



AMERICAN
BANKRUPTCY
INSTITUTE

2017 Southeast Bankruptcy Workshop

Consumer Track

Back-to-Back Bankruptcies

Hon. John E. Waites, Moderator

U.S. Bankruptcy Court (D. S.C.); Columbia

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ABI Southeast Bankruptcy Workshop

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Hilton Head Island, South Carolina

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Prior Case Filed?

- Debtor attorneys must first determine if a prior case has been filed
- Don't take debtor's word for prior filing – check ECF!
- A prior case determines the path the new case will take
- Practice Tip: Whenever you can independently verify what a client tells you - verify

What Was Disposition of Prior Case

- Dismissed or discharged?
- If dismissed, when?
- If discharged, when was the prior case filed?
 - The answers determine:
 - What chapter your client may file
 - What relief your client is entitled to

If Prior Chapter 7 Discharge:

- Cannot file Chapter 7 for eight (8) years. 11 U.S.C. § 727(a)(8) (measured from *filing date*)
- May file Chapter 13 anytime, but ...
 - Eligible for discharge only if filed more than 4 years from Chapter 7 filing date (*not discharge date*). § 1328(f)(1)

If Prior Chapter 13 Discharge:

Debtor may file Chapter 13, but ...

- No discharge unless filed 2 years after filing date of prior Chapter 13. § 1328(f)(2)
- Case may proceed even if not eligible for discharge (Chapter 20 scenarios)

If Prior Chapter 13 Discharge ...

- Cannot receive a Chapter 7 discharge for six (6) years, BUT ...
- May file Chapter 7 within 6 years of prior Chapter 13 discharge and receive a discharge IF:
 - Prior discharged Chapter 13 paid 100% to unsecured creditors, OR
 - Prior discharged Chapter 13 paid 70% AND (1) plan was filed in good faith AND, 2) was debtor's best effort
 - See § 727(a)(9)(A) and (B)

Where Debtor is Not Eligible for Chapter 13 Discharge

- What relief is debtor entitled to?
- Debtor's lawyer should explain to debtor (in writing and signed by debtor!) that unpaid debt will survive along with any interest that accrues while Chapter 13 is pending
- Can a debtor strip off underwater junior mortgage?
- Can a debtor avoid a judicial or nonpurchase money lien?

Not Eligible for Chapter 13 Discharge

- Lien strip under § 506 and § 1322 - allowed in 4th, 6th, 8th, 9th and 11th Circuits
- In re Davis, 716 F.3d 331 (4th Cir. 2013)
- In re Scantling, 754 F.3d 1323 (11th Cir. 2014)
- Cases hold that Chapter 20 debtors may void liens irrespective of their eligibility for discharge.

Judicial and Nonpurchase Money Liens

Are motions to avoid judicial or nonpurchase money liens permitted when debtor not eligible for discharge?

Consider

- In re Mulder, 2010 Bankr. LEXIS 3823, 2010 WL 4286174: No restriction on Section 522(f) lien avoidance when debtor not eligible for discharge, not conditioned on discharge
- In re Peterson, 561 B.R. 788 (Bankr. D. Utah 2013): Lien avoidance is a two-step process 1) lien is immediately avoided for purposes of plan consummation, 2) then completely avoided when plan completed

Chapter 13 Relief, No Discharge

- Chapter 13 case must close
- Dismissal reinstates lien. 11 U.S.C. § 349
- Any unpaid debt survives (plus any applicable interest)
- Does conversion reinstate an avoided lien? Cases suggest no. See In re Phillips, 553 B.R. 536 (Bankr. E.D.N.C. 2016)

Prior Case Was Dismissed

- Motion To Reconsider Dismissal
 - Considerations
 - When was Dismissed?
 - Why was Dismissed?
 - Pros
 - Cons

Prior Case Pending in Past Year

- If a prior case was dismissed within past year...
- The automatic stay under § 362(a) expires after 30 days from filing. 11 U.S.C. § 362(c)(3)
- Debtor should be prepared to *immediately* file a motion to continue the stay as to all creditors
 - Hearing must be held *and* concluded within 30 days of case filing
 - Mind service issues – if a party filed a notice of appearance or a proof of claim in prior case, the best practice is to serve that creditor at proper address(es). Some jurisdictions may require this.

Prior Case Pending in Past Year

- If stay terminates (or does not go into effect), what property is affected?
- Property of the estate? § 362(c)(3)(1)
- Property of the debtor? § 362(c)(3)(2)
- What's the difference? Isn't it all the same?

