

BANKRUPTCY UPDATE—NOW WHAT DO I DO?

Bankruptcy's Impact Upon the Rest of the Legal Community

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I. Automatic Stay--§362¹

A. Filing of a petition operates as a stay for most entities.

B. Applies whether entity knows or does not know of the filing. *Constitution Bank v. Tubbs*, 68 F.3d 685,691 (3rd Cir., 1995)

C. Major Exceptions--§362(b)

1. Criminal actions--§362(b)(1)

2. Commencement or continuation of paternity, support, custody, divorce (except division of property) and domestic violence actions and enforcement thereof (wage attachments, license suspensions, refund intercepts, etc.) -- §362(b)(2)(A)-(G)

3. Enforce police and regulatory powers--§362(b)(4)

4. Tax audits and deficiency determinations--§362(b)(9)

5. Eviction under a non-residential lease that terminated pre-petition-- §362(b)(10)

6. Assessment of real estate taxes--§362(b)(18)

7. Continuation of a residential eviction if judgment for possession is entered pre-petition--§362(b)(22)

8. Stay applies only to debtor and not entities owned by debtor, such as corporations and LLCs. *Maritime Electric Co. v. United Jersey Bank*, 959 F.2d 1194 (3rd Cir., 1991)

¹ All section references are to the Bankruptcy Code (11 U.S.C) unless otherwise noted.

D. Serial Filers--§362(c)

1. If a case was pending but dismissed within a one year period prior to the filing of the current petition, the stay continues for 30 days, but may be extended upon the showing of good faith and a showing of changed financial circumstances--§362(c)(3)
2. If two or more cases were pending but dismissed within a one year period prior to the filing of the current petition, the stay does not go into effect until debtor requests the stay be imposed and, after notice and hearing, the court grants the request--§362(c)(4)
3. On request of a party, the court will issue an order confirming that the automatic stay is terminated--§362(j)

E. Violations of automatic stay can result in recovery of actual damages, including costs and attorney fees, and punitive damages--§362(k)

II. Domestic Relations

A. Automatic Stay

1. Most actions are not stayed.
2. State court has concurrent jurisdiction with the bankruptcy court to determine whether the automatic stay applies—*In re Gandy*, 327 B.R. 796 (Bankr. S.D. Tex., 2005)
3. Although bankruptcy courts have jurisdiction over domestic issues, bankruptcy court may exercise discretion to permissively abstain—28 U.S.C. §1374(c)(1)
4. Bankruptcy court often will accommodate request to lift stay to continue pending litigation in state court.

B. Discharge of marital claims

1. Chapter 7 excepts from discharge
 - a. domestic support obligations--§523(a)(5) and
 - b. property settlement agreements and divorce decrees--§523(a)(15)
2. Chapter 13 excepts from discharge domestic support obligations but not property settlement agreements or divorce decrees--§1328(a)(2)

3. “Domestic support obligation” is defined as “. . . a debt . . . that is owed to . . . a spouse [or] former spouse . . . *in the nature of* alimony, maintenance or support . . . without regard to whether such debt is expressly so designated”-- §101(14A) [emphasis added]

4. Third Circuit set out to determine the factors to be considered in *Gianakas v. Gianakis*, 917 F.2d 759 (3rd Cir., 1990)

a. The court must look beyond the label attached to an obligation by a settlement agreement to examine its true nature—p. 762

b. Determination is a question of federal law—p. 762

c. Determination depends upon the intent of the parties or court at the time of the settlement. Intent can best be found by three principal indications:

i. The court must examine the language and substance of the agreement in the context of surrounding circumstances, using extrinsic evidence if necessary—p. 762

ii. The court must examine the financial circumstances at the time of the settlement—p. 762

iii. The court should examine the function served by the obligation at the time of the settlement. An obligation that serves to maintain daily necessities such as food, housing and transportation is indicative of a debt intended to be in the nature of support—p. 762-763

iv. In *Gianakis*, since wife had no income at the time of the settlement, and since both parties agreed that it was their intent that wife and their four children would live in the marital residence, the court affirmed the district court’s and the bankruptcy court’s conclusion that the obligation was in the nature of support.

