

SUMMARY OF CHAPTER 3

of the

Bankruptcy Code as Amended by
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

May 5, 2006

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SECTION 301

Voluntary Cases

Summary of Amendment

Former section 301 was comprised of two sentences. In the amended section 301, the first sentence is now section 301(a) and the second sentence is now section 301(b). The change is not substantive.

Fed. R. Bankr. P. 1002, 1004.1, 2002, and 5001 all relate in varying degrees to the filing of voluntary petitions. There are no changes to Rules 1002, 1004.1, or 5001. Interim Rule 2002(f) is amended to require the clerk to give two notices in chapter 7 cases. Both notices relate to the means test. See 11 U.S.C. § 707(b)(2). These notices must be given to “the debtor, all creditors, and indenture trustees.” The chapter 7 trustee is not identified among those who must be given the two new notices.

Section 342(d) and Interim Rules 2002(f)(9) and 5008 require the bankruptcy court clerk to give written notice to all creditors not less than 10 days after an individual files a chapter 7 petition if the presumption of abuse arises under section 707(b)(2). See Interim Rules 2002(f)(9), 5008. Official Form 9, the notice of the commencement of the case and the meeting of creditors, is amended to permit the clerk to indicate whether a presumption of abuse has arisen.

Whether an individual chapter 7 debtor is subject to the means test and, if subject to it, whether the debtor the presumption of abuse arises under section 707(b)(2), will be determined in the first instance from Official Form 22A titled, “Statement of Current Monthly Income and Means Test Calculation.” See 11 U.S.C. §§ 521(a)(1)(B)(ii) & 707(b)(2)(C). Interim Rule 1007(b)(4) requires that Official Form 22A be filed by every individual chapter 7 debtor.

Interim Rule 1007(c) gives the debtor the option of filing this new form either with the petition or within 15 days of its filing. If this statement is filed with the petition, the clerk will be able to give the notice required by section 342(d) and Interim Rule 2002(f)(9) with the notice of the commencement of the case. See Fed. R. Bankr. P. 2002(a)(1). But, if the debtor files the statement of current income on the 15th day after filing the petition, the clerk will be unable to give the notice required by section 342(d) by the 10th day after the petition is filed. Interim 5008 anticipates this problem. If the debtor has not filed the new form in time for the clerk to notify creditors that presumption of abuse has arisen, the notice will advise creditors only that the debtor’s statement has not been filed. Thereafter, once the form is filed, “the clerk shall give notice to creditors of the presumption of abuse as promptly as practicable.” See Interim Rule 5008. That is, it may be necessary for the clerk to give two notices in order to satisfy the requirements of section 342(d) and Interim Rules 2002(f)(9) and 5008.

The United States Trustee, after reviewing the debtor’s schedules and statements, is required to file a statement indicating whether the debtor is a presumed abuser of chapter 7. See 11 U.S.C. § 704(b)(1)(A). This statement is due no later than 10 days after the date of the first

meeting of creditors. Id. Section 704(b) does not indicate whether this time period runs from the first date set for the meeting or the date the meeting is concluded. Not later than 5 days after the United States Trustee’s statement is filed, the clerk of the bankruptcy court is required “to provide” it to all creditors. See 11 U.S.C. § 704(b)(1)(B). Section 704(b) does not require that it be provided to the chapter 7 trustee.

Interim Rule 2002(f)(10) directs the clerk to give notice to the debtor, all creditors, and indenture trustees of the United States Trustee’s statement pursuant to section 704(b)(1)(A).

Cross References

Bankruptcy Code

11 U.S.C. § 342(d)	[clerk’s notice of presumption of abuse]
11 U.S.C. § 521(a)	[lists, statements and schedules a debtor must file]
11 U.S.C. § 704(b)	[U.S. Trustee notices concerning the presumption of abuse]
11 U.S.C. § 707(b)(2)	[the chapter 7 means test]
11 U.S.C. § 707(b)(2)(C)	[requirement that the schedule of current income and current expenditures include a statement of current monthly income and the calculations that determine whether a chapter 7 petition raises a presumption of abuse]

Bankruptcy Rules

Fed. R. Bankr. P. 1002	[commencing a bankruptcy case]
Fed. R. Bankr. P. 1004.1	[petition by an infant or incompetent person]
Fed. R. Bankr. P. 2002	[notices to creditors, equity security holders, the United States, and the U.S. Trustee]
Fed. R. Bankr. P. 5001	[courts and clerks’ offices]

Interim Rules

Interim Rule 1007(b)(4)	[need to file statement of current monthly income]
Interim Rule 1007(c)	[time limits for filing statements and schedules]
Interim Rule 2002(f)(9)	[notice of presumption of abuse]
Interim Rule 2002(f)(10)	[notice of U.S. Trustee’s statement under section 704(b)(1)(A)]
Interim Rule 5008	[clerk’s notice under section 342(d) regarding presumption of abuse]

Official Forms

Official Form 6	[includes Schedules I and J modified to include statement of monthly net income as well as statement of reasonably anticipated increases in income and expenses]
Official Form 9	[notice of the meeting of creditors and whether presumption of abuse has arisen]
Official Form 22A	[the Statement of Current Monthly Income and Means Test Calculation for use in chapter 7 cases]

SECTION 303

Involuntary Petitions

Effective Date

The amendments to sections 303(b)(1) and 303(h) are effective in all cases filed on or after April 20, 2005. The other amendments to section 303 are effective in cases filed on or after October 17, 2005.

Summary of Amendment

The holder of a claim that is the subject of a bona fide dispute as to liability or amount cannot join in an involuntary petition pursuant to section 303(b)(1), as amended. Prior section 303(b)(1) did not contain the “or amount” language. Similarly, in order for the court to grant an order for relief under section 303(h)(1), it must find that the debtor generally is not paying its debts as they become due unless such debts are the subject of a bona fide dispute “as to liability or amount.” Prior law simply required that the debts not be “the subject of a bona fide dispute.” A conforming amendment has been made to Official Form 5, the involuntary petition.

Former section 303(k), permitting involuntary petitions in limited circumstances against foreign banks not engaged in banking in the United States, has been repealed.

When the alleged debtor is an individual, new section 303(l)(1) requires the bankruptcy court to seal the record if it is dismissed and the involuntary petition is false or contains any materially false, fictitious, or fraudulent statements. Once the limitation period for prosecuting bankruptcy crimes has expired (see discussion below), section 303(l)(3) permits the court to expunge the involuntary petition from its records. Section 303(l)(2) permits, but does not require, the court to prohibit consumer reporting agencies from making any consumer report that contains any information relating to “such petition” or to the case it initiated.

With respect to obtaining an order prohibiting the publication of information about an involuntary petition filed in the circumstances described in section 303(l)(2), the term “consumer reporting agencies” is defined by the Fair Credit Reporting Act as is the term “consumer report.” See 15 U.S.C. § 1681a(d) & (f).

Section 303(l)(2) also permits, but does not require, the court to expunge any records to “a petition under this section” upon the expiration of the statute of limitations enumerated in 18 U.S.C. § 3282 with respect to violations of 18 U.S.C. §§ 152 and 157. The current statute of limitation is five years from the date of the commission of such crimes. However, 18 U.S.C. § 3284 delays the running of the statute of limitation when the debtor has concealed assets. This is a continuous offense and the limitation period does not begin to run until the grant or denial of the debtor’s discharge.

In a related amendment, 18 U.S.C. § 157(1) is amended to make it a crime to file a fraudulent involuntary bankruptcy petition.

Case Authority Impacted by the Amendment

The amendment to section 303(b)(1) may not be much of a change in the Ninth Circuit because in In re Vortex Fishing Systems, Inc., 277 F.3d 1057, 1064 (9th Cir. 2001), the court noted that in deciding whether a creditor may be a petitioning creditor, a bankruptcy court is not asked to liquidate the creditor's claim. Rather, it must determine only whether there are facts that give rise to a legitimate disagreement concerning the debtor's liability and exposure to the creditor.

Litigation Points

These amendments will make it more difficult to bring a successful involuntary petition because the alleged debtor may challenge each petitioner's standing by contesting its liability and exposure to the petitioner.

Cross References

Applicable Nonbankruptcy Statutes

15 U.S.C. § 1681a(d)	[definition of credit reporting agency]
15 U.S.C. § 1681a(f)	[definition of credit report]
18 U.S.C. § 152	[crimes related to concealment of assets, false oaths and claims, and bribery]
18 U.S.C. § 157	[bankruptcy frauds punishable as a crime]
18 U.S.C. § 3282	[statute of limitation for bankruptcy crimes]
18 U.S.C. § 3284	[tolling of limitations when assets are concealed]

Official Forms

Official Form 5	[involuntary petition form amended to state that the claims of the petitioning creditors are not the subject of "a bona fide dispute as to liability or amount"]
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Drafting Issues and Problems

The amendments added the new subsection dealing with sealing and expunging records in certain cases. New section 303(l) should be section 303(k) because the amendments eliminated former section 303(k).

Administrative Burdens Imposed on Court

On motion of the debtor, the court will have to conduct a hearing to determine whether the petition contained materially false statements, etc. If it does, the court “shall seal all the records of the court relating to such petition, and all references to such petition.” Doing so will impose some burden on the clerk’s office.

Following the expiration of the limitation period for prosecuting bankruptcy crimes, the court may “expunge any records” relating to such petition. Again, the burden of doing so will fall on the court clerk to implement such an order.

SECTION 304
Cases Ancillary to Foreign Proceedings

Summary of Amendment

Repealed in its entirety and replaced by chapter 15.

Cross References

Interim Rules

Interim Rule 1010	[Amends Fed. R. Bankr. P. 1010 to delete the reference to section 304 and substitute chapter 15 and section 1519. The interim rule requires service of a summons and petition for recognition of a nonmain proceeding on the debtor and any entity against whom relief is sought.]
Interim Rule 1011	[Amends Fed. R. Bankr. P. 1011 to delete the reference to a petition commencing an ancillary proceeding and to substitute a petition for recognition of a foreign proceeding]

SECTION 305
Abstention

Summary of Amendment

Section 305(a)(2) has been amended to harmonize it with new chapter 15 and to provide that the court may dismiss the case or suspend proceedings if a petition under new section 1515 for recognition of a foreign proceeding has been filed and the purposes of chapter 15 would be best served by such dismissal or suspension.

Cross References

New Defined Terms

foreign proceeding, 11 U.S.C. § 101(23)

SECTION 306 **Limited Appearance**

Summary of Amendment

Section 306 permits foreign representatives to make limited appearances under certain circumstances. The amendment merely deletes the cross-references to former section 304, which is replaced by new chapter 15.

Cross References

New Defined Terms

foreign representative, 11 U.S.C. § 101(24)

SECTION 308

Debtor Reporting Requirements

Effective Date

Section 308 becomes effective 60 days after the date the new national bankruptcy rules implementing section 308 are adopted under 28 U.S.C. § 2075. Those rules have not been adopted. As yet, then, there is no fixed date for the effectiveness of section 308.

Summary of Amendment

New section 308 adds reporting requirements for small business debtors. See 11 U.S.C. § 101(51D). Small business debtors must report their current and recent financial status, “profitability,” cash flow projections, comparisons of actual and projected receipts and disbursements, compliance with the postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules, filing of tax returns, and payment of all administrative expenses and taxes. The debtor must also disclose “such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11.”

Section 308(a) defines “profitability” as “the amount of money that the debtor has earned or lost during the current and recent fiscal periods.”

If the debtor fails to make these reports, file tax returns, or timely pay administrative claims or taxes, the debtor must explain why, explain what it will cost to remedy these failures, and give a timetable for curing them.

Interim Rule 1020(a) requires that a debtor in a voluntary chapter 11 case state on the petition whether or not the debtor is a “small business debtor.” See 11 U.S.C. § 101(51D). Official Form 1, the petition, has been amended to require a statement as to whether the debtor is a small business debtor. In an involuntary case, the debtor must file a statement within 15 days after the entry for relief.

Unlike former law, the debtor is not given the option of being treated as a small business debtor. If the debtor meets the definition of section 101(51D), the debtor is required to comply with the small business debtor requirements of the Bankruptcy Code. Therefore, unless the United States Trustee or a party in interest objects to the debtor’s statement on the petition or the separate statement, the debtor’s status is determined by the debtor’s statement.

Interim Rule 1020(b) gives the United States Trustee or a party in interest until the later of 30 days after the conclusion of the first meeting, or within 30 days after any amendment of the debtor’s statement to contest the debtor’s statement as to whether it is or is not a business debtor. See Interim Rule 1020(c). An objection is resolved as a contested matter. See Interim Rule 1020(d).

Section 103(k)(1) makes section 1514 applicable to cases proceeding under any chapter of title 11. Section 1514(d) requires that such additional time as is reasonable under the circumstances be given to creditors with foreign addresses when they are served with notice including notices regarding the filing of claims. Interim Rule 2002(p)(1) implements this directive. The Interim Rule provides that if “the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor with a foreign address . . . reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged.” Interim Rule 2002(p)(2) requires that foreign creditors be given at least 30 days’ notice of the deadline for filing proofs of claim under Fed. R. Bankr. P. 3002(c) or 3003(c).

