CHAPTER 13 CASE LAW UPDATE: BAPCPA

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ATORNEYS AS DEBT RELIEF AGENCIES

In re McCartney, 2006 WL 75306 (Bankr. M.D. Ga. 1/12/06)

> Debtor's attorney filed motion to determine that attorneys who practice before the court are not "debt relief agencies" under § 101(12A). Court held that the moving attorney lacked standing to bring the present case. "To satisfy the Article III case or controversy requirement, a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision. In the case at bar, no party has threatened to enforce against Movant the debt relief agency provisions of BAPCPA. Movant has not sustained any real, actual, or direct harm or injury. Movant has not shown that he is in danger of sustaining any immediately impending harm or injury. The court can only conclude that Movant has failed to satisfy the case or controversy requirement. The Court is persuaded that Movant's motion must be dismissed."

In re Attorneys at Law and Debt Relief Agencies, 332 B.R. 66 (Bankr. S.D. Ga. 2005)

> Court ruled *sua sponte* that attorneys are not "debt relief agencies" within the meaning of BAPCPA so long as their activities fall within the scope of the practice of law and do not constitute a separate commercial enterprise.

ADEQUATE PROTECTION

In re Beaver, 05-06123-5-ATS (Bankr. E.D. N.C., 1/24/05)

> The secured car creditor filed a motion requesting that the debtor directly make pre-confirmation adequate protection payments in the same amount as the contract payment. The debtor objected arguing that direct payments were not the only way to provide a creditor with adequate protection.
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> The court noted that adequate protection may be provided by a variety of methods, and that if Congress intended to change this well established practice, it would have done so more clearly. Thus, the court rejected the debtor's argument that regular plan payments provided sufficient adequate protection, and the court rejected the creditor's argument that adequate protection needed to be in the same amount as the prepetition contract payment.
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> The court noted that while adequate protection depends on the unique circumstances of each case, the court could not, as a practical matter, conduct a hearing in each case to determine adequate protection; therefore, the court suggested the creation of a local rule "as to what presumptively provides adequate protection in most cases." The court also recommended that adequate protection payments be made through the trustee given the accounting problems of direct payments by the debtor. Finally, the court accepted the parties' proposal to make adequate protection payments through the trustee of 1% of the value of collateral.

TERMINATING, EXTENDING OR REINSTATING THE STAY

In re Paschal, 05-06133-5-ATS (Bankr. E.D. N.C. 1/6/06).

Debtor filed a motion to extend the 30-day stay of § 362(c)(3). In determining the extent of the relief from stay provided by § 362(c)(3), the court focused on the following language:

> 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.

In parsing the meaning of this language, the court held that "the term 'action' means a formal action, such as a judicial, administrative, governmental, quasi-judicial, or other essentially formal activity or proceeding." Furthermore, the term "taken" "means an action in the past, prior to the filing of the debtor's bankruptcy petition." Because no creditor had taken a prepetition "action," the court held that "no protections of the automatic stay are terminated in this case by § 362(c)(3)(A) and that it is not necessary to continue the automatic stay under § 362(c)(3)(B)."

In dicta, the court noted that there remained questions as to the meaning of the phrase "with respect to the debtor," but that issue would need to wait for another day.

In re Johnson, 2006 WL 51210 (Bankr. W.D. Tenn. 1/9/06)

The debtor filed a motion to extend the 30-day stay of § 362(c)(3), the mortgage company objected because it had scheduled a foreclosure sale, and the court granted the motion. To clarify its decision, the court subsequently entered this opinion stating that the "automatic stay continues to protect 'property of the estate' so long as it remains 'property of the estate.'" Because the confirmation order provided that all property under §§ 541 and 1306 remains property of the Chapter 13 estate, the court held that the debtor's home remained "property of the estate" until the case is dismissed or discharged." Accordingly, the court ruled that its prior order extending the stay was "superfluous" and warned that if "creditors take any action against such property without first seeking relief, they may be violating the automatic stay."