v. If the obligation is awarded by a divorce master or state court, *Gianakis* factors are used to determine the intent of the court. *In re Miller*, 424 B.R. 171 (Bankr. M.D. Pa., 2010)

d. State courts and bankruptcy courts exercise concurrent jurisdiction regarding the federal question of dischargeability, however, once one

court determines the issue, the parties are collaterally estopped from relitigating the issue in another court. *In re Bereziak*, 160 B.R. 533 (Bankr. E.D. Pa., 1993)

e. Bankruptcy court's determination that an obligation is nondischargeable as not being in the nature of support is not binding on the state court as being support for enforcement purposes. *In re Tielsch*, 299 B.R. 114 (Bankr. W.D. Pa., 2003)

III. Personal Injury

A. Filing of bankruptcy creates an estate--§§541 and 1306

1. The estate includes all legal interests of the debtor in property.
2. The estate includes interests in civil claims held by the debtor—*In re Kane*, 628 F.3d 631 (3rd Cir., 2010)

B. The claim remains property of the estate until administered--§554(d)

1. Includes debtor's recovery in a civil claim.
2. Includes attorney fees and costs recovered in the case.

C. Recommendations:

1. Inquire of clients whether they are in bankruptcy and require disclosure of the claim in their bankruptcy documents if they file bankruptcy.
2. Contact client's bankruptcy attorney to determine remaining exemptions (property debtor can keep)--§522
3. Notify Trustee (Chapter 7) or debtor's attorney (Chapter 13) upon settling the matter. All settlements must be conditioned upon approval by the bankruptcy court.

D. Judicial Estoppel.

1. Applicable when a claimant pursues a civil claim in one court and fails to disclose the claim in bankruptcy court. This double dealing can lead to the conclusion that the claim is worthless or has no value.

2. Standards—*In re King*, 628 F.3d 631, 638 (3rd Cir., 2010):

- a. Party to be estopped must have taken two positions that are irreconcilably inconsistent;
- b. Judicial estoppel is unwarranted unless party changed his or her position in bad faith such as with the intent to play fast and loose with the court;
 - i. A rebuttable inference of bad faith arises when averments in a bankruptcy pleading demonstrate both knowledge of a claim and a motive to conceal that claim in the face of an affirmative duty to disclose. *Krystal Cadillac-Olds GMC Truck v. General Motors*, 337 F.3d 314, 321 (3rd Cir., 2003)
 - ii. Judicial estoppel does not apply where the prior inconsistent position occurred because of mistake or inadvertence, debtor lacks a motive to conceal the claim (for example, exemptable or pays all creditors), or where debtor rebuts bad faith. *Javery v. Lucent Technologies, Inc.*, 741 F.3d 686, 698 (6th Cir., 2014)
- c. Remedy must be tailored to address the harm identified and no lesser sanction would adequately remedy the damage done.

3. Case example: *Hardee-Guerra v. Shire Pharmaceuticals*, 737 F. Supp. 2d 318 (E.D. Pa., 2010)

- a. In 2007, Plaintiff cross-filed complaints with the EEOC and PA Human Relations Commission alleging unlawful discrimination against her because of her pregnancy.
- b. In February, 2009, PA HRC issued a “right to sue” letter and in December, 2008, EEOC confirmed the matter was still under investigation and issued a “right to sue” letter on February 26, 2009.
- c. On February 22, 2009, plaintiff filed for bankruptcy through another attorney. Plaintiff disclosed none of the claims in her bankruptcy schedules or statements.
- d. District court granted defendant’s motion for summary judgment on the basis of judicial estoppel. Remedy was to bar her compensatory claims but allow her to pursue equitable relief.

