6-29/108.00 Automatic Stay

The automatic stay affords the debtor a breathing spell from creditors by stopping all collection efforts, harassment and foreclosure actions. It permits the debtor to devise a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove the debtor into bankruptcy. However, the filing of the petition does not necessarily terminate a levy.

• 6-29/108.10 Commencement of Automatic Stay

At the time of filing of a petition in bankruptcy, an automatic stay is created and is applicable to all entities, of (11 USC 362(a); In Re Kleitz 6 BR 214):

1. the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
2. the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
3. any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
4. any act to create, perfect, or enforce any lien against property of the estate;
5. any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
6. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
7. the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
8. the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

• 6-29/108.20 Termination of Automatic Stay

The automatic stay ends as to the debtor when the bankruptcy is closed or dismissed or a discharge is granted or denied. However, it continues as to property of the estate until the case is closed or dismissed or the trustee abandons the property.

Once the automatic stay is terminated, it may not be reinstated in that case except by court order. However, the court may issue a stay under 11 USC 105 or some other code provision. If the debtor files a new case, a new automatic stay begins unless there is an order to the contrary. Upon conversion from Chapter 11 to Chapter 7, a stay is not reimposed so as to make one who obtained relief apply again. (Cowans, Bankruptcy Law and Practice, 11.3(f)) “Nowhere in section 362 is any provision made for reimposing the automatic stay

once it has been terminated." (In Re Campos, 128 BR 790)

Except as it may be terminated, annulled, or modified by the bankruptcy court, the stay of any act against property of the estate continues until such property is no longer property of the estate, and the stay of any other act continues until the earliest of the time the (11 USC 362(c)):

- case is closed;
- case is dismissed; or,
- discharge is granted or denied if the case is under Chapter 7 concerning an individual or a case under Chapter 9, 11, 12, or 13.

The automatic stay ends in all respects when the bankruptcy is closed or dismissed or a discharge is granted or denied.

• 6-29/108.30 Personal Property Lease

The automatic stay is terminated on leased personal property and the property is no longer property of the estate if the leased property is not assumed by the trustee. An individual Chapter 7, 11, or 13 debtor may assume a personal property lease. 11 USC 362(h), 521(a)(2))

• 6-29/108.40 Repeat Filings

• • 6-29/108.41 Prior Case Filed Within One Year

The automatic stay terminates 30 days after a new case is filed within one (1) year after an earlier dismissed case. However, the court may, after notice and hearing, extend the stay upon showing that the new case is filed in good faith. (11 USC 362(c)(3))

• • 6-29/108.42 Two or More Prior Dismissed Cases

There is no automatic stay if a debtor files a case after two or more cases were dismissed in the previous year. However, the court may order, after notice and a hearing, that the stay take effect upon a showing that the new case is filed in good faith. (11 USC 362(c)(4))

There is a presumption that the new case is filed in bad faith if:

- the debtor filed more than one prior case in the preceding year, or
- a prior case was dismissed for failure to file documents without substantial excuse, failure to provide adequate protection, or failure to perform the terms of a confirmed plan, or
- there has been no substantial change of circumstances since the last dismissal that would make the new case likely to be successfully concluded, or
- a prior case was dismissed after a creditor had filed a motion for relief from the automatic stay.

• 6-29/108.50 Notice of Bankruptcy

The automatic stay is effective upon the filing of the petition in bankruptcy whether or not the levying officer has knowledge of the bankruptcy. However, the levying officer must have notice or knowledge of the bankruptcy in order to comply with bankruptcy policies and procedures. "Notice" should be verifiable and may be in a variety of forms, such as a copy of a document issued by the bankruptcy court, a letter signed by the bankrupt or his attorney, information in an employer's return or garnishee's memorandum of garnishee, or verifiable oral notice. At a minimum, reasonable "notice" includes the name or location of the bankruptcy court, the approximate date of filing and the name and address under which the debtor filed the petition.

• 6-29/108.60 Actions by Debtor

The automatic stay applies to actions against the debtor, not to actions brought by the debtor. For example, the stay does not apply to a debtor's counterclaim. The stay "does not address actions brought by the debtor which would inure to the benefit of the bankruptcy estate." (Shorr v Kind, 1 CA 4 249; In re Regal Const. Co., Inc., 28 BR 413) A claim of exemption or third party claim filed by the debtor should be processed as usual.

