 USC §362(b)(23) excludes from the stay (except as provided in new §362(m)), an eviction *action* [not just enforcement of a judgment] that seeks possession of the residential property in which the debtor resides as a tenant” if the eviction is based on

- endangerment of the property or the illegal use of controlled substances on the property.
- (a) landlord must file with the court and serve 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 the property or illegally used or allowed to be used a controlled substance on the property. If the landlord files, 11 USC §362(b)(23) applies 15 days after the landlord files.
 - (b) tenant may file and serve objections. If the tenant does so, the court must hold a hearing within 10 days to determine if the situation giving rise to the lessor's certification existed or *has been remedied*.
 - (i) burden is on the debtor to demonstrate to the court's satisfaction that the condition did not exist or has been remedied.
 - () If so, stay remains in effect.
 - () If not, landlord may proceed and the *clerk of the court* shall *immediately* serve the lessor and the debtor with a *certified copy* of the court's order upholding the lessor's certification.
 - (ii) If tenant does not file objections, 11 USC §362(b)(23) applies *immediately* and the *clerk of the court* shall *immediately* serve the lessor and the debtor with a *certified copy* of the docket indicating such failure.
- 3) Neither exception appears to apply to an eviction after a mortgage foreclosure, since both refer to a lease or rental agreement. A former mortgagee continuing in possession is technically a trespasser. Shelby Co. Dickinson, 59 Mich. 197, 242 N.W. 885 (1932).
- F) §362(c)(3) Motions to continue stay (the "second strike = 30 days" rule)
- 1) IF
 - (a) a single or joint case
 - (b) is filed by or against [a] debtor who is an individual in a case under Chapters 7, 11, or 13,
 - 2) AND
 - (a) if a single or joint case of the debtor was pending
 - (b) within the preceding 1 year period but was dismissed (EXCEPT a chapter 7 dismissed under §707(b) (means test))
 - 3) THEN
 - (a) the stay with respect to any action taken with respect to a debt or property securing a debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the alter case.
 - 4) UNLESS
 - (a) on motion of a party in interest and after notice and a hearing, the court extends the stay in particular cases
 - (i) as to any or all creditors
 - (ii) subject to conditions or limitations as the court may impose

- (iii) granted before the 30 days expires
 - (b) IF the party in interest demonstrates the later case was filed in *good faith* as to the creditors to be stayed.
 - (i) a second case is presumptively *not in good faith* (unless rebutted by clear and convincing evidence)
 - (o) as to all creditors IF
 - 1. there was more than one prior case in the preceding 1 year (3rd filing)
 - 2. prior case was dismissed because the debtor failed to:
 - a. file or amend the petition as required by the code or the court without substantial excuse, and mere inadvertence or negligence is not a substantial excuse, unless it was the attorney who was negligent)
 - b. provide adequate protection as ordered by the court, or
 - c. perform the terms of a confirmed plan (e.g., poor pay history).
 - 3. there has not been a substantial change in the financial or personal affairs of the debtor (divorce? winning the lottery? new job? large inheritance? worker's comp/insurance award settlement?) since the dismissal, or
 - 4. there is not any other reason to conclude that the latest case will be concluded with a discharge (if Chapter 7) or a confirmed and performable plan (if an 11 or 13).
 - (o) as to any creditor that filed a motion for relief from the stay in the prior case, IF as of the date of dismissal:
 - 1. the motion for relief was still pending, or
 - 2. the motion was resolved by terminating (lifting), conditioning ("drop dead" orders), or limiting the stay as to actions of such creditor
- G) §362(c)(4) No-stay cases (the "third strike = no stay" rule)
 - 1) IF
 - (a) a single or joint case is filed
 - (b) by or against a debtor who is an individual
 - 2) AND IF
 - (a) 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refilled under §707(b)(means test),
 - 3) NO STAY goes into effect
 - (a) the court shall "promptly" enter an order confirming that no stay is in effect (no requirement of notice and a hearing; local rule to be enacted?)
 - 4) UNLESS
 - (a) within 30 days of the filing
 - (b) a party in interest requests

- (c) after notice and a hearing
- 5) THE COURT ORDERS THE STAY TO TAKE EFFECT
 - (a) as to any or all creditors
 - (b) subject to conditions and limitations as the court may impose
 - (c) If the party in interest demonstrates that the filing of the latest case is in *good faith* as to the creditors to be stayed.
 - (i) a second case is presumptively *not in good faith* (unless rebutted by clear and convincing evidence)
 - (o) as to all creditors IF
 1. there was more than two prior cases in the preceding 1 year (3rd filing)
 2. any prior case was dismissed because the debtor failed to:
 - a. file or amend the petition as required by the code or the court without substantial excuse, and mere inadvertence or negligence is not a substantial excuse, unless it was the attorney who was negligent)
 - b. provide adequate protection as ordered by the court, or
 - c. perform the terms of a confirmed plan (e.g., poor pay history).
 3. there has not been a substantial change in the financial or personal affairs of the debtor (divorce? winning the lottery? new job? large inheritance? worker's comp/insurance award settlement?) since the dismissal, or
 4. there is not any other reason to conclude that the latest case will be concluded with a discharge (if Chapter 7) or a confirmed and performable plan (if an 11 or 13).
 - (o) as to any creditor that filed a motion for relief from the stay in the prior case, IF as of the date of dismissal:
 1. the motion for relief was still pending, or
 2. the motion was resolved by terminating (lifting), conditioning ("drop dead" orders), or limiting the stay as to actions of such creditor
- 6) Such a stay shall be effective on the date of entry of the order (note In re Glenn; In re Cain; In re Agee; §1322(c)(1))
- 7) See local rules 9001-1 (definition of "first day motion"), 9013-1 (service of first day motions), 9013-4 (filing requirements for first day motions) and Guideline 1 (Notifying the clerk and US Trustee of first day motions).
- H) Failure to File or Comply with Statements of Intention under §521(a)(2)
 - 1) In an individual debtor case, the stay is terminated with respect to property of the estate OR the debtor which secures a claim, or is subject to an unexpired lease, if the debtor fails to
 - (a) file a statement of intention pursuant to §521(a)(2) or

- (b) fails to timely take the action specified in such statement UNLESS the debtor stated an intention to reaffirm the debt and the creditor refuses to agree to reaffirmation on such terms.
- 2) The Trustee may move for a determination that such personal property is of consequence to the estate, in which case the court can order that the stay continue in effect subject to appropriate adequate protection and ordering the debtor to deliver the property to the trustee.
- 3) if an action for violation of the stay is commenced, the debtor may only recover actual damages if the creditor proceeded in the good faith belief that this section applied.
- I) Comfort Orders §362(j)--On request of a party in interest (no mention of notice or a hearing), the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.
 - 1) property no longer property of the estate
 - 2) case is closed
 - 3) case is dismissed
 - 4) second strike = 30 days rule (see F) above)
 - 5) third strike = no stay rule (see G) above)
- J) Small business case exception--§362(n)
- K) Anti-injunction rule--§362(o)