Prior Case Pending in Past Year

Compare **majority approach**: the stay terminates after 30 days “with respect to the debtor” and the debtor’s property. In re Roach, 555 B.R. 840 (Bankr. M.D. Ala. 2016)

- After 30 days creditors may continue lawsuits, attach or enforce liens, or bring eviction actions against the debtor
- Secured creditors cannot proceed against collateral unless a § 362(d) motion is filed

Prior Case Pending in Past Year

Minority approach: the stay terminates in its entirety after 30 days with respect to the debtor, debtor’s property, and property of the estate. In re Reswick, 446 B.R. 362 (9th Cir. B.A.P. 2011)

Prior Case Pending in Past Year

3rd View: focuses on “act” and holds that the § 362(a) stay only terminates as to the continuation of judicial, administrative or other proceedings commenced prior to bankruptcy filing, regardless of whether the property was property of the estate or property of the debtor

More Than One Prior Dismissed Case in Past Year

- If more than 1 prior case was pending in the prior year, no stay goes into effect when case is filed. 11 U.S.C. § 362(c)(4)
- 11 U.S.C. 362(c)(4)(B) provides the court may order the stay take effect after notice on a hearing if a party requests such relief
- What burden of proof must a debtor carry to extend the stay?

Orders Confirming That Stay Terminated 11 U.S.C. 362(j)

Section 362(j) provides: “On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.” 11 U.S.C. §362(j). A §362(j) motion is only appropriate where relief from the stay was granted under 11 U.S.C. §362(c) and does not provide any additional substantive rights. In re Hill, 364 B.R. 826, 829 (Bankr. M.D. Fla. 2007) (characterizing section 362(j) orders as “comfort orders,” issued only on grounds provided under 11 U.S.C. §362 (c)); In re Buchheit, 2009 Bankr. LEXIS 4220, 2009 WL 5227664 (Bankr. S.D. Ga. March 11, 2009) (same)

In re Waltower, 2012 Bankr. LEXIS 4153 (Bankr. S.D. Ga. 2012)

Small Business Cases 11 U.S.C. § 362(n)(1) (Chapter 11 Cases)

Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor –

(A) is a debtor in a small business case pending at the time the petition is filed;

(B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

(C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

[2] Paragraph (1) does not apply –

(A) to an involuntary case involving no collusion by the debtor with creditors; or

(B) to the filing of a petition if –

(i) the debtor proves by a preponderance of the evidence that the filing of the petition resulted from circumstances beyond the control of the debtor not foreseeable at the time the case then pending was filed; and

(ii) it is more likely than not that the court will confirm a feasible plan, but not a liquidating plan, within a reasonable period of time.

Prior Case Was Converted, What Now?

- If prior case converted and debtor wants to file another case...
- If prior case was converted and a discharge entered:
 - Same discharge rules apply
 - Measured from date of filing of initial order for relief

What Impact Do Orders in Previous Cases have on Successive Case?

Res Judicata – Collateral Estoppel

- Same Chapter
- Different Chapter
- Dismissal Issues

Dismissal does not always restore the prepetition status of property. If property has been transferred out of the estate to a third party, even if not by a sale, the bankruptcy court does not normally have jurisdiction to restore it to the debtor upon dismissal. Dismissal does not affect transfers of property made pursuant to a confirmed plan. Nor will dismissal necessarily eliminate the collateral estoppel or res judicata effect a bankruptcy court decision made during the case would have in a later proceeding.

3-349 Collier on Bankruptcy P 349.03

The court granted the guarantor's motion for an order stating that the court's prior order recognizing the guarantor's subrogation rights was to remain in effect notwithstanding the later dismissal of the Chapter 11 proceeding. In re Mulberry Chesterton Inn, L.P., 142 B.R. 566 (Bankr. S.D. Ga. 1992)

Considerations for a Successive Case - Will it be Dismissed?

- Trustee Review of Previous Case(s)
- Good Faith Threshold
- Bad Faith
- Totality of Circumstances
- Inability to Effectuate a Plan
- Purpose of Filing
 - Changed Circumstances
 - Improved Circumstances
 - Delay Tactic
- Previous Cases Dismissed with Prejudice

Dismissal of a Case

- Dismissal with Prejudice
- How long before can file again
- Factors
- 11 U.S.C. §109(g)
 - § 109(g) – individual or family farmer ineligible to file if prior case had been pending within the 180-day period before the date on which the newer petition was filed, and the earlier case had either been (1) dismissed by the court on the ground that the debtor had disobeyed orders or had failed to appear to prosecute the case, or (2) dismissed on the debtor's motion after a request for relief from the automatic stay had been filed.

It is true that even though the automatic stay generally operates "without the necessity for judicial intervention," *Sunshine Dev., Inc. v. FDIC*, 33 F.3d 106, 113 (1st Cir. 1994), certain filings do not trigger the stay. For example, a filing under 11 U.S.C. §301, like Houck's Chapter 13 petitions, does not operate as a stay "of any act to enforce any lien against or security interest in real property...if the debtor is ineligible under [11 U.S.C. §] 109(g) to be a debtor in a case under [Title 11]." 11 U.S.C. § 362(b)(21)(A). *Houck v. Substitute Trustee Servs.*, 791 F.3d 473, 487 (4th Cir. 2015)

This statute was added to the Bankruptcy Code in 1984 to address the precise abuse of the bankruptcy system at issue here—the filing of meritless petitions in rapid succession to improperly obtain the benefit of the Bankruptcy Code's automatic stay provisions as a means of avoiding foreclosure under a mortgage or other security interest.

