

Section 362(c)(3): Does It Terminate The Entire Automatic Stay?

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Introduction

Section 362 operates to create an automatic stay upon the filing of a bankruptcy petition.¹ The automatic stay, among other things, prevents a debtor's creditors from seeking to enforce a judgment against a debtor or against property of the estate,² taking any act to obtain possession of property of the estate,³ or taking any act to create or enforce a lien.⁴ Section 362, however, does contain numerous provisions that provide for limitations to the automatic stay.

Among these provisions is section 362(c)(3)(A), which provides in relevant part that "if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed . . . the stay . . . 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." There is a court split regarding whether

¹ 11 U.S.C. § 362

² § 362 (a) (2)

³ § 362 (a) (3)

⁴ § 362 (a) (4)

section 362(c)(3)(A) terminates the entire automatic stay or just the stay with regards to the debtor.⁵

Recently, in *In re Williford*, the court considered whether the section 362(c)(3)(A) terminates the entire automatic stay or just the stay with regards to the debtor.⁶ Adopting the majority approach, the *Williford* court held that the phrase “with respect to the debtor,” found in section 362(c)(3)(A), limits the termination of the automatic stay to the debtor and the debtor’s property.⁷ Alternatively, the minority approach, as discussed below in *In re Reswick*, holds that section 362(c)(3)(A) operates to terminate the automatic stay in its entirety.⁸

Part I of this Article will discuss the relevant provisions of the Bankruptcy Code. Part II will discuss the holding in *In re Williford* and some relevant facts. Part III will discuss the minority approach, as discussed in *In re Reswick*. Part IV will discuss the implications of each approach and any issues that may remain.

I. Section 362(c)(3)(A)

The automatic stay halts almost all litigation, lien enforcement, or other activities that a creditor might undertake to enforce its claim against the debtor or its property.⁹ Upon the filing of a bankruptcy petition, section 362(a) automatically stays, among other things, “the commencement or continuation . . . 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.”¹⁰ As discussed above, however, section 362 contains numerous

⁵ *In re Williford*, 2013 WL 3772840 (Bankr. N.D. Tex. July 17, 2013).

⁶ *Id.*

⁷ *Id.* at *3

⁸ *In re Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011).

⁹ Commercial Bankruptcy Litigation, Section 6:1.

¹⁰ 11 U.S.C. § 362(a). The section also stays “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; any act to obtain possession of property

provisions that provide for limitations to the automatic stay, including the limitation contained in section 362(c)(3)(A).

Section 362(c)(3)(A) provides in relevant part that “if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding one-year period but was dismissed . . . the stay . . . 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.”¹¹ Courts have struggled when determining whether the phrase “shall terminate with respect to the debtor” only applies to the debtor and his or her property or if the phrase terminates the entire automatic stay.¹²

The majority of courts hold that the stay terminates with regards to the debtor and his property that is not property of the estate,¹³ while the minority holds that the automatic stay terminates in its entirety.¹⁴ The split exists because the two groups of courts analyze the statute differently. On one hand, the majority of courts focus their analysis on the plain meaning to apply to the statute.¹⁵ On the other hand, the minority of courts analyze the phrase in the context of section 362 as a whole in addition to examining to the legislative history of section 362.¹⁶

II. *In re Williford* – The Majority Approach

of the estate or of property from the estate or to exercise control over property of the estate; any act to create, perfect, or enforce any lien against property of the estate; 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; any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title” among other things. *Id.*

¹¹ 11 U.S.C. § 362(c)(3)(a).

¹² For the majority opinion see *In re Holcomb*, 380 B.R. 813 (B.A.P. 10th Cir. 2008). See also *Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011), for the minority view.

¹³ *Holcomb*, 380 B.R. at 816 (automatic stay terminates with respect to the debtor and debtor’s property, but not with regard to the property of the estate).

¹⁴ *Reswick*, 446 B.R. at 373 (stay terminates with regards to debtor, his or her property, and property of estate).

¹⁵ *Williford*, at *3 (this Court will join the majority of courts which conclude that the plain meaning of the phrase “with respect to the debtor” limits the termination of the automatic stay to the debtor and property of the debtor).

