American Bankruptcy Institute
Winter Leadership Conference

You Gotta Have Faith: Exploring Concepts of Good Faith and Bad Faith

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You Gotta Have Faith: Exploring Concepts of Good Faith and Bad Faith
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SECTION 362 DISMISSALS & RELATED ISSUES

A. 11 U.S.C. § 362(d)(4) – *In Rem* Relief

1. The Statute:

> **(d)** On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> **…**
>
> **(4)** with respect to a stay of an act against real property under subsection (a), by a creditor whose claim is secured by an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—
>
> **(A)** transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or
>
> **(B)** multiple bankruptcy filings affecting such real property.
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> If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing. Any Federal, State, or local governmental unit that accepts notices of interests or liens in real property shall accept any certified copy of an order described in this subsection for indexing and recording.

11 U.S.C. § 362(d)(4).

2. Overview of the Statute:

Section 362(d)(4) provides a mechanism for creditors to obtain relief from the automatic stay if the bankruptcy filing is part of a scheme to delay, hinder or defraud creditors. In re Greenstein, 589 B.R. 854 (Calif. 2018), In re Buczek, 653 B.R. 303 (Bankr. N.Y. 2023). The statute allows the bankruptcy court to grant *in rem* relief from the automatic stay to prevent schemes using bankruptcy to thwart foreclosures through one or more real property transfers or multiple bankruptcies. The bankruptcy court in Borsotti v Nationstar Mortg. LLC (In re Borsotti), 2021 Bankr. LEXIS 714,*1 (Bankr. Ca. 2021) held if the order is properly recorded, it can be binding in any other bankruptcy case filed in the next two years purporting to affect the same real property. Relief under this subsection requires the movant to prove three elements: First, debtor's bankruptcy filing must have been part of a scheme. Second, the object of the scheme must be to delay, hinder, or defraud creditors. Third, the scheme must involve either (a) the transfer of some interest in the real property without the secured creditor's consent or court approval, or (b) multiple bankruptcy filings affecting the property. Borsotti v. Nationstar Mortg. LLC (In re Borsotti), 2021 Bankr. LEXIS 714 (Bankr. C.D. Ca. 2021).

Interpretations of this statute vary across federal jurisdictions with some requiring more stringent evidence than others. Counsel pursuing *in rem* relief should ensure they have substantial and well-documented evidence to meet the specific requirements of the jurisdiction in which they are litigating.

3. Representative Cases:

1st Circuit: In In re Taal, the bankruptcy court **ruled** a bank that held a mortgage on a home owned by a husband and wife did not meet its burden to show it was entitled under 11 U.S.C. § 362(d)(4) to relief from the automatic stay because the case was filed in bad faith. Although the wife filed her bankruptcy case after the three cases her husband filed under Chapter 13 were dismissed, her filing did not appear to be related to her husband's filings as part of an intentional scheme or plan to frustrate the bank's exercise of its rights. In particular the court noted the debtor filed with an attorney and the Chapter 13 Trustee was not objecting to the filing, while the husband's prior filings were pro se and all dismissed for failure to file required pleadings. In re Taal, 520 B.R. 370 (Bankr. N.H. 2014).

The district court upheld the bankruptcy's court decision to not reconsider an *in rem* order entered under 11 U.S.C. § 362(d)(4) in a prior case, and also upheld the court's order declining to extend the stay under 11 USC § 362(c)(3) as the motion was filed more than thirty days after the commencement of the case. The bankruptcy court had held that even if the prior *in rem* order were vacated, no stay would exist as the motion under 11 U.S.C. § 362(c)(3) was not timely filed and no stay existed in the present case. Harvey v Bank of NY Mellon, 643 F. Supp. 3d 259, (Mass. 2022), *aff'd*, Harvey v. Bank of NY Mellon, No. 23-1034 (1st Cir. Oct. 22, 2024).

2nd Circuit: Relief from the automatic stay was appropriate under 11 U.S.C. §§ 362(d)(1), 362(d)(2), and 362(d)(4)(B) and 11 U.S.C.S. § 1301(c)(3) based on the debtor's failure to make pre-petition and post-petition mortgage payments, the debtor's failure to pay real estate taxes and insurance, the debtor having no equity in the mortgaged property, and the property not

being necessary to an effective reorganization. Furthermore, the debtor filed multiple bankruptcy petitions—to prevent foreclosures—that were dismissed. In re Kearns, 616 B.R. 458 (Bankr. N.Y. 2020).

3rd Circuit: In an unpublished opinion, the Third Circuit Court of Appeals overturned the bankruptcy court and the district court order granting *in rem* relief when it found the record did not include specific findings of how the multiple prior bankruptcies directly affected the property in question and the lender's claim on that property. The opinion noted the statute requires that the scheme must relate to the specific property at issue, not just any real property. In re Gray, 558 Fed. Appx. 163 (3rd Cir. 2014)(unpublished).

8th Circuit: The Bankruptcy Appellate Panel held that the bankruptcy court's finding that relief from stay under 11 U.S.C. § 362(d)(4) was warranted was supported by the record where debtor's bankruptcy filing involved multiple bankruptcy filings affecting a secured creditor's interest in property. The panel additionally held the bankruptcy court was not required to decide whether the filing was made to defraud creditors, as the requirement of a scheme to delay, hinder, or defraud creditors in § 362(d)(4) was disjunctive. Finally, the panel held the court did not abuse its discretion by not granting the debtor a separate hearing, as he had participated in the hearing held in his wife's bankruptcy case, just one day before the court lifted the stay in his case, and the defense was the same in the wife's case. Behrens v. U.S. Bank N.A. (In re Behrens), 501 B.R. 351 (8th Cir. BAP 2013).

10th Circuit: Even though debtor had filed two bankruptcy cases affecting the Property, made only one payment to the creditor since 2016, defaulted on both the first and second loan modifications, and filed a second bankruptcy on the eve of the scheduled foreclosure trial, such evidence was insufficient to establish that debtor filed the second case as part of a scheme to hinder, delay, or defraud the creditor. In re Lovato, 2021 Bankr. LEXIS 2080 (Bankr. N.M. 2021). Except for cause in the form of lack of adequate protection, "cause" under 11 U.S.C. § 362(d)(1) is not defined by the Bankruptcy Code. It is an intentionally broad and flexible concept which must be determined on a case-by-case basis. A creditor seeking relief from the automatic stay for cause bears the initial burden of going forward to demonstrate sufficient grounds to lift the stay. In re Lovato, 2021 Bankr. LEXIS 2080 (Bankr. NM 2021).