• 6-29/108.70 Exceptions to Automatic Stay

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 created additional exceptions to the automatic stay for: the commencement or continuation of proceedings for child custody, domestic violence, and divorce; withholding of income to pay a domestic support obligation pursuant to a judicial or administrative order or a statute; interception of tax refunds for domestic support obligations; withholding of licenses from debtors who do not pay support obligations; reporting of credit reporting agencies of debtors who do not pay support; interception of tax refunds to collect support; and enforcement of medical support obligations. (11 USC 362(b))

• • 6-29/108.71 Nonresidential Property Eviction

The filing of a petition in bankruptcy does not stay an action by a landlord to recover possession of nonresidential property from a tenant under a lease which has expired under its stated term, whether the term expired prior to or after the tenant's filing of a petition in bankruptcy. A relief order from automatic stay is not required. 11 USC 362(b)(10) The levying officer may proceed with the eviction upon receipt of signed instructions from the judgment creditor stating; "The real property described in the writ of possession is nonresidential property under a lease which has, under the stated term, expired and, pursuant to 11 USC 362(b)(10), is an exception to the automatic stay."

• • 6-29/108.72 Residential Property Eviction

An eviction proceeding to evict a debtor who is a residential tenant is excepted from the automatic stay and

may continue if the lessor (landlord) has obtained a judgment prior to the filing of the petition. However, the automatic stay will apply for 30 days after the petition if (1) the debtor certifies in the petition a right to cure a default and (2) the debtor deposits with the bankruptcy court any rent that would become due during the 30 days after the filing of the petition. The automatic stay may be extended if the debtor files a further certification within 30 days after the petition that the debtor has cured the default and the court finds the landlord's certification to be untrue. (11 USC 362(b)(22))

• • 6-29/108.73 Residential Property Eviction (Endangerment/Drug Activity)

Eviction proceedings to evict residential tenants may continue if the lessor (landlord) seeks possession based on endangerment of property or illegal use of controlled substances at the property. An exception to the automatic stay begins 10 days after the lessor files a certification with the court alleging endangerment or use of substances occurred within 30 days before the certification. The debtor must object to the certification within 15 days of the certification, in which case the court shall determine whether grounds for the exception exist. (11 USC 362(a)(3))

• • 6-29/108.74 Post-Petition Earnings

The collection of alimony, maintenance, or support from earnings or services performed by an individual debtor after the filing of the petition in bankruptcy is not stayed unless the debtor filed a Chapter 13. (11 USC 541(a)(6), FRBP 1306(a)(2)) In a Chapter 13, all wage garnishments, including those for alimony or support, are stayed and claims must be filed with the Chapter 13 trustee. Property of the estate in a Chapter 13 case is broader than that in Chapter 7 and includes earnings for personal services performed by the debtor and all property of the kind specified in 11 USC 541 acquired after the commencement of the case, but before the case is closed, dismissed, or converted to a case under another chapter.

• • 6-29/108.75 Bench Warrant (Civil)

A civil bench warrant for the debtor's arrest following the failure of the debtor to appear at a judgment debtor examination may or may not be stayed, depending on whether the court is exercising its police power (contempt of court). Bankruptcy stays the debtor examination but 11 USC 362(b)(4) excludes from the automatic stay "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory powers." Case law generally recognizes the court's contempt power to uphold the dignity of the court as an exception to the automatic stay. Consequently, the debtor may be arrested for contempt, but not subjected to a debtor examination.

• • 6-29/108.76 Domestic Actions

The automatic stay does not apply to civil or criminal actions concerning (11 USC 362(b)(2)):

- for the establishment of paternity
- for the establishment or modification of an order for domestic support obligations

- concerning child custody or visitation
- for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate
- regarding domestic violence

• • 6-29/108.80 In Rem Order for Relief from Stay

The court may issue an in rem order for an interest in real property if the petition was filed to delay, hinder, and defraud creditors attempting to transfer ownership. The in rem order must be recorded in compliance with state recording statutes to be binding on any bankruptcy concerning that property filed within two years after the in rem order is entered. A debtor may obtain relief from the in rem order upon a showing of changed circumstances or good cause. (11 USC 362(d)(4))

• • 6-29/108.90 Ineligibility for File Bankruptcy

An individual or farmer debtor cannot file bankruptcy if (11 USC 109(g)):

- the debtor filed a prior bankruptcy case within 180 days that dismissed for failure to abide the orders of the court, or
- the debtor dismissed the prior bankruptcy following a creditor's request for relief from the automatic stay

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