Cross References

New Defined Terms

small business case, 11 U.S.C. § 101(51C)
small business debtor, 11 U.S.C. § 101(51D)

Bankruptcy Code

11 U.S.C. § 103(k)(1)	[makes section 1514 applicable to all chapters]
11 U.S.C. § 1116	[duties of debtors and trustees in small business cases]
11 U.S.C. § 1129(e)	[permitting confirmation of a small business debtor’s plan only if “the applicable provisions of title” 11 have been satisfied]
11 U.S.C. § 1514	[Notice to foreign creditors]

Interim Rules

Interim Rule 1020	[requiring a debtor to state whether or not the debtor is a small business debtor and setting a deadline for contesting the debtor’s statement]
Interim Rule 2002(p)	[Notices mailed to creditors with foreign addresses]

SECTION 328
Limitation on Compensation of Professional Persons

Summary of Amendment

Section 328(a) is amended to provide that the trustee may employ a professional person on any reasonable terms, “including on a retainer, on an hourly basis, on a fixed or percentage fee basis, or on a contingent fee basis.” The amendment clarifies, to the extent the statute may have been ambiguous, that professionals may be employed and compensated based upon a fixed or percentage fee basis.

SECTION 330

Compensation of Officers

Summary of Amendment

Section 330(a)(1) is amended to add “ombudsman” to the list of professionals who may be awarded compensation from the estate. The list now includes “a trustee, a consumer privacy ombudsman appointed under section 332, an examiner, an ombudsman appointed under section 333, or a professional person employed under section 327 or 1103.”

Section 330(a)(3) is amended to provide that “[i]n determining the amount of reasonable compensation to be awarded to an examiner, trustee under chapter 11, or professional person, the court shall consider [the factors enumerated].” Thus, amended section 330(a)(3) specifies which professional’s compensation is subject to review under the specified reasonableness factors. Excluded from the list are chapter 7 trustees and ombudsmen.

Section 330(a)(3)(E) is new and specifies that the court should consider, with respect to a professional person, whether the person is “board certified” or otherwise has demonstrated skill and experience in the bankruptcy field when determining the reasonableness of compensation.

Section 330(a)(7) is also new. It provides that “[i]n determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission based upon section 326.” It appears, then, that a chapter 7 trustee’s compensation will not be based on a lodestar analysis. That is, the court is not to determine a reasonable hourly rate and multiply that rate by the amount of time actually, necessarily, and reasonably spent working on a case. Instead, the trustee is entitled to a commission, such as that set by the “cap” under section 326(a), with the proviso that the commission be reasonable. Just what factors the court should consider when determining whether a commission is reasonable is not specified in section 330(a)(7).

Case Authority Impacted by the Amendment

Cases holding that the compensation of chapter 7 trustees must be evaluated using a lodestar analysis because the compensation provided under section 326(a) is not an entitlement are called into question by section 330(a)(7). See e.g., One City Centre Associates, 111 B.R. 872 (Bankr. E.D. Cal. 1990).

Litigation Points

1. Although section 326(a) continues to provide that the trustee is entitled to “reasonable compensation under section 330,” not to exceed the cap, section 330 now provides that the court “shall” treat the trustee’s compensation “as a commission” but also requires that the commission be “reasonable.” Must a trustee keep hourly billing records? Is the amount of time actually spent on a matter relevant when determining a reasonable commission? When will a

commission be “unreasonable?” Does section 330(a)(7) create a rebuttable presumption that a trustee’s cap is reasonable compensation?

2. It appears that a chapter 11 trustee’s compensation is not to be treated as a commission under section 330(a)(7) because section 330(a)(3) continues to subject a chapter 11 trustee to the traditional lodestar analysis. However, section 330(a)(7) does not expressly limit its application to chapter 7 trustees. It specifies “trustees.”

3. “Board certified” is not defined.

Cross References

Bankruptcy Code

11 U.S.C. § 326	[Limitation on compensation of trustee]
11 U.S.C. § 327	[Employment of professional persons]
11 U.S.C. § 332	[Consumer Privacy Ombudsman]
11 U.S.C. § 333	[Appointment of Patient Care Ombudsman]
11 U.S.C. § 1103	[Powers and duties of committees]
11 U.S.C. § 503(b)	[amended to include as an administrative expense the “actual and necessary costs and expenses of closing a health care business incurred by a trustee or by a Federal agency”]

Drafting Issues and Problems

Section 330(a)(7) should be changed from “trustee” to “chapter 7 trustee.”

SECTION 332 Consumer Privacy Ombudsman

Summary of Amendment

Five days prior to the commencement of a hearing convened to consider an asset sale, the court is required to order the United States Trustee to appoint a disinterested person to serve as the consumer privacy ombudsman. This is required whenever the proposed sale will give or disclose to the purchaser “personally identifiable information” [see 11 U.S.C. § 101(41A)] of consumers, such as their names, addresses, phone numbers, email addresses, account numbers, or social security numbers, in violation of the debtor’s pre-petition privacy policy. Any sale involving such a disclosure cannot be approved unless the requirements of section 363(b)(1)(B) are met.

If a sale of estate property includes a sale or disclosure of personally identifiable information belonging to persons not affiliated with the debtor that is inconsistent with the debtor’s pre-petition privacy policies, the sale or disclosure is permissible only after considering information presented by a consumer privacy ombudsman. After considering the input of the ombudsman, the sale or disclosure may only occur if the “facts, circumstances and conditions” of the case require the sale or disclosure. See 11 U.S.C. § 332(b) & 363(b)(1)(B). The ombudsman may report on such information as the potential losses of, or gains to, the privacy of consumers, the potential costs or benefits to consumers if the sale is approved, and alternatives to mitigate the loss of privacy. See 11 U.S.C. § 332(b).

Interim Rule 2002(c)(1) requires that the notice of a proposed sale or lease of personally identifiable information under sections 363(b)(1) must indicate whether the proposed sale or lease is consistent with the debtor’s policy prohibiting the transfer of personally identifiable information.

Interim Rule 6004(g) implements section 332. It requires that a motion for authority to sell or lease personally identifiable information under section 363(b)(1)(B) must include a request that the United States Trustee appoint a consumer privacy ombudsman. See Interim Rule 6004(g)(1). Once the consumer privacy ombudsman is appointed and no later than 5 days before the hearing on the motion under section 363(b)(1)(B), the United States Trustee must file a notice of the appointment that includes the name and address of the ombudsman. The notice must be accompanied by the ombudsman’s verified statement setting forth his or her connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed by the United States Trustee. See Interim Rule 6004(g)(2).

Litigation Points

1. Section 332(a) provides that “[i]f a hearing is required under section 363(b)(1)(B) [i.e., a sale that may disclose “personally identifiable information” in a manner inconsistent with

the debtor’s confidentiality policy], the court shall order the United States trustee to appoint, not later than 5 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as consumer privacy ombudsman in the case and shall require notice of such hearing be timely given to such ombudsman.”

2. The ombudsman must be “disinterested” and is an officer under section 330, but apparently is not employed under section 327. Compensation is governed by the “reasonableness standard” of section 330(a)(1), but not the factors of section 330(a)(3) used to determine what is reasonable are not applicable.

3. If appointed, the ombudsman may, but apparently is not obligated to, provide advice to the court. The ombudsman is required to be appointed only 5 days prior to the sale hearing but must also receive “timely” notice of the hearing. Is 5 days timely notice?

Cross References

New Defined Terms

personally identifiable information, 11 U.S.C. § 101(41A)

Bankruptcy Code

11 U.S.C. § 363(b)(1)(B) [sales involving “personally identifiable information”]

Interim Rules

Interim Rule 2002(c)(1) [notices of proposed sale and leases must disclose whether they include personally identifiable information and whether the sale or lease is consistent with the debtor’s policy prohibiting the transfer of such information]

Interim Rule 6004(g) [mechanics of appointment of consumer privacy ombudsman]

Official Forms

Official Form 6 [Schedule B amended to require disclosure of customer lists or other compilations of personally identifiable information provided]

SECTION 333 Appointment of Patient Care Ombudsman

Summary of Amendment

Section 333 provides that if the debtor “is a health care business,” the court shall, within 30 days of the filing of the petition, order the appointment of an ombudsman to monitor and report on the quality of the debtor’s patient health care. The court may decline to order the appointment if it concludes the appointment is unnecessary. The United States Trustee is charged with appointing the ombudsman. If the debtor provides long-term care, the United States Trustee must give notice to, and may appoint, the State Long-Term Care Ombudsman as the patient care ombudsman.

To aid in identifying debtors who are health care businesses, Official Form 1, the petition, now requires disclosure as to whether the debtor operates a health care business. The same information must also be included in involuntary petitions. See Official Form 5.

Interim Rule 2007.2(a) gives the United States Trustee or any other party in interest 20 days to file a motion requesting that an ombudsman not be appointed on the ground that such appointment is unnecessary for the protection of patients under the specific circumstances of the case. The Interim Rule does not indicate whether such a motion must be disposed of within the first 30 days of the case. Given that section 333(a)(1) requires the ombudsman’s appointment within the first 30 days of the case, it would appear that the motion must be resolved by the 30th day.

If the court orders that no ombudsman should be appointed, the United States Trustee or another party in interest may file a motion at any time during the case for the appointment of an ombudsman if such has become necessary to protect patients. See Interim Rule 2007.2(b). By the same token, if an ombudsman has been appointed, the United States Trustee or another party in interest may file a motion at any time during the case for the termination of the appointment if such has become unnecessary to protect patients. See Interim Rule 2007.2(d).

Once an ombudsman is appointed, the United States Trustee shall promptly file a notice of the appointment. The notice must include the ombudsman’s name and address. Unless the ombudsman is a State Long-Term Care Ombudsman, the notice shall be accompanied by a verified statement of the ombudsman setting forth his or her connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed by the United States Trustee. See Interim Rule 2007.2(c). These disclosures are necessary because the ombudsman appointed must be disinterested. See 11 U.S.C. § 333(a)(2).

The ombudsman shall: (a) monitor patient care; (b) within 60 days of appointment, and in 60-day intervals thereafter, report to the court regarding the quality of patient care; and (c) if patient care is declining significantly or otherwise being materially compromised, immediately

file a report or motion with the court.

The ombudsman shall maintain the confidentiality of patient records and may not review confidential patient information without a court order. See 11 U.S.C. § 333(b). Interim Rule 2015.1(b) permits a motion by the ombudsman to obtain confidential patient records. The motion may not be heard sooner than 15 days after its service. It must be served on the patient, the United States Trustee, and any family member or contact person whose name has been given to the trustee or the debtor for the purpose of providing information regarding the patient's health care. To the extent served on persons other than the patient, such service is "subject to applicable nonbankruptcy law relating to patient privacy."

Interim Rule 2015.1(a) requires that 10 days before making a report under section 333(b)(2), the ombudsman must give notice that the report will be made to the court. This notice must be "transmitted" to the United States Trustee, posted conspicuously at the health care facility that is the subject of the report, and served on the debtor, the trustee, all patients, any committee, and such other persons as the court may direct. The notice must specify the date and time the report will be made, the manner in which it will be made. If the report will be in writing, the notice must give the name, address, telephone number, email address, and website, if any, of the person from whom a copy of the report may be obtained at the debtor's expense. See Interim Rule 2015.1(a).

Litigation Points

The ombudsman must be "disinterested" and is a professional whose compensation is governed by section 330. However, the ombudsman apparently is not employed under section 327. Compensation is governed by the "reasonableness standard" of section 330(a)(1), but reasonableness is not determined using the factors set out in section 330(a)(3).

Cross References

New Defined Terms

health care business, 11 U.S.C. § 101(27A)

patient, 11 U.S.C. § 101(40A)

patient records, 11 U.S.C. § 101(40B)

Bankruptcy Code

11 U.S.C. § 330(a)(1) [ombudsman is officer entitled to compensation]

Applicable Nonbankruptcy Statutes

42 U.S.C. §§ 3001 et. seq. [Older Americans Act of 1965 describing the State Long-Term Care Ombudsman]

Interim Rules

Interim Rule 2007.2	[appointment of patient care ombudsman]
Interim Rule 2015.1	[reports of patient care ombudsman and authorization to review confidential patient records]

Official Forms

Official Form 1	[form voluntary petition required to disclose whether the debtor operates a health care business]
Official Form 5	[form involuntary petition required to disclose whether the debtor operates a health care business]

Administrative Burdens

The court must identify (apparently sua sponte) whether a debtor operates a health care business, and determine at the outset of the case whether the appointment of a patient care ombudsman is appropriate. This will require the clerk to review of the new petition form to ascertain whether the debtor has identified itself as operating a health care business. For those debtors operating such a business, the clerk must bring the petition to the attention of the court within 30 days of its filing in order that the court may discharge its duty under section 333(a)(1) and appoint an ombudsman.

SECTION 341 Meetings of Creditors and Equity Security Holders

Summary of Amendment

Section 341(c) is amended. Former section 341(c) prohibited the court from presiding or attending any meeting of creditors. This is unchanged. Section 341(c), however, is amended to authorize non-attorney representation of creditors holding consumer debt at meetings in chapter 7 and 13 cases. This amendment preempts any otherwise applicable nonbankruptcy law that might require an attorney to appear for creditors at the meeting.