In re Branch, 05-39958-B (Bankr. W.D. Tenn. 1/4/06)

The debtor filed a motion to extend the stay of § 362(c)(3) more than 30 days after the petition date. The court held that the stay automatically terminated and could not be extended because of the debtor's tardy motion. However, the court also held that the statute only terminates the stay "'with respect to the debtor,' meaning that as to property of the bankruptcy estate a motion for relief from the automatic stay must be filed by a party in interest."

In re Montoya, 333 B.R. 449 (Bankr. D. Utah 2005)

The debtor filed a motion to extend the 30-day automatic stay of § 362(c) as to all creditors. The court denied the motion. The court stated that when the debtor seeks to continue the automatic stay as to all creditors, § 362(c)(3)(C)(i) is applicable, which states that a presumption that the case was not filed in good faith arises if one of three events has occurred: 1) the debtor had more than one previous case pending in the previous year; 2) in the case that was dismissed in the previous year the debtor failed to perform certain tasks; or 3) there has not been a substantial change in the financial affairs of the debtor. If the presumption that the case was not filed in good faith arises, then the debtor may show by clear and convincing evidence that the current case was filed in good faith as to the creditors to be stayed. The clear and convincing standard meant this:

> When the presumption arises, it is as though evidence has already been presented establishing that the case was not filed in good faith. If no further evidence is presented by the Debtor, the only evidence the Court has is the presumption … where a presumption such as § 362(c)(3)(C) arises, the burden shifts back to the movant to present clear and convincing evidence in support of the motion.

The court adopted the a totality of the circumstances approach and the good faith factors set fort in *Gier v. Farmers State Bank (In re Gier)*, 986 F.2d 1326 (10th Cir. 1993), which included the following: 1) the nature of the debt and whether it would be non-dischargeable in Chapter 7 as compared to the ability to pay the debt in Chapter 13; 2) the timing of the petition; 3) how the debt arose; 4) the debtor's motivation in filing the case; 5) how the debtor's actions affected creditors because of the repeat filings; 6) the debtor's treatment of creditors both before and after the petition was filed; and 7) whether the debtor has been forthcoming with the bankruptcy court and creditors. The court gave more weight to the fifth and sixth factors and required the debtor to come forward with clear and convincing evidence that the negative impact on creditors has been overcome.

In re Galanis, 334 B.R. 685 (Bankr. D. Utah 2005)

The court granted debtors' motions to extend the 30-day stay of § 362(c) as to all creditors. The court first held that if the presumption that the case was not filed in good faith arises under § 362(c)(3)(C) arises, the party moving to extend the automatic stay must carry its burden by "clear and convincing evidence," but if the presumption does not arise a party in interest must carry it burden under 363(b)(3)(B) by a "preponderance of the evidence." The court next held that in determining good faith under § 363(b)(3)(B) it would use a "totality of the circumstances" approach and adopted the following *Gie*r factors in determining what, under the totality of the circumstances, constituted good faith: 1) the timing of the petition; 2) how the debt(s) arose; 3) the debtor's motive in filing the petition; 4) how the debtor's actions affected creditors; 5) why the debtor's prior case was dismissed; 6) the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to properly fund a plan; and 7) whether the Trustee or creditors object to the debtor's motion.

In re Charles, 332 B.R. 538 (Bankr. S.D. Tex. 2005)

> To extend stay beyond 30 days under § 362(c)(3) requires debtor to give notice to all creditors against whom stay will be extended and to establish by clear and convincing evidence that the second petition was filed in good faith with respect to the creditors to be stayed: "Congress intended to direct the Court to conduct an early triage of refiled cases. Debtors whose cases are doomed to fail should not get the benefit of an extended automatic stay." The court went on to hold that debtor must also "demonstrate sufficient equitable factors to justify" exercise of the court's discretion to extend the stay. Finally, the court held that "[a]bsent a timely filed objection to the continuation of the debtor's automatic stay, the Court may grant the motion without a hearing."