¹⁶ *Reswick*, 446 B.R. at 366.

As discussed above, the majority of courts have rejected the argument that section 362(c)(3)(A) operates to terminate the automatic stay entirely, finding, instead, that the section only operates to terminate the automatic stay with respect to the debtor and the debtor's property. For example, in *In re Williford*, the bankruptcy court found that the plain meaning of the phrase "with respect to the debtor," as used in section 362(c)(3)(A), only operates to terminate the automatic stay with respect to the debtor and the debtor's property.¹⁷ There, the debtor executed a deed of trust to the secured creditor, placing a lien on the debtor's property.¹⁸ At some point, the debtor defaulted on the Small Business Administration Note, leading the secured creditor to serve the debtor with a notice of default and intent to accelerate.¹⁹ The debtor continued to not pay the note and filed for bankruptcy under chapter 7 of the Bankruptcy Code. This first case was dismissed due to the debtor failing to file certain information with the bankruptcy court.²⁰ The debtor then filed for bankruptcy under chapter 11 of the Bankruptcy Code, but failed to file a motion to extend the automatic stay within the thirty-day window provided for in section 362(c)(3)(A).²¹ The debtor then moved to extend the automatic stay but the court denied the motion as untimely.²² The court, however, agreed with the debtor that section 362(c)(3)(A) did not operate to terminate the entire automatic stay and instead only terminated the automatic stay with respect to the "debtor's property."²³

In holding that section 362(c)(3)(A) only terminates the automatic stay with respect to the debtor and his property, the court adopts the majority approach.²⁴ In its decision, the *Williford*

¹⁷ *Williford*, at *3.

¹⁸ *Id.* at *1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.* at *3.

court agreed with many other courts that “[section] 362(c)(3) is poorly drafted.”²⁵ Moreover, the *Williford* court opined that “this section of the statute has been variously referred to as ‘a puzzler,’ one which is at best, particularly difficult to parse and, at worst, ‘virtually incoherent,’ ‘poorly written,’ and ‘bad work product.’ Certainly, the wording of section 362(c)(3) leaves much to be desired.”²⁶

Initially, the *Williford* court agreed with the minority of courts that the legislative history of the statute appears to suggest that Congress intended that section 362(c)(3)(A) would operate to terminate the entire automatic stay on the thirtieth day after filing.²⁷ In particular, the *Williford* court quoted the Bankruptcy Appellate Panel for the Ninth Circuit, which stated that “[t]he history of section 362(c)(3)(A) indicates that Congress intended it to deter second filings. For this provision to have its intended effect, it must be interpreted as terminating the automatic stay in its entirety.”²⁸

However, agreeing with the majority of courts that have ruled on the issue, the *Williford* court examined the plain meaning of the statute and held that the automatic stay terminates only with respect to the debtor and his property.²⁹ The *Williford* court reasoned that it is “well settled law” that where the statutory language is clear, a court cannot resort to the legislative history of the statute.³⁰ When interpreting section 362(c)(3)(A), the *Williford* court found that the statutory language was clear with regards to the statement that the automatic stay “shall terminate with

²⁵ *Id.* at *2.

²⁶ *Id.* (citing *In re Paschal*, 337 B.R. 274 (Bankr. E.D.N.C. 2006); *In re Charles*, 332 B.R. 538 (Bankr. S.D.Tex. 2005); *In re Baldassarro*, 338 B.R. 178 (Bankr. D.N.H. 2006).

²⁷ *Id.*

²⁸ *Id.* (citing *Reswick*, 446 B.R. at 372).

²⁹ *Id.* at *3.

³⁰ *Id.* (“In a statutory construction case, the beginning point must be in the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.”).

respect to the debtor.”³¹ The court also found that the statutory language implies a limitation on the automatic stay.³² If Congress had wanted to terminate the entire automatic stay, the court said, Congress knew how to do so. Indeed, the court noted that Congress had done so in section 362(c)(4)(A)(i), the next section in the statute.³³ Because Congress did not use the same wording in section 362(c)(3)(A) and it did in in section 362(c)(4)(A)(i), the *Williford* court concluded that the plain meaning of the statute dictates that the automatic stay terminated with respect to the debtor and his property and not the entire automatic stay.