Section 341(e) is new. It authorizes the court, after notice and hearing and for cause, to order the United States Trustee not to convene a meeting under section 341 if the debtor has filed a plan to which the debtor has solicited acceptances prior to the filing of the petition. Interim Rule 2003(a) notes this exception to the requirement that a debtor appear at the meeting of creditors.

Interim Rule 4002(b) requires every individual debtor to bring to the meeting of creditors and make available to the trustee the following documents: A) evidence of current income such as the most recent payment advice; B) statements for each of the debtor's depository and investment accounts for the period that includes the date the petition was filed; C) documentation supporting the expenses claimed by the debtor when required by section 707(b)(2)(A) or (B) [records supporting such expenses as an additional 5% over the IRS National Standards for food and clothing; reasonable and necessary expenses for the care of elderly or disabled; education expenses for minor children; additional home energy costs; additional payments to secured creditors whose collateral is necessary for the support of the debtor; expenses occasioned by serious medical condition or other special circumstances]; and D) personal identification consisting of a picture identification issued by a governmental unit or other personal identifying information, and evidence of the debtor's social security number or a written statement that such documentation does not exist.

Case Authority Impacted by the Amendment

Section 341(c) is in accord with State Unauthorized Practice of Law Committee v. Mason, 46 F.3d 469 (5th Cir. 1995); In re Clemons, 151 B.R. 860 (Bankr. M.D. Tex. 1993); In re Kincaid, 146 B.R. 387 (Bankr. W.D. Tex. 1992); and In re Messier, 144 B.R. 617 (Bankr. R.I. 1992).

Section 341(e) “overrides some pre-amendment suggestion that a prepackaged plan could not be confirmed prior to the ‘first meeting.’” Hon. William Houston Brown and Lawrence R. Ahern III, 2005 Bankruptcy Reform Legislation with Analysis, p. 90-91 (Thompson/West 2005).

Litigation Points

1. Does the amendment to section 341(c) mean that creditors must have attorneys in order to appear at creditor meetings convened in cases under chapters 9, 11, 12, and 15 or in chapter 7 cases when creditors hold nonconsumer debt?

2. Does section 341(e) require some cause beyond the pre-filing solicitation of acceptances to a plan?

3. Section 341(e) was likely written with chapter 11 prepackaged plans in mind. However, the wording of section 341(e) is not limited to chapter 11 cases. So, could a chapter 12 or 13 debtor solicit acceptances to a plan prior to filing a petition then seek to avoid a first meeting? While creditors do not, as a matter of course, vote to accept or reject chapter 12 or 13 plans, some creditors may nonetheless accept such a plan. For instance, section 1225(a)(5)(A) and 1325(a)(5)(A) permits a secured creditor to accept a treatment that might not otherwise be confirmable.

Cross References

Interim Rules

Interim Rule 2003(a)	[conforms Rule 2003(a) with section 341(e) permitting a debtor to avoid a meeting of creditors if the debtor solicited acceptances to a plan prior to filing the petition]
Interim Rule 4002(b)	[information and documentation the debtor must bring to the first meeting]

Administrative Burden Imposed on Court

Section 341(e) imposes a minor burden on the clerk by requiring a meeting of creditors not be noticed in those cases where the debtor has solicited acceptances to a plan that is filed soon after the petition is filed.

SECTION 342 Notice

Summary of Amendment

Sections 342(b) & (c) have been amended and sections 342(d), (e), (f) & (g) are new.

Section 342 (b) expands the information the clerk is required to provide to individual debtors who have primarily consumer debt. Previously, the clerk was required to provide written notice of the bankruptcy relief available under the various chapters. Now, section 342(b) requires the clerk's notice to include a brief description of chapters 7, 11, 12 and 13, the general purposes, benefits and costs of proceeding under each chapter, and the types of services available from credit counseling agencies. In addition, the written notice must specify that knowingly fraudulent concealment of assets or a false oath in connection with a bankruptcy case is subject to fine, imprisonment, or both, and that all information supplied by a debtor in a case is subject to examination by the Attorney General.

Section 342(c) is amended to require that notices from the debtor to a creditor include the last four digits of the debtor's taxpayer identification number, and if the notice is of an amendment adding a creditor to the schedules, then the debtor's entire taxpayer identification number must be included in the communication to the added creditor. The copy of the notice filed with the court shall identify only the last four digits. Former section 342(c) provided that the failure to include this information did not invalidate the legal affect of the notice to the creditor. The amendment eliminates that safe harbor.

In addition, section 342(c) provides that if a creditor, within the 90 days prior to commencement of the case, has "sent" to the debtor at least two "communications" with the current account number and an address for correspondence, then any notice the debtor is required to send to the creditor must be sent to the designated address and include the account number. Moreover, if the creditor would be in violation of applicable nonbankruptcy law by sending communications to the debtor within 90 days of the petition, then if the creditor has sent two communications to the debtor between the 90th and 180th day prior to the filing of the petition, the debtor must use the address and account number designated by the creditor in the earlier communications.

Section 342(d) is new and requires the clerk to give written notice that the presumption of abuse has arisen under section 707(b) to all creditors within 10 days after filing of the petition. Interim Rules 2002(f)(9) and 5008 and Official Form 22 implement section 342(d).

Whether or not an individual debtor's chapter 7 petition triggers a presumption of abuse will be determined from "a statement of the debtor's current monthly income" that includes the calculation determining whether a presumption of abuse arises under section 707(b)(2). See 11 U.S.C. §§ 521(a)(1)(B)(ii) & 707(b)(2)(C); Official Form 22, Statement of Current Monthly Income and Means Test Calculation. Interim Rule 1007(b)(4) requires that Official Form 22 be

filed by every individual debtor in a chapter 7 case.

Interim Rule 1007(c) gives the debtor the option of filing this new form either with the petition or within 15 days of its filing. If this statement is filed with the petition, the clerk will be able to give the notice required by section 342(d) and Interim Rule 2002(f)(9) with the notice of the commencement of the case. See Fed. R. Bankr. P. 2002(a)(1). But, if the debtor files the statement of current income on the 15th day after filing the petition, the clerk will be unable to give the notice required by section 342(d) by the 10th day after the petition is filed. Interim 5008 anticipates this problem. If the debtor has not filed the new form in time for the clerk to notify creditors that presumption of abuse has arisen, the notice will advise creditors only that the debtor's statement has not been filed. Thereafter, once the form is filed, "the clerk shall give notice to creditors of the presumption of abuse as promptly as practicable." See Interim Rule 5008. That is, it may be necessary for the clerk to give two notices in order to satisfy the requirements of section 342(d) and Interim Rules 2002(f)(9) and 5008.

Section 342(e) is new and authorizes a creditor in a chapter 7 or 13 case commenced by an individual debtor to file with the court and serve on the debtor a notice of address to be used for purposes of notice in that case. All notices served by the court or the debtor 5 days after receipt of the creditor's notice must be sent to the address designated by the creditor.

Section 342(f) allows an "entity" to file in any bankruptcy court a "notice of address." Thirty days after the notice of address is filed, the designated address must be used by all bankruptcy courts, or the particular bankruptcy courts specified in the notice of address, to provide notice to the entity in all chapter 7 and 13 cases in all courts or those designated in the notice of address.

The notice of address may be withdrawn by the entity. See 11 U.S.C. § 342(f)(3). Also, a notice of address filed pursuant to section 343(f)(1) is superceded by a notice of address filed in a bankruptcy case pursuant to section 343(e). See 11 U.S.C. § 342(f)(2).

Interim Rule 2002(g)(2) amends Fed. R. Bankr. P. 2002(g)(2) by modifying the requirement that the clerk mail notices to a creditor at the address designated under Fed. R. Bankr. P. 2002(g)(1) or, if no address has been designated pursuant to Fed. R. Bankr. P. 2002(g)(1), at the address specified on the list of creditors or the schedule of liabilities. Interim Rule 2002(g)(2) modifies this rule to require service compliant with section 342(f) if it is applicable.

Section 342(c) is amended to delete the provision that the failure to include in any notice the debtor's name, address, and taxpayer identification number does not invalidate the legal effect of the notice. Section 342(g) replaces this provision. It provides that notice to a creditor other than in accordance with section 342 is not effective notice "until such notice is brought to the attention of such creditor." If the creditor has designated a person or organizational subdivision to be responsible for receiving notices under the Bankruptcy Code and establishes reasonable procedures to insure that notices are delivered to the designated person or subdivision, notice is not "brought to the attention of such creditor" until notice is received by

the designated person or subdivision.

Moreover, a monetary penalty may not be assessed against a creditor for violating section 362 or failing to comply with sections 542 or 543 unless such failure occurs after the creditor receives notice that is effective under section 342. See 11 U.S.C. § 342(g).

In a related amendment to section 505 dealing with notice to federal, state, and local governmental units responsible for the collection of taxes, those entities within a district may designate an address for service of requests to determine tax liabilities under section 505. Section 505(b) requires the clerk of the bankruptcy court to maintain a list containing this information. Under section 505(b)(1)(B), if a governmental unit does not designate an address where notices are to be sent, notices shall be sent to the address for the filing of a tax return or protest.

Case Authority Impacted by the Amendment

Section 342(g) appears to limit existing authority imposing sanctions on creditors for violation of the stay and failing to comply with turnover requirements where the entity was not officially on notice of the bankruptcy. Regarding violations of section 362, see e.g., Salem v. Pawli, 260 B.R. 246 (S.D.N.Y. 2001); In re Coors, 123 B.R. 649 (Bankr. N.D. Okla. 1991); In re Alton, 837 F.2d 457 (11th Cir. 1988); In re Wagner, 74 B.R. 898 (Bankr. E.D. Pa. 1987); Matter of Davis, 74 B.R. 406 (Bankr. W.D. Ohio 1987). Regarding violations of section 543, see e.g., In re McCary, 60 B.R. 152 (Bankr. N.D. Ill. 1986).

Litigation Points

While section 342(f)(2) makes clear that a notice of address filed in a particular case will trump a general notice of address filed in a bankruptcy court, what if a creditor has filed a general notice but thereafter informs a debtor in 2 communications to use a different address for correspondence? Which address should be used for notice? The most recent address specified by the creditor? Or, is the general notice filed in a bankruptcy court used because it deals with notices in bankruptcy cases whereas the address in the communications is for correspondence?

Cross References

Bankruptcy Code

11 U.S.C. § 362(a) & (k)	[automatic stay and sanctions for violating the stay]
11 U.S.C. § 542	[turnover of property of the estate]
11 U.S.C. § 543	[turnover of property of the estate by a custodian]
11 U.S.C. § 707(b)	[dismissal of a chapter 7 case]

Applicable Nonbankruptcy Statutes

15 U.S.C. §§ 1681-1681x	[Federal Fair Credit Reporting Act]
15 U.S.C. §§ 1692 – 1692o	[Federal Fair Debt Collection Practices Act]
18 U.S.C. § 152	[crimes related to concealment of assets, false oaths and claims, and bribery]
18 U.S.C. § 153	[embezzlement from an estate]
18 U.S.C. § 154	[acquisition of interest in debtor by officer of the court]
18 U.S.C. § 157	[bankruptcy frauds punishable as a crime]
18 U.S.C. § 1032	[concealment of assets from a conservator of a financial institution]
18 U.S.C. § 1519	[destruction, alteration, or falsification of records in connection with a federal investigation]
18 U.S.C. § 3057	[reporting bankruptcy crimes and investigation of such crimes]
18 U.S.C. § 3282	[statute of limitation for bankruptcy crimes]
18 U.S.C. § 3284	[tolling of limitations when assets are concealed]
Cal. Civ. Code 1788-1788.32	[California Rosenthal Fair Debt Collection Practices Act]
Pub. L. 104-191, 110 Stat. 1936	[Federal Health Insurance Portability and Accountability Act (HIPPA)]

Interim Rules

Interim Rule 1007(c)	[time limits for filing statements and schedules]
Interim Rule 2002(f)(9)	[notice of presumption of abuse]
Interim Rule 2002(g)(2)	[service of notices]
Interim Rule 5008	[clerk's notice under section 342(d) regarding presumption of abuse]

Official Forms

Official Form 22A	[the Statement of Current Monthly Income and Means Test Calculation for use in chapter 7 cases]
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Drafting Issues and Problems

Existing section 342(b) requires the clerk to provide written notice of the relief available under the different chapters prior to commencement of a case, but one wonders how the clerk is to know that the debtor is an individual with primarily consumer debts prior to commencement

of the case. In addition, how will the clerk's notice be able to briefly describe the costs of proceeding under each chapter other than to say chapter 7 and 13 may be cheaper than chapter 12 and certainly cheaper than chapter 11? Moreover, the services available from credit counseling agencies under the new law are not yet known, so it will be difficult for clerks to describe those services.

Administrative Burden Imposed on Court

The amendments to section 342 impose a number of requirements on the court clerk.

First, section 342(b) requires that a more extensive notice of bankruptcy alternatives be given to the debtor when the petition is filed.

Second, section 342(c) requires the clerk to give notice to all creditors in an individual chapter 7 petition if a presumption of abuse arises under section 707(b)(2). This notice must be given within 10 days of the filing of the petition. In order to give this notice, every chapter 7 petition filed by an individual will have to be reviewed by the clerk.