In re Ball, 2006 WL 172273 (Bankr. M.D. N.C. 1/225/06)

> On motions to extend say, court adopted the "totality of the circumstances test" and applied the factors used in the *Galenis* case (see above).

In re Mark, 2006 WL 164883 (Bankr. D. Md. 1/23/06)

> On motions to extend say, court applied "good faith" standards of Neufeld vs. Freeman, 794 F.2d 149 (4th Cir.1986), which are as follows: employment history, unsecured claims, past bankruptcy filings, honesty in the schedules, any exceptional circumstances facing the debtor, what changes had occurred, the economic basis for the current case, the motivation of the debtor in the current case and the prepetition conduct of the debtor.

In re Phillips, 2006 WL 91311 (Bankr. E.D. Okla. 1/6/06)

> In granting a motion to extend the automatic stay after a showing of changed financial circumstances, the court stated that "Attorneys who practice before this Court are advised that if their Motion to Extend the Automatic Stay is unopposed, the Court may grant the Motion under certain circumstances without the necessity of a hearing. In order to do so, there must be proper notice and opportunity to object provided to all creditors. In addition … the Court must find that counsel in their Motion have property pled all the elements under § 362(c)(3) including rebutting by clear and convincing evidence that the case was not filed in good faith."

In re Havner, 2006 WL 51214 (Bankr. M.D. N.C. 1/4/06)

> "[S]ection 362(c)(3)(B) provide for continuation of the automatic stay if four requirements are met: (1) a motion is filed; (2) there is notice and a hearing; (3) the notice and hearing are completed before expiration of the original 30-day period; and (4) the debtor proves that the file of the new case 'is in good faith as to the creditors stayed." A presumption of bad faith arises if the debtors meet any one of the three subsection of § 362(c)(3)(C), at which time the debtor must carry his burden under § 362(c)(3)(B) and prove by clear and convincing evidence that the present case was filed in good faith. In determining what the court would consider in determining whether the debtor filed the

present case in good faith, the court adopted the "totality of the circumstances" approach and the various factors outline under this approach as set forth in *In re Galanis* and *In re Montoya*.

In re Parker, 2006 WL 62568 (Bankr. S.D.N.Y. 1/4/06)

The creditor filed an *ex-parte* application that the automatic stay was not in effect. The court concluded that an ex-parte application was a proper "request" under §§ 362(c)(4)(A)(ii) and 362(j). However, the court concluded that in a joint case, application of the stay must be analyzed as to each debtor. The court ultimately held that the stay was not in effect as to the husband because of two prior cases, but was in effect as to the wife because she did not have a case pending in the year prior.

In re Toro-Arcila, 334 B.R. 224 (Bankr. S.D. Tex. 2005)

Debtor filed a second case within one year of the dismissal of a previous case, so under § 362(c)(3) the automatic stay was only in place for 30 days without a court order extending the stay. On the 30th day at 8:33 p.m., the debtor filed a motion to extend the 30-day stay. The court held that because the hearing needed to be "completed" before the 30th day following the petition date, the stay terminated by operation of law. The debtor then sought to reinstate the stay under § 362(c)(4), which applies when no stay is in place because there were two cases pending within a year. The court noted that at "first blush," this section did not appear to apply because the debtor had only one pending bankruptcy case within the prior year; however, upon further review of the statutory language, the court held that § 362(c)(4) could be used by the debtor to reinstate a stay that had terminated by operation of law under § 362(c)(3) so long as the motion was filed within 30 days of the petition date, as happened in this case.