4. Practice Pointer:

Counsel seeking *in rem* relief must be careful to present evidence in the record of a transfer and the secured creditor lack of consent under sec. 4(A), or show a history of prior filings as the filings specifically related to the property at issue and have evidence of how the prior filings impacted the secured creditor's rights to that specific property.

B. 11 U.S.C. § 362(c)(3):

1. The Statute:

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

(3) if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13 [11 USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.], and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)]—

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate ***with respect to the debtor*** on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 [11 USCS §§ 701 et seq., 1101 et seq., and 1301 et seq.] in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this title [11 USCS §§ 101 et seq.] or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 [11

> USCS §§ 701 et seq., 1101 et seq., or 1301 et seq.] or any other reason to conclude that the later case will be concluded—
>
> **(aa)** if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge; or
>
> **(bb)** if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; and
>
> **(ii)** as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; …

11 U.S.C. § 362(c)(3) (emphasis added).

2. Overview of the Statute:

The automatic stay terminates by operation of law if a prior bankruptcy case was dismissed within a year before the current case and no motion to extend the stay was filed within 30 days of the new petition and a hearing is scheduled and "completed." But note, the language of the statute in 362(c)(3)(A) refers specifically to terminates "with respect to the debtor" which is open to interpretation. Courts are split on whether the termination of the automatic stay under 11 U.S.C. § 362(c)(3)(A) applies only to the debtor and the debtor's property, or also includes property of the estate. The majority view[1] is that the stay as to property of the estate continues beyond the 30 days, regardless of whether the debtor seeks and obtains an extension of the stay. Note, there is an exception if the prior case dismissed was dismissed under 11 U.SC. § 707(b) and the new case is any chapter other than a Chapter 7. Otherwise, if the debtor chooses to repay creditors via a Chapter 11, 12 or 13, he or she will not face the need to extend the stay, as it will not expire.

The elements and timing for obtaining relief under 11 U.S.C. § 362(c)(3) are clearly defined, with the automatic stay terminating if a prior case was dismissed within a year and no motion to extend the stay was filed and hearing completed within 30 days. The standard for review involves assessing the debtor's payment history, equity in the property, and the necessity of the property for reorganization. Objections to relief can be based on the debtor's rehabilitation efforts, lack of substantial change of circumstance or other factors.

[1] *See* Witkowski v. Knight (In re Witkowski), 523 B.R. 291 (B.A.P. 1st Cir. 2014); Holcomb v. Hardeman (In re Holcomb), 380 B.R. 813 (B.A.P. 10th Cir. 2008); Jumpp v Chase Home Fin., LLC (In re Jumpp), 356 B.R. 789 (B.A.P. 1st Cir. 2006); In re Roach, 555 B.R. 840 (Bankr. M.D. Ala. 2016); In re Scott-Hood, 473 B.R. 133 (Bankr. W.D. Tex. 2012); In re Alvarez, 432 B.R. 839 (Bankr. S.D. Cal. 2010); In re Dowden, 429 B.R. 894 (Bankr. S.D. Ohio 2010); In re Stanford, 373 B.R. 890 (Bankr. E.D. Ark. 2007); In re Tubman, 364 B.R. 574 (Bankr. D. Md. 2007); In re Rice, 392 B.R. 35 (Bankr. W.D.N.Y. 2006); In re Hollingsworth, 359 B.R. 813 (Bankr. Utah 2006); In re Pope, 351 B.R. 14 (Bankr. D.R.I. 2006); In re Gillcrese, 346 B.R. 373 (Bankr. W.D. Pa. 2006); In re Harris, 342 B.R. 274 (Bankr. N.D. Ohio 2006); In re Moon, 339 B.R. 668 (Bankr. N.D. Ohio 2006).

3. Representative Cases:

1st Circuit: The Court of Appeals has adopted the minority view that termination of the stay under sec. 362(c)(3)(A) terminates the entire stay as to the debtor, the debtor's property, and property of the estate. Smith v. Me. Bureau of Revenue Servs. (In re Smith), 910 F.3d 576 (1st Cir. 2018).

The district court upheld the bankruptcy's court decision to not reconsider an *in rem* order entered under 11 U.S.C. § 362(d)(4) in a prior case, and also upheld the court's order declining to extend the stay under 11 USC § 362(c)(4)(B) as the motion was filed more than thirty days after the commencement of the case. In the case, which was actually the second bankruptcy in prior year following a dismissal, the motion to impose the stay was filed late and should have been timely filed as a motion to extend the stay under 362(c)(3). The bankruptcy court held that even if the prior *in rem* order were vacated, no stay would exist as the order under 11 U.S.C. § 362(c)(4) was not timely filed and no stay existed in the present case as it has expired 30 days after the filing. Harvey v Bank of NY Mellon, 643 F. Supp. 3d 259, (Mass. 2022), *aff'd*, Harvey v. Bank of NY Mellon, No. 23-1034 (1st Cir. Oct. 22, 2024).

4th Circuit: In a case where there was only one prior dismissal in the past 12 months, and counsel mistakenly filed a motion to impose the stay under 11 U.S.C. § 362 (c)(4) on the day the stay expired (31st day after filing) and scheduled a hearing 54 days after the case was filed, the Court could not extend the stay under sec. 362(c)(3) as the stay had already expired. Nor could the court grant relief under 362(c)(4) as that statute only applies when there were two more prior dismissals in the preceding 12 months. The Court noted that in addition the statute's plain language, a local rule clearly requires any hearing under sec. 362(c) to be scheduled within the first 30 days following the filing of the case. In re Epting, 652 B.R. 134 (Bankr. S.C. 2023). When a debtor filed his motion to extend on the 28th day after filing the petition, the bankruptcy court held the motion was untimely as the court was required to complete a hearing on the motion within the 30 days and that filing the motion on the 28th day did not allow "appropriate notice" under the particular circumstances of the instant case because parties in interest would not have had an opportunity to address the motion and respond to it. In re Norman, 346 B.R. 181, (Bankr. N.D. W.D. 2006).

The Fourth Circuit has generally followed the majority view that expiration of the stay under sec. 362(c)(3) does not terminate as to property of the estate if the stay is not timely extended. See In re Jones, 339 B.R. 360 (Bankr. E.D.N.C. 2006). But, there is now a split in the circuit itself, as the court in In re Dev, 593 B.R. 435 (Bankr. E.D. N.C. 2018) has adopted the minority view that the stay expires as to all property, including that of the estate, but the co-debtor stay remained in effect.