Third, the ability of the clerk to maintain an up-to-date mailing list will be challenged by the requirement in section 342(e) that the address designated by a creditor be used for notices given 5 days after the designation is filed with the court in cases filed by individuals under both chapter 7 and 13.

Fourth, sections 342(f) and 342(g) impose an even greater burden on the clerk and the debtor. They permit a creditor to file in any court notice of the address at which it wishes to receive notices in chapter 7 and 13 cases filed in all courts. If the designated address is not used, the notice will be ineffective.

Section 342(f) will require the creation of some form of national coordination of creditor noticing. In addition, it will require the creation of a national database of such notices to identify those creditors requesting notice of all chapter 13 and 7 cases in which the requesting entity is identified as a creditor.

SECTION 346 (and Sections 728, 1146, 1231) Special Tax Provisions

Effective Date

The amendments to section 1231 are effective in all cases filed on or after April 20, 2005. The other amendments to sections 346, 728, 1146, and 1231 are effective in cases filed on or after October 17, 2005.

Summary of Amendment

In 1978, prior to the enactment of the Bankruptcy Code, early drafts of sections 346, 728, and 1146 applied to federal as well as state and local taxes. However, when the Bankruptcy Code ultimately was enacted, these sections dealt only with state and local taxes. A possible reason for the state and local limitation was a jurisdictional conflict over the federal tax provisions between the House Judiciary Committee (which was responsible for the bankruptcy legislation in general) and the House Ways and Means Committee (which had jurisdiction over federal tax matters). Eliminating federal taxes from coverage under section 346, 728, and 1146 essentially meant that the House Ways and Means Committee did not need to weigh in on the tax provisions, easing the way for the enactment of the Bankruptcy Code.

The House Ways and Means Committee eventually did take up these tax issues. In 1980, Congress passed and the President signed the Bankruptcy Tax Act of 1980, enacting 26 U.S.C. §§ 108, 1398, and 1399.

Section 346 as it existed prior to the 2005 Act has been repealed and replaced by an entirely new section 346. Section 346 now consolidates the former special tax provisions in chapter 7 (section 728), chapter 11 (section 1146), and chapter 12 (section 1231). Section 346 also brings state and local bankruptcy tax provisions into line with the bankruptcy tax provisions set out in the Internal Revenue Code, 26 U.S.C. §§ 108, 1398, and 1399. These tax provisions provide certain rules in the following areas:

- (1) Whether the estate of the debtor is treated as a separate taxable entity;
- (2) Who has the responsibility for filing returns for or on behalf of the debtor;
- (3) How should the bankruptcy estate be taxed;
- (4) What tax attributes does the estate succeed to and what tax attributes does the debtor acquire or re-acquire after the bankruptcy is over;
- (5) Under what circumstances is relief of indebtedness treated as income for tax purposes.

Section 728 was repealed in its entirety by the amendment. Now, under section 346, the taxable year of a chapter 7 debtor is not automatically terminated upon the filing of a petition. The taxable year terminates for state and local taxes in the same fashion as provided under the Internal Revenue Code (26 U.S.C. § 1398). In addition, there are conforming provisions of section 346 which deal with the requirements for filing various types of income and informational returns.

Sections 1146 and 1231 were amended to eliminate the duplicate provisions dealing with the termination of taxable years and the requirements that returns be filed. The remainder of section 1146 was unchanged by the 2005 Act. However, section 1231 was further amended to allow for debtor, after obtaining bankruptcy court permission, to seek a determination from any governmental entity concerning the tax treatment of a proposed chapter 12 plan. The bankruptcy court is given the authority to rule upon the tax treatment after the governmental authority has had the opportunity to make a determination. The similar provision contained in section 1146 only allowed for the request to be made to the state or local taxing authority.

These amendments makes the tax rules applicable to bankruptcy uniform around the country. Now, a tax advisor does not need to be concerned about two potentially different sets of rules when advising a debtor.

Cross References

Bankruptcy Code

11 U.S.C. § 346	[special tax provisions relating to the treatment of state and local taxes]
11 U.S.C. § 728	[repealed special tax provision applicable in chapter 7 cases]
11 U.S.C. § 1146	[special tax provisions applicable in chapter 11 cases]
11 U.S.C. § 1231	[special tax provisions applicable in chapter 11 cases]

Applicable Nonbankruptcy Statutes

26 U.S.C. § 108	[see Summary of Amendment above for brief discussion of this section]
26 U.S.C. § 1398	[see Summary of Amendment above for brief discussion of this section]
26 U.S.C. § 1399	[see Summary of Amendment above for brief discussion of this section]

SECTION 348 Effect of Conversion

Summary of Amendment

When a chapter 13 case is converted to another chapter, section 348(f)(1)(B) provides that valuations of property are effective only if the case is converted to chapter 11 or 12. Such valuations are not effective in cases converted to chapter 7. Moreover, secured claims will be reduced only to the extent they have been paid in accordance with chapter 13 plans in cases converted to chapters 11 or 12.

Section 348(f)(1)(C) is new. It provides that in cases converted from chapter 13, a secured claim shall remain secured by its collateral unless the full amount of the claim, determined under applicable nonbankruptcy law, has been paid as of the date of conversion. This shall be the case despite any valuation or determination of the amount of the allowed secured claim for purposes of the case under chapter 13. In addition, a nonbankruptcy default that has not been fully cured under the chapter 13 plan at the time of conversion shall have the effect given under applicable nonbankruptcy law.

Section 348(f)(2) is amended. The former law provided that if the debtor converted a petition from chapter 13 in bad faith, the property in the converted case consisted of the property of the estate as of the date of the conversion. The amendment provides that the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.

Case Authority Impacted by the Amendment

Cases such as In re Johnson, 213 B.R. 552 (Bankr. N.D. Ill. 1997) and In re Gibbuns, 164 B.R. 207 (Bankr. D.N.H. 1993), permitting a chapter 13 debtor to obtain title to collateral once the stripped down secured claim is paid in full, are no longer good law. See also 11 U.S.C. § 1325(a)(5)(B)(i)(I). Until a chapter 13 case is completed or the secured claim is paid in full (as calculated under nonbankruptcy law), the security interest of a secured creditor continues to encumber the collateral. If a case is converted from chapter 13 to chapter 7, the entire claim, not just the stripped down claim, must be paid in full in order to satisfy a secured claim.

Cross References

Bankruptcy Code

11 U.S.C. § 506	[determination of the secured status of a claim]
11 U.S.C. § 706	[conversion of a chapter 7 petition]
11 U.S.C. § 1307	[conversion of a chapter 13 petition]

Drafting Issues and Problems

Section 348(b) continues to incorporate sections 728(a) and (b) even though section 728 has been deleted from the Bankruptcy Code.

SECTION 351

Disposal of Patient Records

Summary of Amendment

Section 351 is new and it concerns the disposal of patient records. If a health care business commences a case under chapter 7, 9, or 11 and the trustee does not have sufficient funds to pay for the storage of patient records in the manner required under federal or state law, the trustee shall:

Publish a notice in a newspaper that all patient records not claimed by the patient or an insurance provider by a date that is 365 days after the date of notification, the trustee will destroy the patient records; and

During the first 180 days of the 365-day period, the trustee shall promptly attempt to notify directly each affected patient and insurance carrier by mail directed to the most recent known address of the patient, family member, or contact person.

After expiration of the 365-day period, the trustee shall send, by certified mail, a written request to each appropriate federal agency requesting permission to deposit the patient records with that agency. No federal agency, however, is required to accept patient records.

If records are not claimed by patients or insurance companies, or accepted for deposit by a federal agency, the trustee shall destroy those records. Written records are to be shredded or burned and electronic records are to be destroyed so that they cannot be retrieved.

Interim Rule 6011 implements section 351. Interim Rule 6011(a) and (b) provide for notice by publication and by mail. Published notices under section 351(1)(A) may not identify patients by name or other identifying information but shall identify the health care facility whose records the trustee proposes to destroy and the contact information for the person from whom information regarding the records can be obtained and how the records may be claimed. The published notice must state the date by which the patient records must be claimed. See Interim Rule 6011(a).

Notices that are mailed under section 351(1)(B) must include the same information that is contained in a published notice. It must also direct the patient's family member or other representative who receives the notice to inform the patient of the notice. In addition to being mailed to patient and any family member or other contact person whose name and address have been given to the trustee or the debtor for the purpose of providing information regarding the debtor's health care, the notice must be mailed to any insurance company known to have provided health care insurance to the patient. See Interim Rule 6011(b).

Unless the court orders the trustee to file proof of compliance with section 351(1)(B) under seal, the trustee shall not file (but shall “maintain” for a “reasonable time”) the proof of compliance. See Interim Rule 6011(c).

Not later than 30 days after the destruction of patient records pursuant to section 351(3), the trustee shall file a report certifying unclaimed records have been destroyed and explaining the method of destruction. This report must not identify patients by name or other identifying information.

Case Authority Impacted by the Amendment

Adelphi Hospital Corp. v. Sarp, 579 F.2d 726 (2nd Cir. 1978) (Bankruptcy Act) (authorizing abandonment).

Cross References

New Defined Terms

health care business, 11 U.S.C. § 101(27A)

patient, 11 U.S.C. § 101 (40A)

patient records, 11 U.S.C. § 101 (40B)

Bankruptcy Code

11 U.S.C. § 503(b)(8)

[cost of disposal entitled to administrative expense status]

Applicable Nonbankruptcy Statutes

Pub. L. 104-191, 110 Stat. 1936

[Federal Health Insurance Portability and Accountability Act (HIPPA)]

Cal. Civ. Code §§ 56 et seq.

[California Confidentiality of Medical Information Act (CMIA)]

Cal. Wel. & Inst. 14124.1

[Medi-Cal providers]

22 C.F.R. § 70751

[California general acute hospital record retention]

22 C.F.R. § 71551

[California acute psychiatric hospital record retention]

Cal. H. & S. Code § 123149

22 Cal. Code Regs. 73543

Interim Rules

Interim Rule 6011

[Notice requirements for disposal and destruction of patient records by trustee]

SECTION 362 Automatic Stay

Summary of Amendment

There are significant amendments to section 362. Congress has attempted to deal with many of the perceived abuses of the bankruptcy law with these amendments. The automatic stay is no longer as “automatic” or as comprehensive as it has been in the past. Think of it as the “semi-automatic” stay.

Section 362(a). Section 362(a) describes what acts are stayed by the automatic stay.

The current version of section 362(a)(8) provides that the automatic stay enjoins “the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor. . . .” Thus, unlike other provisions of the automatic stay, this section was not limited to a proceeding which could have been brought before the commencement of the case under title 11.

In the case of Halpern v. Commissioner of the Internal Revenue Service, 96 T.C. 895 (1991), the current version of section 362(a)(8) was interpreted to enjoin the commencement of a proceeding against the debtor regarding a post-petition tax period. That case is specifically overruled by the new statute, at least in connection with a petition filed by a debtor other than an individual.

The statute has been amended to provide that as to an individual debtor, the stay applies to a commencement or continuation of a proceeding before the United States Tax Court for a taxable period ending on a date before the order for relief. For a corporate debtor, the stay applies to the commencement or a continuation of a proceeding before the United States Tax Court relating to a taxable period “the bankruptcy court may determine.”

Section 362(b). Section 362(b) sets forth the exceptions to the automatic stay. There are significant amendments to section 362(b) including 11 new exceptions.

Section 362(b)(2). Under prior law, the automatic stay did not apply to the commencement or continuation of an action or proceeding for the establishment of paternity or for the establishment or modification of an order for “alimony, maintenance or support.” See 11 U.S.C. § 362(b)(2)(A)(i)-(ii). Prior law also permitted the collection of such obligations from property that was not property of the estate. See 11 U.S.C. § 362(b)(2)(B).

In keeping with the replacement of the terms “alimony, maintenance or support” with the more expansive term “domestic support obligations” [see 11 U.S.C. § 101(14A)], section 362(b)(2) has been amended to provide that the automatic stay does not apply to the commencement or continuation of a civil action or proceeding for the establishment or modification of an order for domestic support obligations as well as the collection of such

obligations from property that is not property of the estate.

This section has also been amended to provide that the automatic stay does not apply to the commencement of a civil proceeding regarding: (1) child custody or visitation; (2) domestic violence; or (3) the dissolution of a marriage. However, it is clear that this exception to the automatic stay does not allow a spouse to seek a division of property that is property of the estate without leave of the bankruptcy court. See 11 U.S.C. § 362(b)(2)(A)(iii)-(iv).

On the other hand, new exceptions to the automatic stay have also greatly strengthened the hand of someone collecting a domestic support obligation. Section 362(b)(2)(C) permits 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. . . .”

Section 362(b)(2)(F) also permits the interception of a tax refund as specified in section 464 and 466(a)(3) of the Social Security Act or “under analogous State law. . . .” Finally, the failure to timely pay domestic support obligations may be reported to credit reporting agencies and may result in the suspension of a debtor’s driver’s, professional, occupational, or recreational license, the automatic stay notwithstanding.

Section 362(b)(18). Currently, this section provides that the automatic stay does not apply to 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.