In re Warneck, 2006 WL 62667 (Bankr. S.D.N.Y. 1/4/06)

On a motion to extend the automatic stay the court stated this: "The presence of one or more of the acts identified in Section 362(c)(3)(C) will trigger the presumption that the instant case was filed in bad faith, and this presumption can only be rebutted by 'clear and convincing evidence to the contrary.'" The court then held that the presumption of bad faith did not arise in the present case because: 1) the debtors were not debtors in more than one previous case pending in the last year, 2) their prior case was dismissed pre-confirmation so there was no confirmed plan in which they could fail to perform by, 3) there was no evidence that the debtors failed o amend their schedules, 4) the debtor's daughter were willing to fund the debtors' plan, and 5) the third party contributions constituted a change in financial circumstances.

In re Schlitzer, 332 B.R. 856 (W.D.N.Y. 2005)

Section 362(h), with its automatic termination of stay if debtor does not file "statement of intention," does not apply to Chapter 13 cases.

In re Charles, 334 B.R. 207 (Bankr. S.D. Tex. 2005)

Because debtor voluntarily dismissed her single pending case within the prior year, and because none of the other factors of § 362(c)(3)(C)(i)(II) existed that create a presumption that the second case was "filed not in good faith," the debtor needed only "prove good faith by a preponderance of the evidence." The court went on to establish the following test for § 362(c)(3)(C) motions:

1. Whether the creditor to be stayed agrees that the new case was filed in good faith with respect to that creditor?	If so, the inquiry ends and the Court extends the stay. If not, the Court must proceed to the next inquiry.
2. Whether the new case is likely to result in a bankruptcy discharge (i.e., the objective test)?	If not, the inquiry ends absent exceptional circumstances. If so, the Court must proceed to the next inquiry.
3. Whether other factors show that the case was filed in good faith with respect to the creditors to be stayed (i.e., the subjective test).	The following subfactors should be considered on the totality of the circumstances. No one factor should be determinative.
A. Nature of the debt.	
B. Nature of the collateral.	
C. Eve of bankruptcy purchases.	
D. Debtor's conduct in the present case	
E. Reasons why the debtor wishes to extend the stay.	
F. Other circumstances that weight on the wisdom of the extension.	

In re Collins, 2005 WL 3529144 (Bankr. S.D. Tex. 12/27/05)

The debtor filed a motion to extend the 30-day stay. The court denied the motion primarily on a finding that the debtor's financial affairs (income down, expenses up) were worse than when during his prior bankruptcy case and that the information in the statements and schedules was not accurate. In short, the court found that the debtor could not propose a feasible plan.

In re Taylor, 334 B.R. 660 (Bankr. D. Minn. 2005)

Notice of motion to extend 30-day stay under § 362(c)(3) must be delivered to parties-in-interest not later than 10 days or mailed not later than 14 days before the hearing date.

In re Collins, 334 B.R. 655 (Bankr. D. Minn. 2005)

"[T]he notice requisite for a motion under § 362(c)(3)(B) to extend the stay of § 362(c)(3)(A) is, at the very least, service on those individual creditors that the debtor would have subjected to the extended stay, and, most prophylactically, on all creditors."

CREDIT COUNSELING REQUIREMENT

Debtor must satisfy three requirements to obtain thirty-day extension to file Credit Counseling Certificate: (1) described exigent circumstances that merit a waiver; (2) certify that the debtor was unable to obtain credit counseling within 5 days of making a request for such services; and (3) for reasons that are "satisfactory to the court."

In re Fuller, 2005 WL 3454699 (Bankr. W.D. Pa. 2005); *In re Granda*, 2005 WL 3348878 (Bankr. W.D. Pa. 2005); *In re Skarbek*, 2005 WL 3348879 (Bankr. W.D. Pa. 2005)

> Prepetition, the debtors completed a course and obtained a "Certification Of Completion Of Instructional Course Concerning ***Personal Financial Management***" (emphasis added). The debtors filed this certificate in connection with their Chapter 13 bankruptcy petition. The court noted that this is the certificate to obtain a discharge and not the certificate of credit counseling required to qualify for bankruptcy relief under § 109. Consequently, the court directed the debtors to obtain the correct counseling and to file the correct certificate.