e. Other courts have substituted the bankruptcy trustee for plaintiff to pursue the claim for creditors. *Owens v. Dolgencorp., LLC*, 2013 WL 6795415 (S.D. Ohio, 2013)

f. Applies while bankruptcy case is pending. While plaintiff's bankruptcy case was pending, plaintiff was terminated on June 9, 2010. Plaintiff made her last payment under her Chapter 13 plan on July 20, 2010 without amending her schedules. About a year after the bankruptcy case was closed, plaintiff filed suit. The 6th Circuit upheld the district court's motion on the pleadings dismissing the case. *Kimberlin v. Dollar General Corp.*, 520 Fed. Appx. 312 (6th Cir., 2013)

IV. Landlord-Tenant Law

A. Automatic Stay--§362(a)(3)

1. Non-residential lease evictions are not stayed by the filing of a bankruptcy provided the lease terminated pre-petition--§362(b)(10)

2. Residential lease evictions for monetary default are not stayed if judgment for possession is entered pre-petition (§362(b)(22)) unless:

a. Under §362(l), debtor files with the bankruptcy petition and serves upon the lessor a certification that:

i. under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor/lessee would be permitted to cure the monetary default after that judgment was entered; and

ii. the debtor has deposited with the clerk of the bankruptcy court any rent that would become due during the 30 day period after filing the petition, which is then transmitted to lessor;

iii. Under these circumstances, exception to stay does not apply for 30 days.

b. If, within the 30 days after filing the petition, debtor files a certification with the court and serves it upon lessor that the debtor has cured, under applicable nonbankruptcy law, the entire monetary default that gave rise to the judgment, the exception to the stay does not apply unless ordered to apply by the court.

c. The court can order that the (b)(22) exception does not apply if the lessor files and serves an objection to either of debtor's certifications. If an objection is filed, the court shall hold a hearing within 10 days after the objection is filed to determine if the objected to certification is true. If the court upholds the objection, (b)(22) shall apply immediately and relief from the stay shall not be required to enable the lessor to complete the process to recover full possession of the property.

d. If the debtor indicates on the petition that there was a judgment for possession of residential rental property in which debtor resides and does not file either certification as provided, (b)(22) applies immediately and relief from the stay is not required to enable the lessor to complete the process to recover full possession of the property.

e. If a judgment for possession of residential property in which the debtor resides as a tenant has been obtained by lessor, the debtor is directed to indicate on the bankruptcy petition and provide the lessor's name and address and certify on the petition

i. whether a judgment for possession has been obtained against the debtor before the date of the filing of the petition; and

ii. whether the debtor is permitted to cure the entire monetary default that gave rise to the judgment for possession and has made the appropriate deposit with the court.

3. Residential lease evictions for property endangerment or drug use are not stayed if (§362(b)(23)):

a. Lessor files and serves upon lessee a certification that an eviction was filed or during the 30 period prior to filing the certification the debtor has endangered the property or illegally used or allowed to be used a controlled substance on the property. Under §362(m), the §362(b)(23) exception to the stay becomes effective 15 days after the certification is filed and served.

b. If the debtor files and serves an objection to the truth or legal sufficiency of the certification, the (b)(23) exception does not apply unless ordered by the court. §362(m)(2)(A)

c. If the debtor objects, the court will hold a hearing within 10 days to determine if the situation giving rise to the lessor's certification existed or has been remedied.

d. If the debtor demonstrates that the situation giving rise to the lessor's certification did not exist or has been remedied, the stay remains in effect until otherwise terminated. §362(m)(2)(C) If the debtor is not successful, relief from the stay is not required to proceed with the eviction. §362(m)(2)(D)

e. If the debtor does not object to lessor's certification within 15 days, the (b)(23) exception applies immediately upon the failure to file the objection and relief from the stay is not required to proceed with the eviction. §362(m)(3)