5th Circuit: -The appellate court concluded that 11 U.S.C.S. § 362(c)(3)(A) terminated the stay only with respect to the debtor and did not terminate the stay with respect to the property of the bankruptcy estate, but even if the automatic stay remained in effect with respect to the bankruptcy estate, creditors could still obtain judicial relief under 11 U.S.C.S. § 362(d) if circumstances demanded it. The court specifically held the homeowner's successive filings did not terminate the action with respect to the property of the bankruptcy estate, and the property at

issue was part of the bankruptcy estate. The stay with respect to the property at issue lasted the duration of the bankruptcy proceedings (269 days), and the statute of limitations was tolled for at least the same. Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 227 (5th Circ. 2019) (cert. denied 2020).

6th Circuit: In a case where the debtor failed to seek extension of the stay under sec. 362(c)(3), the court adopted the majority approach that sec. 362(c)(3) terminates the stay only as to the debtor and debtor's property, not property of the estate, finding the statutory language supported this interpretation. Though some courts find this conflicts with the legislative purpose, the court found the plain language more persuasive. Additionally, the court held that confirmation does not require the stay to be in effect as to the debtor or debtor's property. Lack of a stay does not necessarily show lack of good faith or feasibility. In re Smith, 596 B.R. 872 (Bankr. E.D. Tenn. 2019).

7th Circuit: Where the debtor was a repeat filer, the bankruptcy court properly confirmed that the automatic stay was terminated as to the debtor and his property, but not the real property of the bankruptcy estate because the unambiguous language of 11 U.S.C. § 362(c)(3)(A) states that the termination of the automatic stay for repeat filers applies only to the debtor and his property, not to the property of the bankruptcy estate. Noting the split in authority on the application of the statute to repeat filers, the court adhered to the majority approach because, inter alia, it was a proper result when the rules of statutory construction were applied, and terminating the stay as to only the debtor and his property did not produce an absurd result. First Fin. Bank v. Clark, 627 B.R. 663 (N.D. Ind. 2021).

9th Circuit: The district court held that a timely-filed Motion to Extend Stay which was heard within the first 30 days after filing applied to creditors that did not get notice of the motion or have an opportunity to object, finding the automatic stay extension is "effective against the world regardless of notice." Fourws, LLC v. Miller, 653 F. Supp. 3d 762 (E.D. Ca. 2023).
The bankruptcy court held that termination of the automatic stay under sec. 362(c) (3) does not terminate the stay with respect to property of the estate. In re Burns, 639 B.R. 761 (Bankr. E.D. Ca. 2022). *But see* Reswick v. Resdwick, 446 B.R. 362 (9th Cir. BAP 2011), holding the stay is terminated in its entirety.

4. Practice Pointer:

Upon filing a case when there was a prior dismissal within a year, counsel must quickly move to file the Motion to Extend Stay and schedule a hearing before the court. Some judges will require the debtor to appear in person to testify, while others will allow an affidavit or other declaration. Some attorneys do not file motions in Chapter 7s (following dismissal of a 13), but that could leave debtors open to collection activity prior to discharge in some states. Additionally, counsel must carefully review the provisions of (C) to prepare and present evidence related to why the current case will be successful and to rebut any presumption arising under (aa), (bb) or (cc). This includes reviewing the docket of the prior case and any relevant sources of information, such as a payment history in a Chapter 13.

C. 11 U.S.C. § 362(c)(4):

1. The Statute:

(4) (A) **(i)** if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)], the stay under subsection (a) shall not go into effect upon the filing of the later case; and

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

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

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

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7 [11 USCS §§ 701 et seq.], with a discharge, and if a case under chapter 11 or 13 [11 USCS §§ 1101 et seq. or 1301 et seq.], with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

11 U.S.C. § 362(c)(4).

2. Overview of the Statute:

If a debtor in bankruptcy has had two cases dismissed in the prior year and files a third (other than a new case other than a Chapter 7 following a 707(b) dismissal), there simply is no automatic stay at all – none for the debtor or the estate. The split in case law over a stay as to the estate does not come in to play, as no stay becomes effective without an explicit court ruling. Under this section, the party in interest (which could be a trustee or debtor) must move to impose the stay within 30 days, but the language does not require a hearing to be completed within that time frame as under (c)(3).

3. Representative Cases:

1st Circuit: The district court upheld the bankruptcy's court decision to not reconsider an *in rem* order entered under 11 U.S.C. § 362(d)(4) in a prior case, and also upheld the court's order declining to extend the stay under 11 USC § 362(c)(4)(B) as the motion was filed more than thirty days after the commencement of the case. In the case, which was actually the second bankruptcy in prior year following a dismissal, the motion to impose the stay was filed late and should have been timely filed as a motion to extend the stay under 362(c)(3). The bankruptcy court held that even if the prior *in rem* order were vacated, no stay would exist as the motion under 11 U.S.C. § 362(c)(4) (had that been the applicable statute) was not timely filed and no stay existed in the present case as it has expired 30 days after the filing. Harvey v Bank of NY Mellon, 643 F. Supp. 3d 259, (Mass. 2022), *aff'd*, Harvey v. Bank of NY Mellon, No. 23-1034 (1st Cir. Oct. 22, 2024).

2nd Circuit: The automatic stay was not currently in effect per 11 U.S.C. § 362(c)(4)(A)(i) where the debtor had two prior cases pending within the preceding one-year period that were dismissed, and more than 30 days had passed since the instant case was filed, and no motion to stay had been filed per 11 U.S.C. § 362(c)(4). In re Benton, 2024 Bankr. LEXIS 2216 (S.D.N.Y. 2024).

The district court ruled the bankruptcy court's imposition of the stay was effective as of the date the order was docketed and not retroactively, as the order did not specifically impose the stay retroactively. However, the court determined the bankruptcy court had found by clear and convincing evidence that the debtor's fourth bankruptcy was filed in good faith. The debtor's testimony regarding her assets and the family 's testimony regarding family income was sufficient to show the Chapter 11 was feasible. E. Sav. Bank, FSB v. Toor (In re Toor), 477 B.R. 299 (Conn. 2012).

4th Circuit: Where the debtor had two cases pending the year preceding filing, and considering the totality of the circumstances in the case, the court found that the evidence was sufficient to rebut the presumption of bad faith in § 362(c)(4) and that grounds for imposition of the automatic stay as to all creditors existed. The court applied the Neufeld and Carolin standards to the case (totality of the circumstances), and looked first at the proposed Chapter 13 plan. Other matters the court considered were the nature and amount of unsecured claims, debtor's past filings, his financial situation, and his prepetition conduct. Finally, the court noted that debtor

had achieved a confirmed Chapter 13 Plan. In re Hurt, 369 B.R. 274, 276 (Bankr. W.D. Va. 2007).