In re Sosa, 2005 WL 3627817 (Bankr. W.D. Tex. 12/19/05)

> The debtors did not seek credit counseling prior to their petition date and did not file a certificate of credit counseling, therefore the debtors "are ineligible to be debtors in this case" and their case must be dismissed.

In re Childs, 2005 WL 3529729 (Bankr. D. Md. 2005)

> In establishing procedures for granting postpetition credit counseling requests, the court held as follows: (1) insufficient certifications will result in dismissal; (2) filing of a credit counseling certificate indicating postpetition counseling is insufficient to set aside the dismissal; (3) certification of exigent circumstances need not be under oath but it must contain a simple description of the exigent circumstance, that the debtor made a request for credit counseling within 180 days before the petition date, and that the debtor was unable to obtain such counseling within five days after making the request; and (4) both statements must satisfy the court that the debtor has complied with the statute.

In re Rios, 2005 WL 3462728 (Bankr. S.D.N.Y. 12/19/05)

> "[I]t is the Court's belief that Congress did not intend for debtors to enjoy the protections, or suffer the consequences, provided in the Bankruptcy Code unless or until they received the credit counseling required by 11 U.S.C. § 109(h). For the reasons set forth above, the Debtor's case is stricken rather than dismissed."

In re Hubbard, 333 B.R. 377 (Bankr. S.D. Tex. 2005)

> Debtors in five cases filed with credit counseling certificate and all filed motions for postpetition credit counseling. The motions alleged that debtors were at risk of home foreclosure or vehicle repossession. While the court denied all motions because the reasons were not "satisfactory to the court" as required by § 109(h)(3)(A)(iii), it held the following: (1) debtor's attorney could make request for credit counseling on behalf of client; (2) debtors must obtain credit counseling prior to filing a petition or receive an exemption from the requirement after certifying that they unsuccessfully requested credit counseling services; (3) request for credit counseling must be made before filing the petition; (4) certification is more than a motion and requires that debtor "declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct"; (5) debtor need only contact a single credit counseling agency before filing a certification under § 109(h)(3); (6) because debtors were ineligible to file, "no case was commenced under § 301, [and] there is no "case" to dismiss;" instead the five petitions were "stricken" (which arguably means the debtors could refile without the automatic stay issues of § 362(c)).

In re Miller, 2006 WL 27217 (Bankr. W.D. Pa. 1/5/06)

> Debtor filed a motion to extend time to file credit counseling certificate. Rather than file a formal certificate, the debtor filed a telecopy from the credit counseling agency stating that the debtor received counseling but that she had not received a certificate because she had not paid the $50 fee. The court held that the telecopy failed to meet the legal requirements of a "certification" but held that it constituted a motion to extend time to obtain and file the formal certificate from the credit counseling agency. In a footnote, the court stated that the credit counseling agency would have an administrative expense claim if it delivered the certificate to the debtor and the fees were reasonable.

In re Hubbard, 332 B.R. 285 (Bankr. S.D. Tex. 2005).

> Debtor's motion for postpetition credit counseling was not in the form of a "certification" as required by the statute: "Without a certification, the motion is fatally defective. Normally, the certification should set forth the facts underlying any alleged exigent circumstances, the date(s) on which the debtor requested credit counseling, which agencies were contacted to render the services, why the debtor believes that the services could not be obtained before the filing, and when the services are reasonably likely to be obtained." Accordingly, the motion was denied without prejudice.

In re Cleaver, 333 B.R. 430 (Bankr. S.D. Ohio 2005)

> Debtor filed Chapter 13 petition on day of foreclosure sale. The motion for postpetition credit counseling alleged that because of the pending sale, there was insufficient time to obtain credit counseling. Court held that "certification" of exigent circumstances required "at a minimum, a written statement that the signer affirms or attests to be true." While the exigent circumstances may be self-created by the debtor's failure to act during

the considerable time between the notice of default and the actual sale, the court held that such "brinkmanship" will be curtailed by the second requirement that the debtor requested but was unable to obtain credit counseling within five days. Because the debtor made no mention of his attempt to obtain prepetition credit counseling, the court dismissed the case. In *dicta*, the court wondered "whether a debtor need only certify that a single agency was not able to provide the services within five days, as a literal reading would seemingly compel, or must instead certify that no approved agency could provide the services within five days."