This exception has been expanded to provide that the automatic stay does not apply to the creation or perfection of a lien for a special tax or special assessment on real property, whether or not ad valorem in nature, imposed by a “governmental unit” so long as the tax or assessment becomes due after the date of the filing of the petition.

The term “governmental unit” is defined at 11 U.S.C. § 101(27) and includes more entities than the “District of Columbia or a political subdivision of a state.” The term “governmental unit” includes the United States, any state, municipality, foreign state, and/or department, agency, or instrumentality of any the foregoing.

Section 362(b)(19). A new exception to the automatic stay is added section 362(b)(19). It excepts from the automatic stay the withholding of income from a debtor’s wages and the collection of amounts withheld for the repayment of a loan made to the debtor by a pension, profit-sharing, stock bonus, or other plan established under Sections 401, 403, 408, 408A, 414, 457, 501(c) of the Internal Revenue Code of 1986. The plan must be sponsored by the employer of the debtor or an affiliate, successor, or predecessor of such employer. In addition, the debtor must have entered into an agreement authorizing the withholding and collection of the payments. The amounts withheld and collected must be used solely for payments to a loan from a plan under section 408(b)(1) of ERISA or subject to section 72(p) of the Internal Revenue Code of 1986.

Section 362(b)(20). An “in rem” exception to the automatic stay has been created by the addition of section 362(b)(20). This exception has been created to address an abuse arising when a debtor transfers real property to a friendly third party in the wake of an order terminating the automatic stay in favor of a home lender. The third party then files a new bankruptcy case, thereby reacquiring the automatic stay and frustrating the impending foreclosure.

Under this new exception, the automatic stay does not apply to any act to enforce a lien or security interest in real property to the extent that an order granting relief from the automatic stay has been entered as to the real property under section 362(d)(4). The exception to the automatic stay is effective for 2 years after the entry of the order under section 362(d)(4).

A debtor in a subsequent bankruptcy case, however, may move for relief from the in rem order. The request for relief from the in rem order may be premised upon “changed circumstances or for other good cause shown. . . .”

The grounds for obtaining an order seeking termination, modification, and/or annulment of the automatic stay are found in section 362(d). Section 362(d)(4) is new and allows the court to terminate, modify and/or annul the automatic stay at the request of a creditor secured by real property if the court finds that the filing of the petition was “part of a scheme to delay, hinder, and defraud creditors. . . .” It should be noted that these elements are set forth in the conjunctive rather than disjunctive. Furthermore, the “scheme to delay, hinder, and defraud creditors” must involve one of two elements: multiple petitions affecting the real property, or the “transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval.” It should be noted that the multiple filings does not necessarily refer to multiple filings by the same debtor.

Section 362(d)(4) also provides that an order granting relief is binding in any other case purporting to affect the real property and filed within 2 years after the date of the entry of such order so long as it is recorded or indexed.

Although section 362(d)(4) requires recordation of the order for it to be binding in a later case, the exception to the automatic stay created by section 362(b)(20) may apply whether or not the order has been recorded. For a 2-year period after the “entry” of an order under section 362(d)(4), the automatic stay will not prevent any act to enforce “any” lien or security interest in real property that has been the subject of an in rem order in a prior case. Thus, for purposes of the section 362(b)(20), the triggering event appears to be the entry of an in rem order, not its recordation.

The exception to the automatic stay created by section 362(b)(20) applies to any lien or security interest in real property, as to which an order has been entered under section 362(d)(4) in a prior case, regardless of whether the creditor seeking to enforce the lien or security interest was the creditor who obtained the order under section 362(d)(4).

Section 362(b)(21). Another new exception to the automatic stay has been created by section 362(b)(21). This exception applies to any act to enforce a lien or security interest in real

property if the debtor is ineligible to be a debtor under section 109(g) or if the bankruptcy case was filed in violation of a bankruptcy order in a prior case prohibiting the debtor from being a debtor in a subsequent bankruptcy case. Section 109(g) remains unchanged and basically prohibits an individual or family farmer from being a debtor in a case for 180 days if a previous case was dismissed for the debtor's willful failure to abide by court orders, or properly prosecute the case. The 180-day prohibition also applies to a debtor who requested and obtained a voluntary dismissal of a case after a motion for relief from the automatic stay had been filed by a creditor. This new exception is consistent with the Ninth Circuit's withdrawn opinion in Umali v. Dhanani, 385 F.3d 818 (9th Cir. 2003).

Because section 362(b)(21) is limited to real property belonging to individuals who are not eligible for bankruptcy relief under section 109(g), does this mean that debtors who are not eligible for bankruptcy relief by virtue of other provisions in section 109, such as section 109(h) (individuals must receive pre-petition credit counseling before filing a petition), nonetheless acquire the automatic stay notwithstanding their ineligibility?

Section 362(b)(22). A new exception to the automatic stay has been created by the addition of section 362(b)(22). This exception to the automatic stay relates to the continuation of any eviction, unlawful detainer action, or similar proceedings by a lessor against a debtor. The lease must involve residential real property in which the debtor resides as a tenant under a lease or rental agreement.

New section 362(b)(22) provides that, subject to section 362(l), section 362(a)(3) does not apply to the continuation of an eviction proceeding involving residential real property occupied by the debtor. This new exception is applicable if the lessor has obtained a judgment for possession of the property prior to the filing of the bankruptcy petition.

Based on the plain language of the statute, it does not appear that this exception applies to leases of non-residential real property.

Pursuant to section 362(l), if the debtor files a certification with the bankruptcy petition and serves the certification on the lessor, then section 362(b)(22) applies, but only from the 30th day after the petition is filed.

In order to qualify for the exception to the exception to the automatic stay, the debtor must certify under penalty of perjury that under applicable nonbankruptcy law there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession even after the judgment was entered. In addition, the debtor must certify that 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. The clerk of the court is responsible for the prompt transmittal of the deposit to the lessor.

An amendment of Official Form 1, the voluntary petition, implements section 362(l)(1). The petition now includes the statement required by section 362(l). The debtor's signature at the

conclusion of the form attests that all information given on the form is done so under penalty of perjury.

Pursuant to section 362(l)(2), section 362(b)(22) will never apply if within the first 30 days following the filing of the petition for relief, the debtor or an adult dependent of the debtor complies with the above requirements and further files with the court and serves on the lessor a second certification under penalty of perjury. The second certification must attest that the debtor, or an adult dependent of the debtor, has cured the entire monetary default that gave rise to the judgment for possession. It does not appear that the amount necessary to cure the default is deposited with the clerk. Presumably, it will be paid directly to the lessor.

However, this exception to the exception is itself subject to an exception. Under section 362(l)(3), the lessor may file an objection to one or both of the certifications filed by the debtor. The objection must be served upon the debtor. The statute provides that the court “shall” conduct a hearing within 10 days of the filing and service of the objection by the lessor. The purpose of the hearing is to determine whether the certification to which the lessor has objected “is true.” If the objection is sustained, the exception to the automatic stay, section 362(b)(22), will apply immediately and the lessor may recover possession of the residential property despite the filing of the petition. The clerk of the court must immediately serve upon the lessor and the debtor a “certified copy” of the court’s order sustaining the lessor’s objection.

Pursuant to section 362(l)(5), a debtor must indicate on the petition whether a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been entered against the debtor. The debtor must provide the name and address of the lessor on the petition and on any certification. See Official Form 1.

If the debtor indicates on the petition that a judgment for possession of residential rental property in which the debtor resides has been entered, but does not file the initial certification, the exception to the automatic stay under section 362(b)(22) is immediately applicable. See 11 U.S.C. § 362(l)(4)(A). The statute provides that relief from the automatic stay shall not be required to enable the landlord to recover possession of the property. The clerk of court must 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).”

Section 362(b)(23). A new exception to the automatic stay has been created by section 362(b)(23). Unlike section 362(b)(22), which deals with the enforcement of a pre-petition judgment for possession of residential real property, section 362(b)(23) addresses an eviction action that either is pending or yet to be filed when the bankruptcy relief is sought. If the eviction action is based on the endangerment of residential property or the illegal use of controlled substances on such premises, the automatic stay will not hinder the prosecution of the eviction action or the eviction of the debtor from the premises.

This exception to the automatic stay becomes operative if the lessor files and serves upon the debtor a certification, under penalty of perjury, that an eviction action based on

endangerment of the property has been filed or that the debtor, during the 30-day period preceding the filing of the certification, has endangered property or illegally used or allowed to be used a controlled substance on the property.

Pursuant to section 362(m), the automatic stay will remain in effect for 15 days after the lessor files the certification required by section 362(b)(23). Thereafter, the exception to the automatic stay under section 362(b)(23) shall apply. However, if the debtor files and serves an objection to the truth or legal sufficiency of the lessor's certification pursuant to section 362(m)(2), the exception to the automatic stay is not applicable unless the court orders otherwise.

Once an objection to the landlord's certification is filed by the debtor, the court must hold a hearing within 10 days after the objection is filed and served. The court must determine whether or not the situation certified by the landlord existed or has been remedied. If the debtor can demonstrate to the satisfaction of the court that the property was not, or is no longer, endangered, the automatic stay shall remain in place until otherwise terminated. If the debtor cannot so demonstrate, the lessor may proceed with the eviction. An order terminating the automatic stay is unnecessary.

If the debtor cannot convince the court that the property is not endangered, the clerk of the court must immediately serve a certified copy of the court's order upholding the lessor's certification and overruling the debtor's objection.

Section 362(m)(3) provides that if the debtor fails to file an objection to a lessor's certification within 15 days, then the exception to the automatic stay under section 362(b)(23) shall be applicable immediately. Relief from the automatic stay will not be required to enable the landlord to complete the process to recover full possession of the subject property. Again, the clerk of the court is required to immediately serve upon the lessor and the debtor "a certified copy of the docket" reflecting that the debtor has failed to file a timely objection to the lessor's certification.

Section 362(b)(24). A new exception to the automatic stay has been created by the addition of section 362(b)(24). It excludes from the automatic stay "any transfer that is not avoidable under section 544 and that is not avoidable under section 549."

Under 11 U.S.C. § 549, a trustee may avoid a transfer of property after the commencement of the case if it was not authorized by the court, or if it is only authorized under section 303(f) [transfers made while an involuntary petition is pending but before an order for relief has been entered] or under section 542(c) [transfers of property of the estate by a third party who has no knowledge of the commencement of a case concerning a debtor to an entity other than the trustee].

Pursuant to section 549(c) a trustee may not avoid the transfer of real estate to a good faith purchaser, without knowledge of the commencement of the case, who has paid fair equivalent value, unless a copy of the petition was recorded. This is usually referred to as the

bona fide purchaser defense to an action to avoid a post petition transfer.

An action to avoid a post-petition transfer must be filed within the earlier of two years after the date of the transfer sought to be avoided or the time the case is closed or dismissed.

In the past, trustees have attempted to circumvent the bona fide purchaser exception to a post-petition transfer by filing actions to avoid transfers to bona fide purchasers on the basis that the transfer was void, not voidable, as a violation of certain provisions of 11 U.S.C. § 362(a). This theory also circumvents the 2-year limitation period. Trustees have argued that a transfer in violation of the automatic stay is void, and does not become valid due to the passage of time.

This new exception to the automatic stay may codify the position that section 549 must be used as the exclusive vehicle to avoid post-petition transfers. Construed in this fashion, section 362(d)(24) might be regarded as overruling Thompson v. Margen (In re McConville), 110 F.3d 47 (9th Cir. 1997) and 40235 Washington Street Corp. v. Lusardi, 329 F.3d 1076 (9th Cir. 2003).

In McConville the Ninth Circuit concluded that the creation of a lien after the filing of the petition was not a transfer for purposes of section 549. Consequently, the lien was subject to attack only as a violation of sections 362 or 364.

In Lusardi, the Ninth Circuit concluded that the statutory exception in section 549(c) to the avoidance of an unauthorized postpetition transfer of real property to a good faith purchaser without knowledge of commencement of a bankruptcy case is not a defense to the automatic stay. Section 549(c) could not be invoked by a person who purchases the debtor's property in good faith at a foreclosure sale conducted in violation of the automatic stay.

However, the wording of section 362(d)(24) is troubling. It refers to transfers that are unavoidable under section 544 and under section 549. Because section 544 deals with pre-petition transfers and section 549 deals with post-petition transfers, it is difficult to imagine a transfer that is avoidable or unavoidable under both sections.

Consequently, a creditor foreclosing on a mortgage after the filing of a petition, might argue that the automatic stay was not violated because the foreclosure is avoidable under section 549 (subject to limitations period and any bona fide purchaser defense as discussed above) but not under section 544.

The limitation of section 362(b)(24) to transfers that are both unavoidable under section 544 and under section 549 might limit its application to pre-petition foreclosures that are followed by the post-petition delivery and/or recordation of a deed to the buyer at the foreclosure.

Section 362(b)(25). A new exception to the automatic stay has been created by the addition of section 362(b)(25). This section makes the automatic stay inapplicable to the commencement or continuation of an investigation by a securities self regulatory organization, to

the enforcement of its order or decision, other than for monetary sanctions, and to any act to “delist, delete, or refuse to permit quotation of any stock that does not meet applicable regulatory requirements. . . .”

