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Problems in the Code

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Intent over Plain Meaning: The Minority Perspective of § 362(c)(3)(A)

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The automatic stay, provided for in § 362 of the Bankruptcy Code, is widely regarded as one of the most (if not *the* most) essential features of bankruptcy law. The "stay" under § 362 immediately halts (on the filing of a petition) all collection activities against a bankruptcy debtor, including — but not limited to — the continuation/commencement of legal actions to recover a claim against the debtor, any act to obtain possession of property of the debtor, or any act to create, perfect or enforce a lien.

Expectantly, and understandably so, many debtors file for bankruptcy primarily for the breathing space offered by the stay. The halting of certain legal actions — and perhaps even a literal "last minute" effort to save a *major* asset such as a family home — provides debtors with an incredibly powerful weapon against creditors. However, as with most powerful legal rights or benefits (especially if easily accessible/invokable), it is likely that those who are able to use such privileges will exceed their intended boundaries. Over the course of its existence, the automatic stay has qualified as one of those legal protections that (some) bankruptcy debtors have abused, stretched or otherwise misused.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) created new subsections to § 362 — (c)(3), (c)(4) and (d)(4)(B) — in an effort to quell perceived abuse by serial bankruptcy filers. Under § 362(c)(3), if a debtor files a bankruptcy petition within the same year that he/she had a separate bankruptcy case pending, the stay under subsection (a) with respect to any action taken with respect to a debtor, 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.

Despite BAPCPA's clear attempt to impose consequences for debtors that file multiple cases in a short period of time, § 362(c)(3)(A) has divided courts, seemingly from its inception, into two distinctly different interpretations: the stay terminating *partially* (the "majority view"), and the stay terminating in its *entirety* (the "minority view"). Unsurprisingly, considering the title of this article, the author is advocating for the minority.

Premised on a "plain meaning of the statute" approach, supporters of the majority posit a "partial release" theory, finding that the phrase "with respect to the debtor" terminates the stay imposed by § 362(a) only regarding the debtor, but *not* with respect to the bankruptcy estate.[1] The majority argues that Congress knew the difference between the debtor and the estate, and could have added "and the property of the estate" or eliminated "with respect to the debtor," and thus written a statute that terminated the entire stay after 30 days, but Congress did not.[2] Full disclosure: The majority view has merit from a strict textual standpoint, but the minority view (taking the statute as whole) provides a more logical interpretation in light of BAPCPA's desire for bad-faith deterrence.

The plain meaning of legislation should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters; in such cases, the *intention of the drafters, rather than strict language, controls*.[3] In that rare instance where it is uncontested that legislative intent is at odds with the literal terms of the statute, then a court's primary role is to effectuate Congress's

1 *In re Yarbra*, 2023 WL 162691, at 2 (Bankr. N.D. Ga. Jan. 11, 2023).
2 *First Fin. Bank v. Clark*, 627 B.R. 663, 667 (N.D. Ind. 2021).
3 *United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 109 S. Ct. 1026 (1989) (emphasis added).

intent — *even if a word in the statute instructs otherwise*.[4] While the majority view (fairly) stresses the importance of the (c)(3)(A)'s inclusion of "with respect to the debtor" compared to the exclusion of the same phrase in (c)(4), it is necessary to view the statute in a broader context. The minority view appears to harmonize BAPCPA's objective especially in light of other parts of § 362, such as subsection (j).

Congress provided a summary method by which parties-in-interest may confirm that the stay has been terminated through § 362(j).[5] Section 362(j) allows a party-in-interest, without notice and a hearing, to receive an order confirming that the automatic stay has been terminated under § 362(c).[6] If it does not effectuate a wholesale termination of the stay, this provision would be inconsistent with § 362(c)(3)(A) because § 362(j) does not carve out exceptions for property that remains protected by the stay, but it broadly and summarily allows parties to confirm that the stay has been terminated under § 362(c).[7]

Furthermore, through BAPCPA, Congress found it appropriate (in its effort to combat abusive/serial filers) to create subsection (d)(4)(B) of § 362. This provision allows a secured creditor to move the court for an order determining that a petition was filed as part of a scheme to hinder, delay or defraud such creditor due to the filing of multiple bankruptcies. Should the court make such a determination, the secured creditor is entitled to *in rem* relief for a period of two years, specifically covering the affected collateral.