Colonial Auto Ctr. V. Tomlin (In re Tomlin), 105 F.3d 933, 937 (4th Cir. 1997)

Good Faith Determination for Confirmation

11 U.S.C. § 1325(a)(3)

- When debtor is eligible for discharge
- When debtor is NOT eligible for discharge
 - Nature of debt
 - Timing of debt
 - Amount of debt
 - 11 U.S.C. § 1322 and § 506 issues
 - 11 U.S.C. § 522 (lien avoidance issues)
 - Dividend to unsecured creditors
- In re Kitchens, 702 F.2d 885 (11th Cir. 1983)

Simultaneous Filings

- Most commonly done where debtor files 7, then files 13 before the 7 case closes. Is this allowed?
 - 11th Circuit – Yes: In re Saylor, 869 F.2d 1434 (11th Cir. 1989)
 - See In re Brown, 399 B.R. 162 (Bankr. W.D. VA 2009)
 - Acknowledged that a Chapter 7 case is often open for considerable time after a discharge is entered and debtors should not be barred from Chapter 13
 - Bankruptcy courts must make a good faith inquiry

Simultaneous Filings

4th Circuit In re Brown, 399 B.R. 162 (Bankr. W.D. Va 2009)

Holding – A debtor cannot maintain simultaneous Chapter 13 cases concerning the same debt prior to receiving a discharge in the first

- Good discussion on:
 - Majority View – debtor may never maintain simultaneous cases.
Freeshman v. Atkins, 269 U.S. 121, 46 S. Ct. 41, 70 L. Ed. 193 (1925)
 - Minority View – there is no per se prohibition on simultaneous filing
 - Single Estate Rule
 - Bad Faith Filing

See In re Washington, 2017 Bankr. Lexis 810 (Bankr. D.S.C. Mar. 24, 2017)

- Chapter 24 Case – debtor filing Chapter 13 Case after confirmation of an Individual Chapter 11 Case

Simultaneous Filings

9th Circuit – Yes: In re Blendheim, 803 F.3d 477 (9th Cir. 2015)

- Agreed with 11th Circuit – a good faith requirement is sufficient to prevent undeserving debtors from using this procedure
- There is “no reason to force debtors to wait until the Chapter 7 case has been administratively closed before filing for relief under Chapter 13”.
- “Nothing in the Bankruptcy Code prohibits debtors from seeking the benefits of Chapter 13 reorganization in the wake of a Chapter 13 discharge”.

Simultaneous Filings

7th Circuit – No: In re Sidebottom, 430 F.3d 893 (7th Cir. 2005)

- Cannot file a case when a prior case is still open, only one bankruptcy can be administered at a time
- “The Code is designed to resolve a debtor’s financial affairs by administration of a debtor’s property as a single estate under a single chapter within the code.”

Trustee Administrative Issues

- Money on hand from prior case
- Reasonable attorney fees
- Timely review of Current and Prior Cases
 - Administrative dismissal (11 U.S.C. §521) after 14 days
 - Trustee filing Motions to Extend or Impose Stay to protect equity

11 U.S.C. § 109(e) Issues

Scenario: Debtor files Chapter 7 and schedules a wholly underwater second mortgage lien. A discharge is entered. Debtor then files Chapter 13. Does the amount of the discharged second mortgage count towards the 109(e) debt limit for jurisdictional purposes?

See In re Hernandez, 2017 Bankr. LEXIS 1072 (B.A.P. 9th Cir. 2017), Debtor filed Chapter 7 scheduling a wholly unsecured second mortgage. Debtor then filed Chapter 13 five years later. The second mortgage creditor moved to dismiss the case asserting that debtor exceeded the 109(e) debt limits. Creditor argued that since its claim had not yet been avoided (stripped off), its secured claim caused debtor to exceed the debt limits. In the alternative, creditor argued that, even if its claim were allowed as an unsecured claim, debtor would still exceed the 109(e) limits.

11 U.S.C. § 109(e) Issues

- The 9th Circuit B.A.P. found:
 - 1) Because the personal liability was discharged there was no allowable unsecured claim that could be included under 109(e) in the Chapter 13 case;
 - 2) Creditor argued in the alternative that since the lien had not yet been stripped, it should count towards the secured debt limit (debtor would exceed the debt limit either way whether allowed as a secured or unsecured amount). The court found that regardless of the status at the time of filing, the lien was clearly undersecured based on "readily ascertainable circumstances"; and
 - 3) No amount of the claim (secured or unsecured) should count towards the debt limit where the personal liability was discharged in a prior Chapter 7 and where the lien was entirely underwater.