III. *In re Reswick* – The Minority Approach

The minority approach, as described in *In re Reswick*, holds that section 362(c)(3)(A) operates to terminate the automatic stay terminates in its entirety.³⁴ In *Reswick*, the debtor filed a voluntary chapter 13 petition.³⁵ The debtor’s first case was dismissed due to nonpayment.³⁶ Subsequently, the debtor filed a second voluntary chapter 13 petition.³⁷ Because the second case was filed within a year of the first one, Section 362(c)(3)(A) applied once thirty days had passed from the date of the second filing because the debtor failed to move to extend the automatic stay.³⁸ Shortly thereafter, the debtor’s ex-wife initiated wage-garnishment proceedings against the debtor’s post-petition earnings.³⁹ In response, the debtor filed a motion for damages for a violation of the automatic stay, claiming that the automatic stay terminated only as to him and

³¹ *Id.*

³² *Id.*

³³ *Id.* (congress used “the stay under subsection (a) shall not go into effect upon the filing of the later case ...” in the following section, something they failed to do with section 362(c)(3)(a). That phrase, in the context of the entire paragraph of (c)(4)(a)(i), terminates the entire stay.

³⁴ *Reswick*, 446 B.R. at 373.

³⁵ *Id.* at 364.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* (the bankruptcy court could have extended the stay if a motion was filed within 30 days from the hearing, but no motion was made).

³⁹ *Id.*

not as to property of the estate.⁴⁰ The bankruptcy court denied the debtor’s motion, holding that the automatic stay had terminated once thirty days had passed from the date of the second filing, and that therefore, the wage garnishment, that was commenced after that date, did not violate the stay.⁴¹

The Bankruptcy Appellate Panel for the Ninth Circuit affirmed the bankruptcy court, opining that the minority approach is the “better-reasoned” approach⁴² and that the phrase “with respect to the debtor” must be analyzed in the context of section 362(c)(3) as a whole.⁴³ The *Reswick* court stated that whereas the courts adopting the majority approach focus on the phrase “with respect to the debtor” on its own, finding that it is unambiguous, the courts adopting the minority approach interpret the phrase in the context of the entire section 362(c)(3) and then examine the legislative history to support this approach.⁴⁴ The *Reswick* court then stated that because reading the phrase in the context of section 362(c)(3) better comports with “principles of statutory construction,” that the minority approach is more persuasive and is supported by legislative history.⁴⁵

IV. Implications and Possible Issues

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 365.

⁴³ *Id.* at 366.

⁴⁴ *Id.* at 366-367.

⁴⁵ *Id.* at 367. (the court found that where statutory language is ambiguous, courts can look to legislative history. They then looked to legislative history and found that it supports their interpretation of the statute (that they automatic stay terminates in its entirety, 30 days after the petition date for a repeat filer). The court noted that for many years successive bankruptcy filings have caused significant problems within the bankruptcy system and for creditors seeking to pursue state law remedies. Congress then created the National Bankruptcy Review Commission to address the issue of successive filings that were meant to abuse the automatic stay. The commission investigated and suggested that the automatic stay not go into effect in certain successive bankruptcy filings, something implemented by the House and Senate. Similar language, this court noted, is found in section 362(c)(3)(A). Therefore, the court stated, the history of section 362(c)(3) indicate that Congress intended the section to deter second filings and that for the provision to have its intended effect, “it must be interpreted as terminating the automatic stay in its entirety.”