A “securities self regulatory organization” is defined in section 101(48A) as follows:

The term ‘securities self regulatory organization’ means either a securities association registered with the Securities and Exchange Commission under section 15A of the Securities Exchange Act of 1934 or a national securities exchange registered with the Securities and Exchange Commission under section 6 of the Securities Exchange Act of 1934.

Section 362(b)(26). A new exception to the automatic stay is created by the addition of section 326 (b)(26). Generally, the exercise of a right to setoff arising before the petition is filed is restrained by the automatic stay. Section 362(b)(26), however, makes clear that the right of a governmental unit to setoff against an income tax refund is not subject to the automatic stay provided the tax refund and the tax liability both arose prior to the petition. If the setoff is not permitted under applicable nonbankruptcy law due to the pendency of an action to determine the amount or legality of the tax liability, the governmental unit may hold the refund pending the resolution of the action, unless the trustee, after notice and a hearing, provides the taxing authority with adequate protection under 11 U.S.C. § 361.

This new statute reiterates that a claim that is subject to a setoff is a secured claim and, like any other secured claim, is subject to adequate protection as set forth within section 361.

Section 362(b)(27). A new exception to the automatic stay has been added by section 362(b)(27). This exception permits a setoff by a participant to a master netting agreement of a mutual debt and a claim under or in connection with one or more master netting agreements. Two new related definitions appear at 11 U.S.C. § 101(38A) & (38B):

The term ‘master netting agreement’

(A) means an agreement providing for the exercise of rights, including rights of netting, setoff, liquidation, termination, acceleration, or close out, under or in connection with one or more contracts that are described in any one or more of paragraphs (1) through (5) of section 561(a), or any security agreement or other credit enhancement related to one or more of the foregoing, including any guarantee or reimbursement obligation related to 1 or more of the foregoing; and

(B) if the agreement contains provisions relating to agreements or transactions that are not contracts described in paragraphs (1) through (5) of section 561(a), shall be deemed to be a master netting agreement only with respect to those agreements or transactions that are described in any one or more of paragraphs (1) through (5) of section 561(a).

The term ‘master netting agreement participant’ means an entity that, at any time before the date of the filing of the petition, is a party to an outstanding master netting agreement with the debtor.

Section 362(b)(28). The final new exception to the automatic stay appears at section 362(b)(28). This exception provides that the automatic stay does not apply to an action by the Secretary of Health and Human Services to exclude the debtor from participation in the Medicare program or any other federal health care program.

Other Exceptions to the Automatic Stay. There are two other exceptions to the automatic stay that are not found in section 362(b).

Section 362(c)(4). The first is found at section 362(c)(4). This exception to the automatic stay is discussed at length below.

Section 362(n). The automatic stay does not apply to cases filed by a small business debtor if the debtor is a debtor in an earlier small business case that remains pending, or it was previously a debtor in a small business that was dismissed or had a plan confirmed within the 2 years preceding the latest petition. Also, an entity that acquires substantially all of the assets of a small business having a petition dismissed or plan confirmed in the preceding 2 years cannot acquire the automatic stay in its own bankruptcy case petition unless it proves by a preponderance of the evidence that the acquisition was not for the purpose of evading section 362(n). See 11 U.S.C. § 362(n)(1).

However, section 362(n)(1) does not apply if the petition is an involuntary petition filed without any collusion between the debtor and the petitioning creditors, or if the debtor proves by a preponderance of the evidence that the new petition is necessitated by circumstances beyond the debtor’s control and it is more likely than not that a feasible plan (but not a liquidating plan) will be confirmed within a reasonable time. See 11 U.S.C. § 362(n)(2).

Section 362(c). Generally, section 362(c) deals with the duration of the automatic stay. Its prefatory language has been revised to provide: “except as provided in subsections (d), (e), (f), and (h) of this section– . . .” Thus, subsection (c) must be read in conjunction with, among other sections, new section 362(h). Former section 362(h) dealt with the remedies for a willful violation of the automatic stay. This provision is now section 362(k), discussed below.

In addition, sections 362(c)(3) & (c)(4) have been added. Section 362(c)(3) limits the duration of the automatic stay when the debtor has filed a prior petition. Section 362(c)(4) makes the automatic stay inapplicable when the debtor has filed multiple prior petitions.

Section 362(c)(3) applies only to individual debtors. If an individual was a debtor in a prior case under chapter 7, 11, or 13, if that prior petition was dismissed, and if the prior petition was pending within 1 year of the new petition, the automatic stay with respect to a debt, property securing such debt, or any lease terminates as to the debtor (but not the estate) on the 30th day

after the filing of new case. However, section 362(c)(3) does not apply if the new case was filed under a chapter other than chapter 7 after the prior case was dismissed pursuant to section 707(b).

One court has concluded that a prior petition was not pending within one year when the prior petition was dismissed more than one year prior to the latest case. See In re Moore, 337 B.R. 79 (Bankr. E.D.N.C. 2005). It makes no difference that the prior case remained open within the one year period in order to permit the trustee to file her final report.

Section 362(c)(3)(A) provides that the automatic stay expires with reference “to any action taken with respect to a debt or property securing such debt . . . shall terminate with respect to the debtor. . . .” One court has held that this language means that the automatic stay limits only the protection given the debtor and the debtor’s property. See In re Johnson, 335 B.R. 805 (Bankr. W.D. Tenn. 2006). Section 362(c)(3) has no impact on the duration of the automatic stay vis a vis property of the estate. See also In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006). Another court, focusing on the phrase, “any action taken,” concluded that it pertains only to the continuation of formal judicial, administrative, quasi-judicial, or governmental actions commenced against the debtor before the filing of the petition. See In re Paschal, 337 B.R. 274 (Bankr. E.D.N.C. 2006).

Section 362(c)(3)(B) permits any party in interest to file a motion for continuation of the automatic stay. The court has authority to extend the stay as to any or all creditors after notice and a hearing. See In re Taylor, 334 B.R. 660 (Bankr. D. Minn. 2005) [discussing amount of notice required]. This means all creditors are likely entitled to notice of the motion and hearing. See In re Collins, 334 B.R. 655 (Bankr. D. Minn. 2005); In re Charles, 332 B.R. 538 (Bankr. S.D. Tex. 2005). The hearing must be completed before the expiration of the initial 30 days of the case. See In re Ziolkowski, 338 B.R. 543 (Bankr. C.D. Conn. 2006); In re Wright, 339 B.R. 474 (Bankr. E.D. Ark. 2006); In re Toro-Arcila, 334 B.R. 224 (Bankr. S.D. Tex. 224).

In order to extend the automatic stay, the party seeking the relief must demonstrate that the filing of the new case was in good faith as to the creditors to be stayed. See In re Montoya, 333 B.R. 449 (Bankr. D. Utah 2005) (using “traditional” factors for evaluating debtor’s good faith in the context of a motion under section 362(c)(3)(C)).

Under section 362(c)(3)(C), there is a presumption, rebuttable only with “clear and convincing evidence,” that the new case was “filed not in good faith.” The presumption is applicable as to all creditors if any other following circumstances are present:

1. more than one previous case under chapter 7, 11, and/or 13 was pending against the individual within the preceding 1-year period;
2. a previous case under chapters 7, 11, 13 in which the individual was a debtor was dismissed within the 1-year period because the debtor failed to file or amend, without substantial excuse, the petition or other documents as required by title 11 or the court, or failed to provide adequate protection as ordered by the court, or

failed to perform the terms of a plan confirmed by the court; or

3. “there has not been a substantial change in the financial or personal affairs of the debtor since 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. . . .”

See cases holding that presumption not rebutted: In re Ellis, 339 B.R. 136 (Bankr. E.D. Pa. 2006); In re Wilson, 336 B.R. 338 (Bankr. E.D. Tenn. 2005); In re Montoya, 333 B.R. 449 (Bankr. D. Utah 2005); In re Havner, 336 B.R. 98 (Bankr. M.D.N.C. 2006); In re Kurtzahn, 337 B.R. 356 (Bankr. D. Minn. 2006). See cases holding that the presumption had been rebutted: In re Baldassaro, 338 B.R. 178 (Bankr. D. N.H. 2006); In re Ball, 336 B.R. 268 (Bankr. M.D.N.C. 2006); In re Mark, 336 B.R. 260 (Bankr. D. Md. 2006); In re Phillips, 336 B.R. 818 (Bankr. E.D. Okla. 2006); In re Warneck, 336 B.R. 181 (Bankr. S.D.N.Y. 2006); In re Galanis, 334 B.R. 685 (Bankr. D. Utah 2005).

If a creditor filed an “action” under section 362(d) in a prior case involving the same individual debtor, the presumption is triggered if at the time of dismissal the action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor.

Section 362(i) provides that if a chapter 7, 11, or 13 case is dismissed due to the creation of a debt repayment plan, then for purposes of section 362(c)(3), the presumption that a new case was “filed not in good faith” shall not arise.

Section 362(c)(4) is similar to section 362(c)(3). When an individual debtor has filed 2 or more prior cases that were pending during the previous year, but were dismissed, the automatic stay never goes into effect. Once again, there is an exception for “a case refiled under section 707(b).” The use of the term “refiled” in connection with 707(b) is somewhat ambiguous when compared to the similar provision in section 362(c)(3) [providing that the automatic termination of the automatic stay does not apply to “a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)”].

Section 362(c)(4)(A) provides that “on request of a party in interest the court shall promptly enter an order confirming that no stay is in effect. . . .” See also 11 U.S.C. § 362(j). Section 362(c)(4)(A)(ii) does not appear to condition issuance of the order on notice and a hearing. However, the dismissal of a prior case may not prejudice a debtor if the dismissal was pursuant to section 707(b) and the current petition was filed under chapter 13. See 11 U.S.C. §§ 362(c)(3) & (c)(4).

A party in interest may request that the court impose the automatic stay despite the filing and dismissal of multiple prior petitions. See 11 U.S.C. § 362(c)(4)(B). Such a request must be made with notice and a hearing and must be made within 30 days of the filing of the petition. To obtain the automatic stay, the party in interest must demonstrate that the latest case has been filed in good faith. If shown, the court may impose conditions on the imposition of the automatic stay.

Section 362(c)(4)(D) invokes a presumption that the case was “filed not in good faith,” under much the same circumstances set out in section 362(c)(4)(C). Section 362(c)(4)(D) requires that 2 or more previous cases were pending for the same individual debtor within the one year period. Section 362(c)(3)(C) required only more than 1 previous case.

In In re Parker, 336 B.R. 678 (Bankr. S.D.N.Y. 2006), the court concluded that even though section 362(c)(4) meant that the automatic stay did not go into effect with respect to the debtor, such was not true with respect to a joint debtor who had not filed the two prior dismissed cases.

Other Amendments to Section 362

Section 362(h). Section 362(h) is new. This section applies only to individual debtors and must be read in conjunction with the requirements of section 521.

An individual chapter 7 debtor must file a statement of intention with reference to property that secures a debt. The statement must be filed within 30 days of the filing of the petition or by the date of the meeting of creditors, whichever is earlier. The debtor must disclose in the statement whether he or she intends to retain or surrender such property, whether the property is claimed as exempt, and whether the debtor intends to redeem such property or reaffirm the debt it secures. See 11 U.S.C. § 521(a)(2)(A).

If the property securing a debt is personal property and an individual chapter 7 debtor fails to file a statement of intention, or fails to indicate in the statement that he or she either will redeem the property or enter into a reaffirmation agreement, or fails to timely surrender, redeem, or reaffirm, the automatic stay is automatically terminated and the property is no longer property of the bankruptcy estate. See 11 U.S.C. § 362(h)(1)(A). However, if the creditor refuses to enter into a reaffirmation agreement with the debtor on the original contract terms, section 362(h) is not triggered and the automatic stay remains in place. See 11 U.S.C. § 362(h)(1)(B).

Section 362(h) also provides for the automatic termination of the automatic stay with reference to unexpired leases of personal property. If the trustee fails to assume the lease within the time required by section 365(d)(1) [60 days after the order for relief], the automatic stay will terminate automatically. While section 365(p) gives an individual chapter 7 debtor the right to assume the lease, the consent of the lessor is required. See 11 U.S.C. § 365(p)(2)(A). Also, section 365(p) does not indicate when, relative to the trustee’s deadline to assume the lease, the debtor must take the initial steps to assume the lease. See 11 U.S.C. § 365(p)(2)(A). If the debtor must wait for the trustee to reject the lease, it appears that the automatic stay will no

longer be in place while the debtor attempts to assume the lease.

The statement of intention required by section 521(a)(2) is applicable only with reference to “debts which are secured by property of the estate.” Yet, section 362(h)(1)(A) appears to require that the statement of intention also disclose whether the debtor intends to assume an unexpired lease of personal property.

Official Form 8 is the statement of intention. It has been amended to include a citation to section 362(h)(1)(A) and to require that leased property be listed. This form, however, does not require the debtor to reaffirm the lease nor does it suggest the debtor will be able to redeem the leased property. The purpose of the form change is calculated to insure the trustee and the debtor are aware that if the listed leases are not assumed, the automatic stay will terminate.