A Chapter 7 Trustee was unsuccessful in trying to avoid a post-petition sale of real estate, as the Chapter 7 was the third bankruptcy in a year following two dismissed cases. The dispute centered on the interplay of sec. 549(a) and the application of sec. 362(c)(4). After the debtor filed her third bankruptcy in a year, her real estate was sold within 4 days at public auction and yielded $17,216.04 in excess funds. The Chapter 7 trustee sought to set aside the sale as he believed the property could be sold for a significantly higher amount. Because no stay was in effect at all as to the debtor or the estate, the court denied the motion. Johnson v Struebing, 2024 Bankr. LEXIS 1670 (Bankr. N.D. W.V. 2024).

10th Circuit: The court denied the imposition of the automatic stay after reviewing the evidence about what led to the multiple bankruptcy filings, and how debtors managed their previous bankruptcy cases. The court was not clearly convinced that debtors changed, or that there was any other reason to believe that debtors would have the discipline and organization, and, for that matter, the funds, to confirm a Chapter 11 case and then successfully perform under it. The court held that evidence must meet the clear-and-convincing standard. In re Benefield, 438 B.R. 709 (2010).

11th Circuit: The 11th Circuit Court of Appeals dismissed the appellant's argument that that sec. 362(c)(4) hinged on the filing of two cases in the prior year, and clearly held it is the fact that two cases were pending and dismissed in the prior year that implicates the statute and provides the automatic stay did not go into effect. Because the appellant had been a debtor in two prior cases that were both dismissed within the one-year period preceding the filing of the instant case, and neither of these prior cases was a Chapter 7 case dismissed pursuant to 11 U.S.C. § 707(b), the automatic stay under sec. 362(a) did not go into effect upon the filing of the latest bankruptcy case. Jean v SunTrust Bank (In re Jean), 508 Fed. Appx. 939 (11th Cir. 2013).

DC Circuit: While the court found the debtor showed good faith to justify imposition of the automatic stay, the court limited the imposition of the automatic stay in three ways: First, because one property was already the subject of a post-petition foreclosure sale auction, the court did not stay that action. Second, the court imposed a condition regarding keeping current on post-petition payments on any debt secured by a security interest in any real property of debtor. Finally, the Court held that the stay would be lifted as to any property which ceases to be estate property, whether by abandonment or by exemption claim becoming effective. In re Phillips, 2019 Bankr. LEXIS 2504 (Bankr. D.C. 2019).

4. Practice Pointer:

Just like with 363(c)(3), counsel representing a client with two prior dismissals which results in no automatic stay must promptly file a motion and obtain a hearing to impose the stay as quickly as possible, and seek retroactive relief to the date the case was filed. As a practical matter, the burden to impose the stay feels greater than the extension of the stay, as the debtor has multiple dismissals to overcome. Counsel must be prepared to present evidence of the change in circumstance in a convincing, substantive manner.

D. 11 USC. § 109(g):

1. The Statute:

> **g)** Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—
>
> > **(1)** the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
> >
> > **(2)** the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title [11 USCS § 362].

11 U.S.C. § 109(g).

2. Overview of the Statute

This statute renders a debtor ineligible to file a new bankruptcy case within 180 days if the prior case was dismissed due to the debtor's willful failure to abide by court orders or to appear before the court in proper prosecution of the case. Bankruptcy courts have the authority to bar debtors from refiling a case under 11 U.S.C. § 109(g) when the debtor has willfully failed to comply with court orders or prosecute the case. This authority is supported by several cases that have upheld dismissals with prejudice and refiling bars. However, some judicial precedents have limited this authority, particularly when the court's equitable powers conflict with the express terms of the Bankruptcy Code.

The statute also provides if a debtor voluntarily dismisses the case following the filing of a Motion for Relief, the 180 day bar applies. Courts are split in this interpretation, with some applying a plain language approach, while others focus on a totality of the circumstances review to determine if the new filing is in bad faith.

3. Representative Cases:

2nd Circuit: In reviewing the plain language of the section 109(g), the bankruptcy court found it had to dismiss the debtor's case. While it found the debtor was acting in good faith with her most recent Chapter 13 filing, the fact the case was filed within 180 days following a voluntary dismissal after the filing of a Motion for Relief made her ineligible to be a debtor. In re Moore, 2023 Bankr. LEXIS 2371 (Bankr. Conn. 2023).

3rd Circuit: The Third Circuit Court of Appeals vacated an injunction and remanded the case after finding the injunction imposed against the debtor was an abuse of discretion because it barred the debtor from making any bankruptcy filings anywhere for the indefinite future absent the bankruptcy court's express permission. The court found the bankruptcy court does have the authority to issue an injunction even in the context of a debtor's sec. 1307(b) voluntary dismissal, but in this case, no reasoning was provided for the broad nature of the injunction, the

injunction went beyond what the creditor requested, it was harsher than the filing injunction imposed against the debtor's spouse in that case, and it was harsher than the 180-day restriction imposed on bad faith debtors under 11 U.S.C.S. § 109(g). In re Ross, 2017 U.S. App. LEXIS 10236 (3rd Cir. 2017).

The bankruptcy court rejected the concept of a *per se* prohibition against concurrent filings and adopted in its place an analysis of debtors' good faith as it related to the subsequent and concurrent petition. In the present case, the court found when the debtors refiled a case within 180 days that their motives and actions, given the history and circumstances, were an abuse of the bankruptcy law and also demonstrated that filing the petition in this case was not in good faith. Ruth v. Swigert (In re Swigert), 601 B.R. 913 (Bankr. M.D. Pa. 2019)

4th Circuit: Following motions by the Chapter 13 Trustee and the U.S. Trustee, the court barred the debtor under 11 U.S.C. § 109(g) from filing a new case for 365 days after finding the debtor was knowingly and deliberately filing bankruptcy cases without any intention to comply with the mandatory requirements of the Bankruptcy Code after he filed five prior cases (three within the past year) which were dismissed. The court held the debtor "has repeatedly filed cases in this Court for which he is not eligible, in which he defies his duties, eschews this Court's orders, and shuts his eyes to the obvious limited jurisdiction of the bankruptcy court." In re Hayes, 2024 Bankr. LEXIS 561 (Bankr. W.D. Va. 2024).

The district court upheld dismissal of the debtor's Chapter 13 and the 180 day bar upon refiling imposed by the bankruptcy court after the debtor had fired her counsel, failed to comply with court orders and rules, insisted she had a right to court-appointed counsel, and filed improper affidavits. Gibas v Micale, 2024 U.S. Dist. LEXIS 194465 (W.D. Va. 2024).