A court's decision to adopt one approach over the other is significant regardless of which approach is adopted. On one hand, if a court adopts the majority approach, it will mean that a creditor will only be able to proceed against property that is "property of the debtor" at the commencement of the bankruptcy proceedings, assuming that the creditor is permitted to execute against such property under applicable law.⁴⁶ "Property of the debtor" includes any property the debtor exempted under section 522 of the Bankruptcy Code or applicable state law,⁴⁷ as well as any property excluded from property of the estate.⁴⁸ The automatic stay, however, still protects all property of the estate, which includes "all legal or equitable interests of the debtor in property as of the commencement of the case."⁴⁹ As such, a secured creditor must move to terminate, modify, annul, or condition the automatic stay with respect to its interest in the property of the estate if it wants to pursue its remedies against such property.⁵⁰

On the other hand, if the court, however, adopts the minority approach, the entire automatic stay will be terminated. This means that the creditors will have free rein to proceed against the debtor, his or her property, and the property of the estate. As such, under the minority approach, a creditor is spared the time and expense of moving for relief from the automatic stay. Consequently, in a jurisdiction that applies the majority approach, an individual debtor will

⁴⁶ *Bankr. L. Rep.* P 1148 (C.C.H.), 2011 WL 577683.

⁴⁷ See 11 USC 522 (exempted property includes, among others, interest in certain property, both real and personal; retirement funds; unmatured life insurance, except for credit life insurance; social security benefits; unemployment compensation; local public assistance; veterans' benefit; alimony or other support; payment under stock bonus, pension, profitsharing, annuity;

⁴⁸ See 11 USC 541 (excluded from property of the estate includes power a debtor exercises on solely for the benefit of another entity; certain interest a debtor may have as a lessee of nonresidential property; eligibility of debtor to participate in programs authorized under the Higher Education Act of 1965; accreditation status or State licensure of the debtor as an educational institution; funds used to purchase a tuition credit or certificate (only if the tuition credit or certificate was for the child, stepchild, grandchild, or stepgrandchild of the debtor; money withheld by an employer from wages of employment for contribution towards an employee benefit program, deferred compensation plan, tax deferred annuity, health insurance plan;

⁴⁹ § 541 (a) (1).

⁵⁰ Neil Stadtmire, *Reilief From Automatic Stay- Inadequate Protection of Secured Interest*, 20 Am. Jur. Proof of Facts 3d 521 (1993, updated 2014).

likely be unable to protect his or her property by refiling a second case if the debtor's first bankruptcy case was dismissed within the previous year.

It is important to remember that section 362(c)(3)(B) provides that upon the motion of a party in interest, including the individual debtor, the court may extend the automatic stay as to any or all creditors if after notice and a hearing completed before the thirty-day period expires if the moving party demonstrates that filing of the second case is in "good faith" with respect to the creditor to be stay.⁵¹ If a debtor files in a jurisdiction that adopts the minority approach or a jurisdiction that has yet to decide the issue, he should consider moving to extend the automatic stay within the thirty-day window in order to protect the property included in his bankruptcy estate. Ultimately, the outcome of such motion will depend on whether the debtor can establish that he filed the second case in good faith with respect to his creditors. However, if a debtor files in a jurisdiction that adopts the majority approach, he probably would not want to incur the expense associated with filing such a motion because "the remaining room for operation of [section 362(c)(3)] would be so small that the statute would become almost meaningless."⁵²

Conclusion

Section 362(c)(3) is going to continue bringing about different results depending on what jurisdiction the debtor files in. If the debtor files in a jurisdiction that follows the majority approach, the automatic stay will terminate with respect to the debtor and the debtor's property.⁵³ As such, the creditor will only be able to proceed against property that is "property of the debtor" at the commencement of the bankruptcy proceedings.⁵⁴ If, however, the debtor files in a

⁵¹ See § 362(c)(3)(B)

⁵² Peter E. Meltzer, *Wont' You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)*, 86 Am. Bankr. L.J. 407, 409 (2012).

⁵³ *Williford*, at *3.

⁵⁴ See *supra* note 46

jurisdiction that follows the minority view, the automatic stay will terminate in its entirety,⁵⁵ and the creditor will be able to proceed against the debtor, his or her property and the property of the estate immediately.

This distinction is also important for a debtor's decision as to whether he should move to extend the automatic stay in second case. On one hand, if the debtor files in a jurisdiction adopting the majority approach, the debtor will likely not want to incur the expense associated with filing a motion to extend the automatic stay. On the other hand, if a debtor files in a jurisdiction that adopts the minority approach or a jurisdiction that has yet to decide the issue, he should consider moving to extend the stay within the thirty days of the filing of the second bankruptcy case.

⁵⁵ *Reswick*, at 373.