The consequence of failing to file a timely statement of intention or to take timely action to reaffirm, redeem, or assume a lease is automatic termination of the automatic stay. However, section 365(p) appears to require the trustee to reject an unexpired lease of personal property, or fail to assume it within 60 days of the order for relief, before a chapter 7 debtor may act to assume the lease. Section 365(p) automatically terminates the automatic stay when the trustee rejects the lease. Thus, from the chapter 7 debtor’s perspective, listing an unexpired lease of personal property on the statement of intention will accomplish nothing. If the trustee assumes the lease, the debtor cannot assume it whether or not the lease was listed. If the trustee rejects the lease, the automatic stay terminates automatically whether or not the debtor has included the lease on the statement of intention.

The trustee may avoid automatic termination of the automatic stay by filing a motion within whichever of the two 30-day periods set by section 521(a)(2) is applicable, and proving that such property is of consequential value or benefit to the estate. If proven, the court must order appropriate adequate protection of the creditor’s interest in its collateral and order the debtor to deliver possession of the property to the trustee. If not proven, the automatic stay terminates upon the conclusion of the hearing on the trustee’s motion. See 11 U.S.C. § 362(h)(2).

Section 362(j). Section 362(j) requires the court to issue an order confirming that the automatic stay has terminated pursuant to section 362(h). It is not clear whether such a request must be made on notice and after a hearing. See, also 11 U.S.C. § 362(c)(4)(A)(ii).

Section 362(k). Section 362(k) supplants former section 362(h), providing that “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.”

An exception has been created for the protection afforded to debtors by section 362(k). The general language set forth in former subsection (h) is now found in subsection (k)(1), and is prefaced with the following language “except as provided in paragraph (2).”

If the act violating the automatic stay is taken “in the good faith belief that section 362(h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.” See 11 U.S.C. § 362(k)(2). This exception is limited by section 362(h), which applies only to personal property secured claims and leases. Thus, paragraph (2) cannot apply to actions taken against real property. In such cases, attorneys’ fees will still be recoverable because attorneys’ fees are included as “actual damages” under section 362(k)(1).

Section 362(o). Acts excepted from the automatic stay by sections 362(b)(6), (7), (17), or (27), cannot be stayed by any order of a court or administrative agency in any proceeding under title 11. These particular exceptions to the automatic stay pertain to the exercise of rights under various securities, commodities, and futures contracts.

The negative implication of section 362(o) is that for all other exceptions to the automatic stay found in section 362(b), it is possible to obtain injunctive relief staying the acts not otherwise stayed by the automatic stay.

Litigation Points

1. Litigation points created by the domestic relations exceptions to the automatic stay. In the past, out of an abundance of caution, most practitioners sought relief from the automatic stay to continue a proceeding to dissolve the status of a marriage. It appears that it will no longer be necessary to seek an order for relief from the automatic stay to commence or continue a proceeding for the dissolution of marital status. It will continue to be necessary to seek relief from the automatic stay to determine issues regarding property that is property of the estate.

Section 362(b)(2)(C) permits 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. . . .” What does “withhold” mean? Must the holder of the domestic support obligation have something due the debtor in order to withhold it? Does this exception to the automatic stay merely permit a setoff? Or, may the holder of the domestic support obligation obtain an order directing a levying officer to withhold wages? What is “income?” Are rents income? May this exception be used to collect a domestic support obligation that first comes due after the petition is filed.

If a chapter 13 plan is confirmed and provides for payment in full of a domestic support obligation, may the holder of the obligation continue with enforcement action outside of bankruptcy? 11 U.S.C. § 1327(a) provides that the debtor and all creditors are bound by the terms of the plan.

2. Litigation points created by sections 362(b)(20) and 362(d)(4).

As previously noted there is a discrepancy between section 362(b)(20) and section 362(d)(4). While section 362(d)(4) provides that an order granting in rem relief from the automatic stay is effective for 2 years following the date of the entry of the order, if the order is

recorded under applicable nonbankruptcy law, section 362(b)(20) simply creates an exception to the automatic stay as to the real property which is the subject of an order under section 362(d)(4) for a period of 2 years after the date of such an order. The exception to the automatic stay does appear to be premised upon the recordation of the order.

Can section 362(b)(20) nonetheless be interpreted to require the recordation of the order entered under section 362(d)(4)? By referring to an “order under subsection (d),” doesn’t this mean an order that is recorded and thereby has “in rem” effect?.

If an order under section 362(d)(4) is given effect under section 362(b)(20) even though it is not recorded, these sections may also impact legitimate real estate transactions by making property unmarketable and title uninsurable.

Suppose, for instance, that an order under section 362(d)(4) is entered but not recorded. The property is thereafter sold to a bona fide purchaser who pays valuable consideration for it. That consideration is used to satisfy the lien of the secured creditor who obtained a section 362(d)(4) order. If the bona fide purchaser falls upon financial difficulties and files a bankruptcy case within two (2) years of the entry of the order for relief under section 362(d)(4), the bona fide purchaser will not receive the benefits of the automatic stay. Such bona fide purchaser must request relief from an order under section 362(d)(4) based upon changed circumstances. If the purchaser unknowing fails to act to extend or impose the automatic stay and the purchaser’s lender, aware of the prior bankruptcy and order, forecloses despite the filing of the second petition, does the purchaser have a claim against the seller or the title insurer? Should the purchaser been advised on the prior unrecorded order?

This will create significant disclosure issues in connection with real estate transactions and in connection with the issuance of title insurance, unless as part of a legitimate sales transaction, a lender who obtained an order under section 362(d)(4) is required to vacate such an order prior to obtaining satisfaction of its lien.

Litigation points created by Section 362(b)(22). This new exception to the automatic stay applies to residential real property in which the debtor resides as a tenant under a “lease or rental agreement.” Neither of these two terms are defined within the Bankruptcy Code. It appears that there will be some litigation as to what constitutes a “lease” or “rental agreement” under the statute.

Litigation points created by Section 362(k)(2). As previously noted, if a willful violation of the automatic stay is committed by an entity in the good faith belief that section 362(h) applies, the debtor may still recover damages, but the recovery shall be limited to actual damages.

Section 362(h) applies only to personal property. If section 362(h) applies, then section 362(k)(2) appears to overrule cases such as Goichman v. Bloom, (In re Bloom), 875 F.2d 224 (9th Cir. 1989), holding:

A “willful violation” does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was “willful” or whether compensation must be awarded. [Citation omitted.]

It appears that actions involving willful violations of the automatic stay as to personal property will now draw a defense that the action was taken in a good faith belief that section 362(h) applied. The timing of the violation will be critical. If the violation takes place before the time that section 362(h) becomes applicable, it will be obvious that the violation was not made in a good faith belief that section 362(h) applied.

Such a defense will be subject to discovery and litigation. Each case will be factually intensive. Although the good faith belief in the applicability of section 362(h) may insulate a creditor from punitive damages, it does not appear that the good faith belief will insulate a creditor from an award for all actual damages caused by the violation of the automatic stay. Most courts, including the Ninth Circuit, have held that creditors willfully violating the automatic stay must compensate the injured party for emotional distress suffered as a result of the willful violation. Emotional distress damages are considered as “actual damages.”

Cross References

New Defined Terms

domestic support obligations, 11 U.S.C. § 101(14A)
securities self regulatory organization, 11 U.S.C. § 101(48A)
master netting agreement, 11 U.S.C. § 101(38A)
master netting agreement participant, 11 U.S.C. § 101(38B)

Bankruptcy Code

11 U.S.C. § 361	[adequate protection]
11 U.S.C. § 362(h)	[automatic termination of the automatic stay]
11 U.S.C. § 365(p)(1)-(2)	[assumption of a lease by a chapter 7 debtor]
11 U.S.C. § 506	[determining secured status and valuation of collateral]
11 U.S.C. § 521(a)(2)	[statement of intention]
11 U.S.C. § 544	[trustee’s strong arm powers]
11 U.S.C. § 549	[avoidance of post-petition transfers]
11 U.S.C. § 553	[setoff]
11 U.S.C. § 561	[master netting agreements]
11 U.S.C. § 707	[dismissal and conversion of chapter 7 petitions]

Applicable Nonbankruptcy Statutes

29 U.S.C. § 1001, et seq. [ERISA employee benefit plans]

Official Forms

Official Form 1 [petition amended to include information and statement required by § 362(l)]
Official Form 8 [statement of intention]

Administrative Burdens Imposed on Court

Section 362(l) creates a number of administrative burdens on the office of the clerk. Pursuant to section 362(l)(5), if the petition discloses that a judgment for possession of residential property in which the debtor resides has been obtained prior to the filing of the petition for relief, but does not make the required certification under section 362(l)(1), then the clerk must serve a certified copy of the docket on the debtor and the lessor indicating the absence of a filed certification and the applicability of the exception to the automatic stay under section 362(b)(22). Thus, it appears that the office of the clerk must actually make a determination based on the petition information to the effect that a judgment for possession has been issued prepetition and make at least one docket entry. The nature of the docket entry, must prove a negative, to wit: that no certification has been filed. It appears that a second docket entry must be made to the effect that the exception to the automatic stay under section 362(b)(22) is in effect.

The Official Form 1, the Voluntary Petition to be used for cases filed on or after October 17, 2005, contains a new section entitled “Statement by a Debtor who Resides as a Tenant of Residential Property.” The debtor is advised to “check all applicable boxes.” There are three boxes that can be checked. The first box must be checked if “landlord has a judgment for possession of debtor’s residence.” If that box is checked then the debtor must provide the name of the landlord or lessor that obtained the judgment and the address of the landlord or lessor.

Another box must be checked if

[d]ebtor claims that under applicable nonbankruptcy law, 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 the judgment for possession was entered. . . .

Another box must be checked if “[d]ebtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.”

Because the required deposit must be included with the petition, is the deposit made payable to the clerk of the court or should the deposit be made payable to the landlord? If the

deposit is made payable to the clerk of the court, then an additional administrative burden will be placed on the clerk who will have to issue its own check to the lessor, promptly.

An additional burden will also be placed on the court to conduct hearings on a landlord's objection to a certification made by a debtor within 10 days after the filing and service of such objection. If the court upholds the lessor's objection, the clerk must immediately serve a certified copy of the court's order upholding the objection.

Section 362(m) also places administrative burdens on the clerk and on the court. If the landlord files a certification under section 362(b)(23), and the debtor objects to the certification, the court must hold a hearing within 10 days of the date that the objection is filed and served. If the court overrules the debtor's objection to the landlord's certification, then the clerk of the court must immediately send a certified copy of the order to the debtor and the landlord.

The burden of monitoring whether the timely objection to a landlord's certification under section 362(b)(23) is filed, is also placed on the clerk of the court. If no timely objection is filed, a docket entry must be made to that effect, and a certified copy of the docket must be mailed to the debtor and the lessor.

Section 362(j) mandates that, on the request of a party in interest, the court issue an order confirming that the automatic stay has been terminated. This will create a burden on the court whether it is done on an ex parte basis or after notice and a hearing. Given the complexities of the amended 362, the court may be barraged with requests for "comfort orders."

SECTION 363

Use, Sale or Lease of Property

Effective Date

The changes to section 363(d) are effective immediately upon enactment and apply to all cases, including those pending on the April 20, 2005 enactment date. The remaining amendments to section 363 are effective in cases filed on or after October 17, 2005.

Summary of Amendment

Section 363 was amended in two respects.

First, section 363(b) is supplemented in an attempt to protect consumer privacy in the context of asset sales that include customer lists. The revision ensures that a debtor sells “personally identifiable information,” as defined in new section 101(41A), only in accordance with their prepetition privacy policies. Sales inconsistent with such policies are not permitted unless, pursuant to section 363(b), the court authorizes a sale of a customer list in a manner that is inconsistent with the debtor’s prepetition privacy policies because under the particular “facts, circumstances and conditions” of the case, a sale is appropriate.

Interim Rule 2002(c)(1) requires that the notice of a proposed sale or lease of personally identifiable information under sections 363(b)(1) must indicate whether the proposed sale or lease is consistent with the debtor’s policy prohibiting the transfer of personally identifiable information.

Interim Rule 6004(g) requires that a motion for authority to sell or lease personally identifiable information under section 363(b)(1)(B) include a request that the United States Trustee appoint a consumer privacy ombudsman. See Interim Rule 6004(g)(1). Once the consumer privacy ombudsman is appointed and no later than 5 days before the hearing on the motion under section 363(b)(1)(B), the United States Trustee must file a notice of the appointment that includes the name and address of the ombudsman. The notice must be accompanied by the ombudsman’s verified statement setting forth his or her connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed by the United States Trustee. See Interim Rule 6004(g)(2).

To further protect the consumer’s privacy, the amended section requires the court to consider information presented by a “consumer privacy ombudsman” appointed by the United States Trustee under section 332. The ombudsman may report on such information as the potential losses of, or gains to, consumers’ privacy, as well as potential costs or benefits to consumers, if the sale or lease is approved.

Second, section 363(d)(1) is modified to require that any sale of estate assets involving a nonprofit debtor comply with applicable nonbankruptcy law. This amendment will have its most significant impact on dispositions of assets by nonprofit debtors operating health care businesses. Section 1221(d) of the 2005 Act confers standing on the attorney general of the state in which the debtor is incorporated or does business to appear and be heard in connection with such sales.