Through this provision, Congress acknowledged that part of the abuse that required a remedy through BAPCPA was the tendency of debtors to file petitions to evade the prosecution of specific creditors holding claims on specific collateral. Consequently, an elevated level of protection for secured creditors was realized with § 362(d)(4)(B). While a natural response to this position could be that Congress used subsection (d)(4)(B) as the provision to address secured creditors (and that subsection (c)(3)(A) was designed for a different purpose), the impact of the partial-release theory posited by the majority does not comport with the rest of the statute and hardly serves as a deterrent.

In practical terms, what is the impactful difference between "property of the debtor" and "property of the estate?" To interpret § 362(c)(3)(A) as allowing the stay to continue as to property of the estate would effectuate one of the following: (1) be contrary to the clear legislative history; (2) do little to discourage bad-faith, successive filings; and (3) create, rather than close, a loophole in the bankruptcy system by allowing these debtors to receive the principal benefit of the automatic stay, which is protection of property of the estate.[8]

BAPCPA was designed to do precisely what its title suggests: prevent abuse. Many courts have discussed, examined or otherwise alluded to BAPCPA's legislative intent when faced with the issue of whether the stay terminates partially under § 362(c)(3)(A) or terminates in its entirety under the same provision. A recent Eleventh Circuit case attempted to provide context and support for the partial-release theory as it relates to the role of a chapter 7 trustee.

Under the partial-release theory, the trustee in a chapter 7 case need not worry about creditors attempting to enforce their debts against the trustee, or against unencumbered property of the estate.[9] Convincing analysis of the minority view must explain how § 362(c)(3)(C) functions for a chapter 7 trustee, who (if property of the estate loses stay protection per § 362(c)(3)(A)) would be subjected to an impossibly short deadline to prove by "clear and convincing evidence" that the chapter 7 case was filed in good faith.[10] While consideration for a chapter 7 trustee's role is important, deterring and preventing debtor misuse was BAPCPA's overarching intent. Even so, the trustee, as a party-in-interest, can move to extend the stay if the trustee believes that a debtor's assets are beneficial to the administration of the estate.[11]

Ultimately, if § 362(c)(3)(A) merely allowed creditors to badger the debtor with phone calls or obtain debtor property that is not property of the estate, then *this section would be of no value*.[12] A creditor's threat to collect would be hollow if the stay remained as to property of the estate, because § 1306 broadly incorporates nearly all of a debtor's valuable pre- and post-petition property.[13]

Conclusion

While this article favors the minority view over the majority (as a matter of congressional intent and appropriate application), the purpose is not to petition for the enhancement of additional rights or protections for a certain constituency. In fact, perhaps the termination of the entire stay *only* pursuant to § 362(c)(4) is punitive enough as it relates to the termination of the stay by operation of law. However, given the existence of § 362(c)(3), the "termination in its entirety" perspective appears more appropriate than partial termination. abi

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4 *Morgan v. Gay*, 466 F.3d 276, 278 (3d Cir. 2006) (emphasis added).
5 *In re Jupiter*, 344 B.R. 754, 760 (Bankr. D.S.C. 2006).
6 *See* 11 U.S.C. § 362(j). *See also Jupiter* at 760.
7 *Id.*
8 *Id.* at 762.
9 *In re Yarbra* at 3.
10 *Id.* (quoting *In re Thu Thi Dao*, 616 B.R. 103, 107 (Bankr. E.D. Cal. 2020)).
11 *Jupiter* at 760.
12 *Id.* (emphasis added).
13 *Id.* at 761-62.