The district court found the bankruptcy court had the authority to bar married debtors from refiling for a period of 5-10 years due to intentional fraud and willful violation of court orders after being explicitly denied permission to incur debt. The court held section 109(g) only imposed a minimum amount of time before a case can refiled. Purdy v Burnett, 2023 U.S. Dist. LEXIS 202822 (E.D. N.C. 2023) (appeal filed).

6th Circuit: The Court of Appeals held that a bankruptcy court is authorized to dismiss a petition with prejudice permanently if there is sufficient cause, which bars the debtor from filing under any chapter of title 11, holding section 109(g) does not limit the court's ability to bar refiling for longer than 180 days. In this case the bankruptcy case made a specific filing the debtor acted in bad faith, and then analyzed the interplay of sections 109(g) and 349(a). The Court of Appeals added in a footnote that many courts use the phrase "dismissed with prejudice" to mean the 180-day bar to refiling, and the bankruptcy court could have made the order clearer and avoided part of the ensuing litigation. Dietrick v. Nob-Hill Stadium Props., 2007 U.S. App. LEXIS 3591 (6th Cir. 2007).

9th Circuit: Under the plain meaning of 11 U.S.C. § 109(g)(2), the prohibition against filing a new bankruptcy case for 180 days was applicable in any case in which a debtor voluntarily requested dismissal of a case at any time after the filing of a motion for relief from the 11 U.S.C. § 362 automatic stay. Although the motion to dismiss was filed by the trustee, section 109(g)(2)

applied because the debtor requested dismissal by advocating for it in two briefs and by filing a motion that asked the bankruptcy court to issue a scheduling order advancing the hearing on the trustee's motion to dismiss and then to grant dismissal without a bar to refiling so that the debtor could file a new case immediately upon dismissal to prevent a scheduled foreclosure sale. In re La Granja 240, L.P., 636 B.R. 801 (C.D. Bankr. 2022).

10th Circuit: The Court of Appeals held that a bankruptcy court cannot deny access to the bankruptcy court itself for more than 180 days under 109(g) as that is beyond the authority conferred under section 349(a), but did hold that under 349(a) the court could deny discharge for a longer time period for the debt scheduled in the case which was dismissed for bad faith. In re Frieof, 938 F. 2d 1099 (10th Cir. 1991).

4. Practice Pointer:

In reviewing a case for a prior debtor whose case was dismissed, review the docket and findings carefully and know how your jurisdiction interprets sec. 109. In particular if a debtor is barred for filing pro se, and having counsel will remedy the prior errors, consider asking the court to amend or alter the restrictions.

SECTION 707 DISMISSALS

I. Dismissal under Section 707(a) for Bad Faith

A. Statute:

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

11 U.S.C. § 707(a).

B. Cause in 707(a) Includes Bad Faith in Some Jurisdictions (Majority View). *See Janvey v. Romero,* 883 F.3d 406, 412 (4th Cir. 2018) (bad faith is cause for dismissal, but it must involve "real misconduct"); *Krueger v. Torres (In re Krueger)*, 812 F.3d 365, 370 (5th Cir. 2016) ("[A] debtor's bad faith in the bankruptcy process can serve as the basis of a dismissal 'for cause'"); *In re Schwartz*, 799 F.3d 760, 764 (7th Cir. 2015) ("[A]n unjustified refusal to pay one's debts is a valid ground under 11 U.S.C. § 707(a) to deny a discharge of a bankrupt's debts."); *Piazza v. Nueterra Healthcare Physical Therapy, LLC (In re Piazza)*, 719 F.3d 1253, 1260–61 (11th Cir. 2015) ("[T]he power to dismiss 'for

cause' in § 707(a) includes the power to involuntarily dismiss a Chapter 7 case based on prepetition bad faith."); *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 207 (3d Cir. 2000) ("Section 707(a) allows a bankruptcy court to dismiss a petition for cause if the petitioner fails to demonstrate his good faith in filing."); *Industrial Insurance Services, Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991) ("[L]ack of good faith is a valid basis of decision in a 'for cause' dismissal by a bankruptcy court.").

C. Cause in 707(a) Does Not Include Bad Faith in Other Jurisdictions (Minority View). *See Neary v. Padilla (In re Padilla)*, 222 F.3d 1184, 1191 (9th Cir. 2000) ("[B]ad faith as a general proposition does not provide 'cause' to dismiss a Chapter 7 petition under § 707(a)."); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 832 (8th Cir. 1994) (adopting a "narrow, cautious" approach that requires "extreme misconduct falling outside the purview of more specific Code provisions").

II. Dismissal under Section 707(b)(3) for Bad Faith When There is No Presumption of Abuse

A. Statute:

(b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

* * *

(b)(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b)(1), (3).

B. Examples of bad faith under 707(b)(3)(A)

Courts have sometimes found the following to provide a basis for finding bad faith:

- Inaccurate schedules and failure to disclose. *See e.g. In re Fox,* 521 B.R. 520 (Bankr. D. Md. 2014) (Failure to disclose income from rental property and an automobile); *In re Hornung,* 425 B.R. 242 (Bankr. M.D. N.C. 2010) (numerous inaccuracies on schedules).

- Eve-of-bankruptcy purchases. *See e.g. In re Hornung,* 425 B.R. 242 (Bankr. M.D. N.C. 2010) (debtors purchased two new vehicles three months before filing); *In re Hageney,* 422 B.R. 254 (Bankr. E.D. Wash. 2009) (purchase of new motorcycle 10 weeks before filing).

- Bad faith filing of petition. *See In re Miller*, 2016 WL 5957270 (C.D. Ca. 2016) (gathering cases and finding, *inter alia,* debtor's filings of multiple bankruptcies were to gain an advantage in a state court litigation); *In re Victoria,* 389 B.R. 250 (M.D. Ala. 2008) (no clear error in bankruptcy court's decision finding that debtor and husband made approximately $400,000 a year and transferred jewelry to family members for insufficient consideration); *In re Ricci,* 456 B.R. 89 (M.D. Fla. 2009) (finding debtors timed the filing of their case to precede increase in debtor husband's income to manipulate the Means Test and filed incomplete and false disclosures); *In re Mitchell*, 357 B.R. 142 (Bankr. C.D. Cal. 2006) (setting out nine-part test and determining that debtor filed petition in bad faith where, *inter alia*, spent more than $13,000 on non-essential items in four months before filing).

- Voluntarily quitting job. *See e.g. In re Schwenk,* 411 B.R. 211 (Bankr. M.D. Pa. 2009) (debtor wife quit her job before filing and debtors incurred substantial debt on the eve of bankruptcy in moving to a different state).

