

**EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE AUTOMATIC STAY
(BUT WERE AFRAID TO ASK)**
12th Annual Consumer Bankruptcy Practice

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EVERYTHING YOU EVER WANTED TO KNOW ABOUT THE AUTOMATIC STAY (BUT WERE AFRAID TO ASK)

I. The Automatic Stay Generally

Generally, the automatic stay is a legal “bubble” that protects the debtor and property of the estate from legal actions upon a filing of a petition for bankruptcy relief. As with most laws, there are exceptions to the rule. 11 U.S.C. § 362(a) gives an exhaustive list of what the automatic stay protects the debtor from: ongoing litigation; acts to obtain possession of property of the estate such as repossession and foreclosure; perfecting or enforcing lien; and collecting or assessing a debt that occurred before the filing of the case.

The stay goes into effect upon the filing of a petition without the necessity of any motion or hearing, and remains in place until the earliest of a dismissal, closing of the case, or at the time a discharge is granted or denied. The stay protects both the debtor and property of the estate. The debtor is identified on the petition, but what about property of the estate? Section 541(a) defines property of the estate as all legal and equitable interests owned by the debtor at the time of filing. For example, if the debtor has 50% interest in real property, then the estate’s interest is limited to the debtor’s 50 % interest. *Id.* If it is unclear what the debtor’s interest is, then a determination as to the debtor’s interest must be made under state law. The Supreme Court stated in *Butner v. United States* that: “Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.” 440 U.S. 48, 55 (1979).

WARNING: Even though it may appear that certain property is not owned by the debtor at the time of filing, creditors should proceed with caution regarding any collection actions against the debtor or the debtor’s property. The Fifth Circuit noted in *In re Chesnut*, 422 F.3d

298, 305–07 (5th Cir. 2005) that, if it is uncertain whether the property is property of the debtor, courts should presume the automatic stay applies. Therefore, creditor attorneys should file motions for relief when there is a hint of ambiguity related to the property their client wishes to take action against.

II. Extending or Imposing the Automatic Stay

In a debtor’s first case the automatic stay goes into effect upon the filing of a petition. 11 U.S.C. § 362(a). Nonetheless, a debtor must still be “eligible” to be a debtor under 11 U.S.C. § 109(a). *See In re Barnet*, 737 F.3d 238 (2d Cir. 2013) (holding that § 109(a) applies to a debtor under chapter 15 because the definition of “debtor” in § 1502 does not block application of § 109 in chapter 15). If the debtor had a prior case pending in the last 12 months and that case was dismissed, however, the stay in a newly filed case is not “automatic” for the entire case.

A. Motions to Extend the Stay

With one prior case filed and dismissed in the last 12 months, the debtor in his/her new case only has the protection of the automatic stay for thirty days. *See* 11 U.S.C. § 362(c)(3). The debtor must file a motion to extend the stay beyond the thirty day period; provide notice of the motion and obtain a hearing; all before the expiration of the thirty day period under § 362(c)(3). Here, it is important to note the Code requires that the motion, notice, and hearing must be filed and held within the thirty-day time frame. There is some precedent, however; to allow a judge to impose the automatic stay under 11 U.S.C. § 362(c)(4), where the debtor missed the deadline required under 11 U.S.C. § 362(c)(3). *See In Re Toro-Arcila*, 334 B.R. 224, 228–29 (Bankr. S.D. Tex. 2005) (finding that the court could use § 362(c)(4) to impose the stay in a case where multiple filings had not occurred).

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