In re Davenport, 2005 WL 3292700 (Bankr. M.D. Fla. 12/6/05)

Debtor's failure to request credit counseling before filing the petition was fatal to motion for waiver of counseling requirement, and the fact that debtor received credit counseling two days after filing the petition did not rectify this flaw.

In re Wallert, 332 B.R. 884 (Bankr. D. Minn. 2005)

The court noted as a practical matter that the debtor must request credit counseling at least 5 days before the event that will force to file for bankruptcy: "The statute does nothing more than mandate debtors to recognize and start dealing with their straits of insolvency squarely, at least a week before they will bloom out to an actual, permanent economic loss. As Congress clearly contemplated, within that week one would either lay the eligibility issue to rest by snagging the counseling agency's certificate, or would qualify for the temporary exemption and, in tandem, lay the groundwork to get the briefing and counseling promptly after filing for bankruptcy."

In re Randolph, 2005 WL 3408043 (Bankr. M.D. Fla. 2005)

Debtor's statement in motion that she was unable to contact the credit counseling agency in a timely manner was not sufficient under 11 U.S.C. § 109(h)(3)(A), which requires the debtor state that she requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the required services during the 5-day period beginning on the date on which the debtor made the request.

In re Talib, WL 3429224 (Bkrtcy. W.D. Mo., Dec. 12/12/05)

A debtor sought to obtain credit counseling the afternoon of the day before a scheduled foreclosure sale of her home. She was informed that the earliest she could meet with a credit counselor was two days, which was after the scheduled foreclosure sale. The debtor filed the bankruptcy petition that day along with a motion to extend the credit counseling deadline by 30 days, which the court denied. In a motion to reconsider, the Debtor argued that she had complied with the statute because she could have received credit counseling within 5 days of making the request but not before her foreclosure sale. She also argued that § 109(h)(3) is "absurd" because it "results in ineligibility for some debtors who wait until the eleventh hour and are advised that they can obtain the required credit counseling services within the five-day statutory period, but subsequent to the

scheduled time for the event which causes the debtor to need to file." The court rejected these arguments based on a plain reading of the statue: "The Court acknowledges that the requirement may not be realistic or even fair in many circumstances, but it is a determination of policy which Congress is entitled to make and the courts are not permitted to second guess."

In re Sukmungsa, 333 B.R. 875 (Bankr. D. Utah 2005)

The debtors moved to vacate the dismissal of their bankruptcy case for failure to obtain credit counseling from an approved agency. The Court declined to grant relief from the credit counseling requirement based on excusable neglect "[g]iven the inconsistencies in the testimony of Debtors' counsel, the lack of contemporaneous documentation, the representations in the Motion and at oral argument, and the multiplicity of documents filed in this case … [when] the real issues involve the Debtors' questionable prepetition actions and counsel's inexcusable failure to reasonably inquire and verify before filing.

In re Watson, 332 B.R. 740 (Bankr. E.D. Va. 2005)

The requirement that only individuals must obtain credit counseling to qualify for bankruptcy relief, and not business associations such as partnerships or corporations, does not violate the Constitution's equal protection requirements.

In re Graham, 2005 WL 3629925 (Bankr. W.D. Ky. 12/6/05)

The court gave the debtor 15 days to amend her motion to extend the time in which to comply with the credit counseling requirement. In order to be excepted from the credit counseling requirement a debtor must file a signed motion that describes exigent circumstances that merit a wavier of the requirements and that states the debtor requested credit counseling before filing their petition, but was unable to obtain the counseling within five days after making the request. What is satisfactory to the court will be resolved on a case-by-case basis considering a totality of the particular facts and circumstances.