C. Good faith as part of the totality of the circumstances analysis under 707(b)(3)(B)

Bad faith is *not* required to be shown as an element in the totality analysis. But many jurisdictions consider a debtor's good faith as a factor in the totality of the circumstances, applying pre-BAPCPA case law. *See e.g. In re Schumacher,* 495 B.R. 735 (Bankr. W.D. Tex. 2013); *In re Hornung,* 425 B.R. 242 (Bankr. M.D. N.C. 2010); *In re Schwenk,* 411 B.R. 211 (Bankr. M.D. Pa. 2009).

A POTPOURRI OF CHAPTER 7/13 DISMISSAL AND CONVERSION ISSUES

In most cases, the decision to convert from Chapter 7 to Chapter 13 or from Chapter 13 to Chapter 7 is based upon a relatively straightforward scenario, is not controversial, and will not lead to any type of contentious challenge. The same is true regarding dismissals of Chapter 13s. This presentation will not address routine conversions or dismissals, but rather focus on ones which, by their very nature, could lead to challenges, litigation, and in certain instances, unexpected consequences. In many instances, especially depending upon which Circuit you practice in, a certain degree of uncertainty exists as to the outcome of a disputed Motion to Convert or Dismiss. However, any lawyer who regularly faces this issue needs to understand the benefits and risks from the onset, not just to warn clients of the potential outcome, but to also try to minimize the chances that such a Motion will be successfully challenged.

The following is a summary of the issues that will be raised in this article.

1. The automatic right to dismiss a Chapter 13?

2. Circumstances in which a Chapter 13 case should be converted to Chapter 7.

3. The risks of converting from Chapter 13 to Chapter 7. Is the Chapter 13 Trustee entitled to be paid prior to the confirmation of a Chapter 13 Plan in a converted case?

4. When converting from Chapter 7 to Chapter 13 can backfire.

5. What strategies to use to dismiss a Chapter 7.

6. Creditors' strategies when facing either conversion efforts or dismissal Motions.

THE AUTOMATIC RIGHT TO DISMISS A CHAPTER 13?

Over the years, Bankruptcy Courts have been troubled by an interpretation of the Bankruptcy Code which provides that as long as the debtor has not previously converted from Chapter 7 to Chapter 13, the debtor has the absolute right to dismiss such a case. Controversy has arisen because in certain instances, a Chapter 13 debtor is objectively a despicable individual who filed for Chapter 13 for unequivocally questionable purposes and was probably "gaming" the system. In other cases, the debtor may have filed for relief under that Chapter although that individual was not even eligible for Chapter 13. This led to a number of courts seeking a way to carve out exceptions to the automatic right to dismiss to avoid what was perceived as an improper manipulation of the Bankruptcy Code.

Any uncertainty as to that issue in the 9th Circuit came to an end with *Nichols v. Marana Stockyard & Livestock Mkt., Inc.(In re Nichols)*, 10 F. 4th 956 (9th Cir. 2021). In *Nichols*, it would have been hard the Nichols to argue with straight faces that the original Chapter 13 filing was pursued with any expectation of reorganization or complying with the Bankruptcy Code. Understandably, a creditor objected to what was perceived as a patent "abuse" of the Bankruptcy Code.

Ultimately, the Ninth Circuit ruling held that based upon the clear wording of the statute, bad faith was simply not a factor in the debtor's right to exercise that prerogative.

The *Nichols'* decision noted that in certain instances, a Bankruptcy Court may have other means of addressing a bad faith filing, including even sanctioning a lawyer or restricting a debtor's ability to file another Chapter 13 within a certain amount of time, but the decision put to bed once and for all any issue about how "automatic" that right may be.

That is the case, according to *In re: Powell v. Van Meter* No 22-60052 (9th Cir. 2024), even if the debtor never was eligible for Chapter 13 from the onset. Said another way, a debtor can file a Chapter 13, even one ineligible for that Chapter and then, upon either being challenged or facing a conversion to Chapter 7, summarily dismiss the case. Once again, this doesn't leave the court without **any** recourse, but that recourse does not include the ability to prevent the debtor from dismissing the proceeding.

Because for obvious reasons, since a Bankruptcy Court may look with disfavor at this right, a debtor needs to be very careful to move for relief under the right Subsection. 11 USC §1307(b) empowers the debtor with an absolute right to dismiss. Section 1307(c) grants discretion to the court to either dismiss or convert. In the Arizona *Colburn* case, a request was uttered under 1307(c) to dismiss the case and the court relied upon that request as a vehicle to force a conversion. *Colburn* is intriguing because everyone involved suspected that the debtor was trying to proceed under Section 1307(b), but the debtor's failure to cite the proper statute prior to the court's ruling proved to be fatal to the debtor's efforts to dismiss. The Federal Court upheld the conversion to Chapter 7.

CIRCUMSTANCES IN WHICH A CHAPTER 13 CASE SHOULD BE CONVERTED TO CHAPTER 7

In certain instances, deciding to convert from Chapter 13 to 7 is relatively straightforward and uncontroversial. If a debtor's income has dropped precipitously and the debtor can no longer afford to fund a Chapter 13 Plan, conversion may not just be an option for a debtor to consider, but necessary. Converting for that reason is totally acceptable and as long as the debtor has accurately represented his income, he should not meet any resistance or complications.

In other instances, a debtor may want to convert if unexpected circumstance may dictate doing so. For example, if a debtor becomes entitled to an inheritance outside of 180 days from the date of the original bankruptcy filing, converting should allow the debtor to keep the inheritance free and clear of the bankruptcy estate. Claiming doing so is in bad faith will probably not succeed. Or, if a debtor anticipates in the foreseeable future a quantum increase in income, converting before that occurs allows the debtor to avoid the consequences of his Plan payment increasing because of the income change. In another section, I'll address potential risks of such conversions, but normally material adjustments in the debtor's financial condition prompts a conversion Motion. As will be discussed later, this doesn't necessarily mean that the debtor can remain in Chapter 7, but the debtor does have the right to at least obtain the initial conversion.

THE RISKS OF CONVERTING FROM CHAPTER 13 TO CHAPTER 7. IS THE CHAPTER 13 TRUSTEE ENTITLED TO BE PAID PRIOR TO THE CONFIRMATION OF A CHAPTER 13 PLAN IN A CONVERTED CASE?

If a debtor converts from Chapter 13, but is ineligible for Chapter 7, the court can then compel the debtor to reconvert to Chapter 13. A debtor who is otherwise ineligible for Chapter 7 cannot circumvent that ineligibility by starting in Chapter 13 and then converting to Chapter 7.