Litigation Points

By inviting a fact specific inquiry as to whether the benefit to consumers of a sale of customer lists outweighs the detriment and harm caused to consumers' privacy, the amendments to section 363 (b) are likely to be a fertile ground for controversy when a proposed sale of a customer list contravenes the debtor's pre-petition privacy policy. The creation of a consumer privacy ombudsman may delay approval of such sales.

Ironically, the language regarding privacy may permit the court to approve a sale which would have been rejected prior to the amendment as violating the debtor's prepetition contractual privacy obligations.

The changes to section 363(d) will substantially strengthen the hand of state regulators opposing asset sales by nonprofit debtors when the terms of sale run afoul of state law.

Cross References

New Defined Terms

health care business, 11 U.S.C. § 101(27A)

personally identifiable information, 11 U.S.C. § 101(41A)

Bankruptcy Code

11 U.S.C. § 332	[duties of ombudsman]
11 U.S.C. § 330	[compensation of ombudsman]
11 U.S.C. § 431(f)	[transfer of property by nonprofit debtor]
11 U.S.C. § 1129(a)(16)	[transfer of property by nonprofit debtor under plan]
§ 1221(d) of 2005 Act	[uncodified provision giving standing to state attorneys general in connection with asset sales by nonprofit corporations]

Interim Rules

Interim Rule 2002(c)(1)	[notices of proposed sale and leases must disclose whether they include personally identifiable information and whether the sale or lease is consistent with the debtor's policy prohibiting the
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Interim Rule 6004(g)

transfer of such information]
[mechanics of appointment of consumer privacy
ombudsman]

SECTION 365 Executory Contracts and Unexpired Leases

Summary of Amendment

First, a significant amendment was made to the requirements of section 365(b)(1)(A) concerning leases of real property. This amendment eliminates the requirement that the trustee cure a nonmonetary default under an unexpired lease of real property if it is impossible for the trustee to do so at or after the time of assumption. However, there is an exception for an unexpired lease of nonresidential real property where the nonmonetary default is a failure to operate. In that event, the nonmonetary default arising from the failure to operate must be cured by continuous operation at and after the time of assumption. In addition, the lessor under an unexpired lease of nonresidential real property is entitled to recover pecuniary losses resulting from a failure to operate nonmonetary default.

Second, section 365(b)(2)(D) has been revised to clarify that penalty rates as well as penalty provisions relating to nonmonetary defaults need not be paid or cured.

Third, section 365(d)(4) has been substantially revised. A non-residential real property lease will no longer be deemed rejected if it is not assumed within 60 days after the order for relief. Such a lease now will be deemed rejected if not assumed by the earlier of 120 days after the order for relief [section 365(d)(4)(A)(i)], or the date of entry of an order confirming a plan [section 365(d)(4)(A)(ii)]. The 120-day time period may be extended, for cause, for up to an additional 90 days. See 11 U.S.C. § 365(d)(4)(B)(i). Any extension for longer than 90 days requires the lessor's consent. See 11 U.S.C. § 365(d)(4)(B)(ii).

Fourth, the provisions in section 365 dealing with airline or airport leases, expired in 1993. These were found at sections 365(c)(4) and 365(d)(5)-(9), as well as the last phrase in section 365(f)(1). These sections are now deleted. Section 365(d)(10), dealing with personal property leases, has been re-designated as section 365(d)(5).

Fifth, the requirements of section 365(b) (in addition to those of section 365(c)) have been added as exceptions to the anti-assignment provision of section 365(f).

Finally, section 365(p) is new. Section 365(p)(1) provides that if a lease of personal property is rejected or not timely assumed, the leased property is no longer property of the estate and the automatic stay automatically terminates. In an individual chapter 11 case or in a chapter 13 case, a personal property lease not assumed by the plan is rejected at the conclusion of the hearing on confirmation, and that the stays provided by sections 362 and 1301 are automatically terminated. See 11 U.S.C. § 365(p)(3)

Section 365(p)(2)(A) permits an individual chapter 7 debtor to assume a lease if the estate rejects its interest in it. While the placement of section 365(p)(2)(A) between sections 365(p)(1) and 365(p)(2) suggests that it applies only to personal property leases, section

365(p)(2) is not expressly limited to personal property leases. The debtor must notify the lessor in writing that the debtor wishes to assume the lease. The creditor may, at its option, agree to permit such assumption and it may condition its agreement on the debtor's cure of any outstanding default on terms set by the contract. See 11 U.S.C. § 365(p)(2)(A). If, not less than 30 days after the notice given by the debtor pursuant to section 365(p)(2)(A), the debtor gives the lessor a second written notice assuming the lease, the lease has been assumed by the debtor. See 11 U.S.C. § 365(p)(B). Dealing with the debtor as permitted by section 365(p)(2)(A) will not subject the lessor to liability under sections 362 or 524(a)(2). See 11 U.S.C. § 365(p)(2)(C).

Case Authority Impacted by the Amendment

In re Claremont Acquisition Corp., Inc., 113 F.3d 1029 (9th Cir. 1997), prohibited assumption of a franchise agreement because a nonmonetary default for failure to operate could not be cured and because the continuous operation covenant giving rise to the default was not unenforceable as a penalty rate or provision. The change in section 365(b)(2)(d) is consistent with the Claremont interpretation of the former section. The outcome of Claremont, however, would not be changed as a result of the amendments to section 365(b)(1)(A) because those amendments only concern real property leases. Claremont concerned a franchise agreement. See, Hon. William Houston Brown & Lawrence R. Ahern III, *2005 Bankruptcy Reform Legislation With Analysis*, pp. 99-102 (Thomson/West 2005).

Numerous cases, particularly retailer cases, permitting extensions of the 60-day deadline in section 365(d)(4) to assume or reject over the lessor's objection, are overruled by the requirement of section 365(d)(4)(B) that the lessor consent to an extension beyond 210 days. Cases permitting a confirmed plan to defer the time to assume or reject leases of non-residential real property to a post-confirmation time have also been overruled.

"Lease designation rights" are not prohibited. However, section 365(d)(4)'s new time limits will greatly reduce the value of such lease designation rights.

The inclusion of section 365(b) as an exception to section 365(f)'s preemption of anti-assignment provisions makes it clear that lease provisions that had been susceptible to interpretation as "anti-assignment" provisions are now enforceable in the assignment context. Such provisions are most commonly encountered in the large retailer cases and include "going dark," use, and percentage rent provisions. These provisions will be enforceable.

Litigation Points

The new nonmonetary default rules apply *only* to leases of real property. The amendments do not change the rules for other leases and all executory contracts. For those leases and contracts, the law has not changed and the rule in Claremont applies.

The debtor's ability to assume without curing nonmonetary default that are impossible to cure at or after assumption will generate disputes as to what is impossible. Will objective impossibility be the standard or will subjective impossibility be sufficient?

The addition to the provisions in section 365(b) regarding non-monetary defaults gives the lessor of a non-residential real property lease the right to recover for any pecuniary loss caused by the tenant's failure to operate in accordance with the lease's use provisions. For instance, if the debtor's default is "going dark" the lessor will be entitled to recover the pecuniary loss as a condition of assumption.

The scope of nonmonetary default under "failure to operate" lease provisions will be the source of disputes. Is the provision limited to complete failures or will partial failures to operate also have to be remedied by future performance in order for debtors to assume/assign nonresidential real property leases?

Cross References

Bankruptcy Code

11 U.S.C. § 362	[the automatic stay]
11 U.S.C. § 524(a)(2)	[the discharge injunction]
11 U.S.C. § 1301(a)	[the codebtor stay in chapter 13 cases]

Bankruptcy Rules

Fed. R. Bankr. P. 1007(a)	[Rule effective December 1, 2005 requires the filing of a list of all entities included on Schedules D, E, F, G, and H. This list will include names of parties to unexpired leases and executory contracts.]
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Official Forms

Official Form 6	[Schedule G amended to delete language indicating that parties to unexpired leases and executory contracts may not receive notice of case unless they are listed on Schedules D, E, or F. The amendment to Rule 1007(a) requires that these parties be included on a list filed at the beginning of the case.]
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Drafting Issues and Problems

Section 365(p) is drafted awkwardly. Contextually, the entire section makes sense if it applies uniformly only to personal property leases. However, the plain language is susceptible to other interpretations. Subsections (1) and (3) refer to "personal property"; subsection (2) does not refer to "personal property." Rather, it refers merely to "the lease." Does subsection (2) apply to any lease? Does it give an individual the right to assume a lease in derogation of the trustee's and the estate's rights?

Also, section 365(p) does not state how soon after the trustee rejects a lease the debtor must send the initial notice required by section 365(p)(2)(A). Presumably, the debtor must act simultaneously with the trustee's rejection of the lease otherwise the automatic stay will terminate. Requiring simultaneous rejection by the trustee and assumption by the debtor would seem unlikely.

SECTION 366 Utility Service

Summary of Amendment

The section was substantially modified to give utilities considerable additional power over the post-petition delivery of, and payment for, utility service. Under amended section 366, it is possible for a utility to alter, refuse, or discontinue service without relief from the automatic stay and without court approval.

The utility may alter, refuse, or discontinue service if neither the trustee nor the debtor, within 20 days of the order for relief, furnishes the utility with adequate assurance of payment. Such assurance must be in the form of a deposit or other security. See 11 U.S.C. § 366(b). Section 366(b) does not require that the utility find the offered adequate assurance of payment to be satisfactory. However, the court may, on request of a party in interest, make reasonable modifications to the adequate assurance of payment.

In a chapter 11 case, the debtor or the trustee has 30 days to provide adequate assurance that is satisfactory to the utility. See 11 U.S.C. § 366(c)(2).

Whether the deadline is 20 or 30 days, with notice and a hearing any party in interest may seek a court order modifying the amount of the adequate assurance. See 11 U.S.C. §§ 366(b) & (c)(3)(A). Apparently, in a case under any chapter other than chapter 11, if the trustee/debtor offers adequate assurance of payment within the 20-day deadline that is of the type specified in section 366(c)(1)(A), it will be incumbent on the utility to seek a modification of the offered adequate protection. See 11 U.S.C. § 366(b). In a chapter 11 case, however, the burden rests with the debtor either to satisfy the utility or seek a court order within the 30-day window of time specifying the required adequate assurance. See 11 U.S.C. § 366(c)(2).

In In re Lucre, 333 B.R. 151 (Bankr. W.D. Mich. 2005), the debtor offered adequate assurance of payment for future service to several utilities. When the utilities did not respond, the debtor moved for an extension of the automatic injunction imposed by section 366(a). It was declined. The court viewed section 366(a) as prohibiting a utility from discontinuing service unless the discontinuance is pursuant to sections 366(b) or 366(c). Under section 366(b), the utility could not discontinue service if within 20 days after the order for relief, the debtor furnishes adequate assurance of payment for future service. If the utility is not satisfied, it may ask the court to modify the adequate assurance. Under section 366(c), a utility may refuse service in a chapter 11 case if within 30 days after the petition the utility has not received adequate assurance of payment that it finds satisfactory. If the debtor is not satisfied with a counter-demand made by the utility, the debtor must accept the demand then ask the court to modify it.

What if the utility simply refuses to negotiate with the debtor during the 10-day gap between the 20-day and 30-day deadlines? How can the debtor accept the utility's counter-

demand if there is no counter-demand? The court in Lucre suggested that the utility might have an implied obligation to negotiate in good faith and if the utility breaches that obligation the court might then enjoin a discontinuance of service after the 30-day deadline expires.

Section 366(c)(1)(A) defines what is an acceptable deposit or security. The definition permits a cash deposit, letter or credit, certificate of deposit, surety bond, prepayment, or any other form of security that the trustee/debtor and the utility may agree upon. Conspicuously absent from the list of acceptable adequate assurance is a grant of administrative expense priority. See 11 U.S.C. § 366(c)(1)(B) & (c)(3)(B)(iii). Nor may the court consider, when asked to modify the amount of adequate protection, the absence of security before the filing of the petition or the debtor's prior good payment history. See 11 U.S.C. § 366(c)(3)(i) & (ii).

In In re Astle, 338 B.R. 855 (Bankr. D. Idaho 2006), the bankruptcy court determined subsection (c) of section 366 applied only in chapter 11 cases. This is because section 366(c)(1), which defines "assurance of payment" does so for purposes of subsection (c) only. Section 366(c)(2) goes on provide that its provisions, subject to sections 366(c)(3) and (c)(4), are applicable only "with respect to a case filed under chapter 11. . . ." Consequently, the debtor in a chapter 12 case was not limited to the forms of adequate assurance required by section 366(c)(1).

A utility may also "recover or set off" against a prepetition security deposit without notice or order of the court. See 11 U.S.C. § 366(c)(4).

Case Authority Impacted by the Amendment

The amendment effectively overrules cases such as Virginia Elec. & Power Co. v. Caldor, Inc., 117 F.3d 646 (2nd Cir.1997), holding that granting a utility an administrative expense priority is an acceptable form of adequate assurance of payment.

Litigation Points

A debtor may no longer rely on the argument that the automatic stay protects against post-petition termination of utility service. Absent an agreement with a utility, a debtor must act quickly and obtain a court order within the 20 or 30 day deadlines to establish adequate assurance of payment for utility service.