The debtor may be facing a good faith objection which could force the reconversion to Chapter 13. Initially, the debtor had to demonstrate that he had the financial wherewithal to fund the requisite Plan. By converting, the debtor will have to allege that he doesn't have excess income which would otherwise render him ineligible for Chapter 7, and that circumstances have changed since the original Chapter 13 was filed. In other words, if the debtor files an initial Chapter 13 and avows there is $500 a month available to fund a Plan, the debtor will have to explain what happened to that disposable income.

If the debtor disposes of substantial assets during the course of the Chapter 13 so that upon conversion, he no longer possesses non-exempt assets, this could trigger a challenge as well. Whether the challenge is in the form of an objection to the debtor's right to receive a discharge or request that the matter be reconverted would depend upon the specific circumstances present, but it's hard to envision a Chapter 13 debtor being able to use a Chapter 13 for the specific purpose of intentionally depleting his estate.

Not surprisingly, if the debtor may have engaged in some foresight when first filing a Chapter 13, this could simplify the ultimate conversion. For example, if the debtor's eligibility in a Chapter 13 was based upon funding from a gratuitous third party or because the debtor was working overtime or a second job, the debtor's conversion to Chapter 7 would be justified if those other income sources are gone. In contrast is the rather precarious strategy of arguing that the debtor no longer has disposable income because expenses have mysteriously increased without specific justification for that contention.

However, probably the riskiest consequence of converting is the impact on the debtor's home if it has increased in value to such an extent that it now exceeds the applicable exemption. Courts have been split on whether in that situation, the Chapter 7 trustee is entitled to the increased equity in the house. If the case had begun in Chapter 7, in most Circuits, and specifically in the 9th Circuit, the increase in the equity inures to the benefit of the bankruptcy estate as long as the house remains in the estate. The majority of other courts have ruled that once the case is converted, the increase inures to the Chapter 7 trustee's benefit. See *Goetz v. Weber (In re Goetz*) 95 F. 4th 584 (8th Cir. 2014) and *Castleman v. Burman (In re Castleman),* 75 F. 4th 1052 (9th Cir. 2022.

This forces the debtor and counsel to seriously consider ways to try to circumvent this outcome. If the house is sold while in Chapter 13, could the debtor purchase a home with equity within the statutory exemption and then spend the excess prior to the conversion? Or, does the debtor need to proactively try to procure an abandonment of the house out of the bankruptcy estate early in the Chapter 13 case? Unfortunately, most debtors are blindsided by this issue because in most situations, dramatic increases in home equity occur unexpectedly and for unforeseen reasons.

Finally, a recent Missouri Bankruptcy Court case, *In re Shelby*, No 24-40247, held that a Chapter 13 Trustee could seek payment of administrative expenses incurred prior to conversion of the case.

WHEN CONVERTING FROM CHAPTER 7 TO CHAPTER 13 CAN BACKFIRE

Why would anyone in their right mind want to convert from Chapter 7 to 13 because in a Chapter 7, you can normally receive a discharge and quickly move on with your life? The answer is that in certain situations, a Chapter 7 debtor finds himself facing the loss of certain assets that the debtor thought would be protected. Or, the debtor may have engaged in preferential or fraudulent transfers which were not recognized prior to the filing, which the debtor does not want to see reversed, or the debtor may be trying to discharge certain debts that are otherwise non-dischargeable in a Chapter 7.

As a preliminary matter, the debtor will now have to argue the exact opposite of what was contended so that the debtor could file Chapter 7, *i.e.*, lack of disposable income. Generally, a debtor represented by experienced counsel can address this issue by having the debtor either legitimately decrease certain mandatory expenses, find a way of increasing his income, or procuring a third-party source to help out. Since in many cases, a Plan payment can be relatively insignificant unless the debtor is facing a problem with an excessive amount of non-exempt assets, justifying the conversion could be achievable.

Initially, the case law has suggested that if the Chapter 7 debtor has already received his discharge, he will not be entitled to a Chapter 13 discharge unless the initial discharge is set aside. What is unclear is what has to be demonstrated to do so. Simply arguing that the debtor wants to set aside the Chapter 7 discharge to achieve a Chapter 13 discharge would probably be insufficient. It can be a very difficult task and therefore, as a practical matter, if a debtor is considering converting from Chapter 7 to 13, it's a good idea to do something before the discharge is obtained. In certain instances, waiting a few days too long so that the debtor can't do so probably borders on malpractice.

Finally, *Shelby*, cited above, allowed the debtor to convert to a Chapter 13 post-discharge and held that the need to do so was sufficient for the court to set aside the debtor's Chapter 7 discharge.

WHAT STRATEGIES TO USE TO DISMISS A CHAPTER 7

A debtor does not have an automatic right to dismiss a Chapter 7. This restriction oftentimes triggers the "Murphy's Law" scenario. If a Chapter 7 debtor doesn't want his case dismissed, he will invariably meet an insurmountable Motion to see it dismissed.

Normally, a Chapter 7 debtor wants his case dismissed because he realizes; 1) he is holding exposed assets; 2) he is facing an inevitable non-dischargeability challenge; or 3) he's creating issues for innocent third parties who may be drawn into preferential or fraudulent transfer litigation. In those instances, the debtor realizes that in the long run, trustees and/or creditors don't

want to see the case dismissed because a substantial dividend may be paid. So, under the circumstances, how does the debtor get the case dismissed?

An age-old approach is to simply not show up at the first meeting of creditors, but in certain circumstances, the court can order the debtor to appear to avoid the case being dismissed. Or, the debtor may not prepare his Schedules, and the court can do the same and order the debtor to do so. It's highly unusual, especially since I've found that as a practical matter in almost all instances, no one has the energy to challenge the dismissal, and the debtor accomplishes his goal.

This leaves the question of is it ethical for a lawyer to advise a client not to appear at a first meeting of creditors or not to prepare Schedules for that purpose? My initial review of this issue found little guidance because most creditors would prefer that a debtor not be in bankruptcy, although occasionally trustees may lose a rather large commission upon dismissal of the case.

You really don't want to be an attorney representing a debtor who realizes he never should have filed for Chapter 7 from the onset, which is why it's so important that an attorney conduct complete and full due diligence to avoid having to address a rather messy issue.

All that being said, if a debtor can convince creditors to buy into the dismissal, which can be done if deals are negotiated with the creditors, then courts are very much inclined to allow the case to be dismissed since not dismissing is normally for the purpose of ensuring that creditors receive a proper dividend.

CREDITORS' STRATEGIES WHEN FACING EITHER CONVERSION EFFORTS OR DISMISSAL MOTIONS

I've always been intrigued by how often creditors have stayed on the sidelines when a debtor is either converting or trying to dismiss a case. It's intriguing because a creditor should recognize that the debtor is taking such steps to advance his own self-interest and not for the benefit of creditors. Consequently, you would assume that creditors would be very sensitive to such tactics, but in many cases, are not.

Nonetheless, when a debtor attempts to convert or dismiss a case, the creditor should not have the visceral reaction of objecting, especially if the debtor has an automatic right to do so.

For example, if a Chapter 13 debtor has run into serious obstacles in pursuing a reorganization and seeks dismissal, a creditor should be ready to immediately respond by commencing collection efforts post dismissal if it already has a judgment, or if it doesn't, to expeditiously seek relief in State Court or in certain instances, even consider a provisional remedy, which would allow relief prior to a judgment. Incredibly enough, oftentimes debtors are so excited and relieved to have their case dismissed, that they totally forget that they are now subject to the whims of an aggressive creditor.

If a Chapter 7 debtor is seeking dismissal of his case, a creditor has an absolute right to object and should condition the withdrawal of the objection on some type of monetary settlement since presumably the debtor has material reasons why the case needs to be dismissed. Requiring

a Chapter 7 debtor to pay the price for a dismissal is not just proper, but in many instances, almost mandatory.

Before your client objects to a conversion, which normally cannot be stopped, your client needs to understand whether it is better off if the debtor converts. It's not always clear on the surface. For example, if a Chapter 7 debtor is converting to 13 to protect non-exempt assets and the creditor has reason to believe that the debtor's income is either being understated or will be increasing in the future, the conversion will be in the creditor's best interest.

The same approach needs to be utilized when a debtor is converting from Chapter 13 to 7. In some cases, the debtor can convert, but then may be forced to reconvert back to Chapter 13 because the debtor is not eligible for Chapter 7. If you want the debtor in Chapter 13, be on the lookout for a debtor trying to sneak into Chapter 7 under such circumstances.

Don't be afraid to think outside the box when representing a creditor. When a disreputable debtor is trying to exit from Chapter 13 under the automatic right, don't be afraid to ask the court to prohibit the debtor from refiling Chapter 13 in the near future. The case law has resoundingly concluded that the debtor has an automatic right to dismiss, but the Code does not prohibit the judge from prohibiting the debtor to refile in the future in certain instances.

Ultimately, your creditor client's reaction to conversion or dismissal is based upon what options your client may have, the cost of intervening in such situations, and whether in the end, adopting an opposing position will really be worth it.

Faculty

Malissa Lambert Giles is a partner with the firm of Giles & Lambert, PC in Roanoke, Va., with additional offices in Blacksburg and Martinsville. She and the firm, which was formed in 1993, limit their current practice to the areas of bankruptcy and consumer rights, focusing on debtor and plaintiff representation. Ms. Giles has taught at numerous regional and national bankruptcy seminars and has been a frequent speaker at the Mid-Atlantic Institute on Bankruptcy and Reorganization and for the Virginia State Bar, the Virginia Bar Association and Virginia CLE. She has presented nationally for the National Association of Consumer Bankruptcy Attorneys and for ABI. Ms. Giles has served as editor of the *Bankruptcy Law News*, and has served as chair of the board of the Virginia State Bar's Bankruptcy Section. She currently sits on the Virginia Bar Association's Bankruptcy Council, and is a member of the IWIRC Virginia Board. Ms. Giles has been named a *Virginia Super Lawyer* in the area of consumer bankruptcy practice since 2007. She recently was appointed class counsel in *Harlow v Wells Fargo*, a national class action case which resulted in one of the largest bankruptcy class action settlements in decades. Ms. Giles received her B.A. in 1987 from the University of Mississippi and her J.D. in 1991 from the University of Mississippi School of Law in Oxford.

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Randy Nussbaum is an attorney with Sacks Tierney P.A. in Scottsdale, Ariz., and has assisted individuals and businesses with complex bankruptcy protection (debtor and creditor), transaction and litigation matters for more than 40 years. He has represented secured and unsecured creditors, surety companies, creditors' committees, lessors, professional athletes, doctors, lawyers, and trustees in chapter 5, 7, 11 and 13 proceedings, including adversary actions (bankruptcy litigation). The cases have involved such diverse matters as real estate, construction, manufacturing, trucking, asset-based lending, bankruptcy related to divorce, and high-value and complex individual bankruptcies. Mr. Nussbaum is a Certified Bankruptcy Specialist by the Arizona Board of Legal Specialization and is Board Certified in Business Bankruptcy Law by the American Board of Certification, for which he currently serves as president. He has been named to the *Super Lawyers* "Top 50" list of Arizona attorneys multiple times and has been listed in *The Best Lawyers in America* annually since 2010; he was selected as its "Lawyer of the Year" (Scottsdale) for Bankruptcy and Creditor Debtor Rights in 2019 and for Bankruptcy Litigation in 2021 and 2024. Mr. Nussbaum is a 1990 graduate of Scottsdale Leadership and has volunteered for the organization for nearly 30 years, serves on its advisory board, and is a recipient of the prestigious Frank W. Hodges Alumni Achievement Award. He also served as a Sterling Awards Jurist for the Scottsdale Chamber of Commerce and received the Chamber's Volunteer of the Year Award for 2017. Mr. Nussbaum is the president of the American Board of Certification for 2024 and has presented at ABI programs annually since 2011. In 2018, he was inducted into the Scottsdale History Hall of Fame. Mr. Nussbaum received his B.A. *cum laude* and in 1977 his J.D. in 1980 from Arizona State University, graduating in the top 25 percent of his class.

Hon. Sage M. Sigler is a U.S. Bankruptcy Judge for the Northern District of Georgia in Atlanta, appointed in March 2018. She succeeded Hon. Mary Grace Diehl, for whom she clerked after graduating from law school. Prior to her appointment to the bench, Judge Sigler was a partner in Alston & Bird LLP's Bankruptcy Group. She is an active member of ABI's Board of Directors, NCBJ, IWIRC, TMA and the Bankruptcy Section of the Atlanta Bar Association, and she has been a volunteer presenter for the Credit Abuse Resistance Education (CARE) program. Judge Sigler was an honoree in ABI's inaugural class of "40 Under 40" in 2017. She received her B.A. in political science from the University of Florida in 2001 and her J.D. in 2006 from Emory University School of Law, where she was the executive symposium editor of the *Emory Bankruptcy Developments Journal*.