

# Repeat Filing Under BAPCPA: Stays, Multiple Discharges and Chapter 20

*“It’s not ignorance does so much damage; it’s knowin’ so darned much that ain’t so.”*<sup>2</sup>

—Josh Billings

It is now widely known that the Bankruptcy Abuse and Consumer Protection Act of 2005 (BAPCPA) changed the waiting times for certain debtors who, having previously obtained a discharge, wish to seek another.<sup>3</sup> It is perhaps less widely known that BAPCPA limits or denies a stay to certain repeat filers following dismissals during the previous year. It is not unusual, therefore, for a lawyer to be asked how long a person who previously filed bankruptcy must wait to file again. A common answer to this question seems to be something like, “You now have to wait eight years.” That answer is often wrong and can mislead and discourage debtors in need of bankruptcy relief from seeking a remedy for which they qualify.

Laypersons unfamiliar with the language of the law cannot articulate their questions in precise legal terms. Lawyers must therefore attempt to discern what inquisitive clients really need to know. Usually, a debtor does not need to know whether he can file a case, although even the simple act of filing may at times be unavailable.<sup>4</sup> He probably needs to know whether he can obtain a stay, and, in most cases, a discharge of dischargeable<sup>5</sup> debts.

Analysis of these questions must begin with a determination of whether the previous case was dismissed or concluded with a discharge. If the debtor’s previous



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case ended by dismissal, the issue is whether or when the debtor can obtain and maintain another stay. If, on the other hand, the previous case concluded with a discharge, the issue is when the debtor may be able to obtain another discharge.

## STAYS

In general, any person who files a petition is automatically entitled to a stay under 11 U.S.C. § 362(a). The stay does not apply to a number of legal and creditor actions. These are set out in subsection (b) of the same section. There are dozens of exceptions to the automatic stay, but exceptions of general interest would include criminal proceedings,<sup>6</sup> matters

related to paternity, support, child custody, visitation, dissolution of marriage (except division of property that is property of the estate),<sup>7</sup> and matters related to domestic violence.<sup>8</sup>

The purpose of the stay was stated *In re Whitaker*<sup>9</sup> as follows:

Traditionally, the automatic stay has served to “prevent dismemberment of the [bankruptcy] estate and insure its orderly distribution.” *SEC v. First Financial Group*, 645 F.2d 429, 439 (5th Cir.1981), citing S. Rep. No. 95-989, 95th Cong., 2d Sess. 50 (1978); H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 341 (1977). In that capacity, the automatic stay serves the interests of both the debtor and the creditors of the bankruptcy estate. For the debtor, it provides a “breathing spell” by “stopping all collection efforts, all harassment, and all foreclosure actions.” S. Rep. No. 95-989, 95th Cong.2d Sess. 54-55 (1978); H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977). However, the stay also serves the interest of creditors, insofar as it “eliminate[s] the impetus for a race of diligence by fast-acting creditors.” *SEC v. First Financial Group*, at 439. The stay ensures that assets are distributed according to the order of priorities established by Congress.<sup>10</sup>

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<sup>2</sup> Quote by Josh Billings, which was the pen name of the humorist born Henry Wheeler Shaw. See [http://en.wikipedia.org/wiki/Josh\\_Billings](http://en.wikipedia.org/wiki/Josh_Billings).

<sup>3</sup> 11 U.S.C. § 101. The principal provisions of BAPCPA became effective on October 17, 2005.

<sup>4</sup> Bankruptcy courts do occasionally enjoin repeat filers from filing cases for specified periods of time. See *In re Casse*, 198 F.3d 337 (2d Cir. 1999) and *In re Rusher*, 283 B.R. 544 (Bankr. W. D. Mo. 2002) for cases in which courts issued such injunctions, pursuant to their general powers under 11 U.S.C. § 105. In the absence of such an order, a debtor can file if the debtor is eligible to be a debtor in bankruptcy under 11 U.S.C. § 109.

<sup>5</sup> Exceptions to discharge are set forth in 11 U.S.C. §§ 523 and 1328, and in 42 U.S.C. § 292f(g), which pertains to “HEAL” loans (educational loans to prospective healthcare providers under the federal Heal Education Assistance Act).

<sup>6</sup> 11 U.S.C. § 362(b)(1).

<sup>7</sup> Property of the estate is defined in 11 U.S.C. § 541.

<sup>8</sup> 11 U.S.C. § 362(b)(2).

<sup>9</sup> 341 B.R. 336 (Bankr. S.D. Ga. 2006)

<sup>10</sup> *Id.* at 8-9.

BAPCPA added provisions designed to deny a stay to persistent filers of bad-faith petitions, specifically filings intended not to reorganize or obtain a discharge, but merely to temporarily frustrate creditors by repeatedly invoking the automatic stay, and then dismissing the case or suffering a dismissal by the court, only to file again once a creditor resumes collection efforts. By such filings, the debtor seeks merely to delay legitimate collection procedures, notably inevitable foreclosures.

Accordingly, BAPCPA provides that if two or more bankruptcy cases filed by the debtor were dismissed within the previous year, there is no stay automatically available to the debtor.<sup>11</sup> The court can, however, impose a stay, on motion filed within 30 days of filing and a showing of good faith.<sup>12</sup> If only one case was dismissed within the previous year, the debtor is entitled to an automatic stay lasting only 30 days. The court can continue this temporary stay on motion of the debtor and demonstration of good faith; however, the notice and hearing must be completed within 30 days following the filing to qualify under this subsection.<sup>13</sup> Ironically, a one-time repeat filer who misses the deadline apparently can dismiss and re-file and still have a chance to get a stay imposed as a multiple filer. See *In re Toro-Arcila*,<sup>14</sup> where this possibility was mentioned. At least one court has extended the temporary stay of a debtor who filed too late to allow for completion of the notice and hearing within 30 days, relying upon § 105 for authority to do so.<sup>15</sup>

A debtor's Chapter 7 case can be dismissed for abuse where it has been determined that the debtor has sufficient

resources to fund a repayment plan under another chapter.<sup>16</sup> Since it would not be abusive for a debtor whose case was dismissed for that reason to immediately re-file under another chapter, the new law provides an exception for such a debtor, thereby permitting an unfettered automatic stay upon re-filing under the other chapter.<sup>17</sup> Also, the stay is not limited with respect to a co-filing spouse who has not had a case dismissed within the previous year, and is filing jointly with a spouse who has.<sup>18</sup> Several cases have held that § 362(c)(3)(A) terminates the stay with respect to the debtor, but does not terminate the stay with respect to property of the estate (as distinguished from the property of the debtor).<sup>19</sup> But see *In re Jupiter*,<sup>20</sup> holding that the stay terminates with respect to property of the estate, as well.<sup>21</sup>

### MULTIPLE DISCHARGES

Eligibility for a multiple discharge depends upon (a) which kind of procedure was done before, (b) if the previous case was under Chapter 12 or 13, how much was paid, and (c) which kind of new case will be filed. BAPCPA now contains four different waiting periods for eligibility for a discharge, and in some circumstances no waiting period at all. The specified waiting periods are two, four, six and eight years.

The following code provisions govern multiple discharges:

For Chapter 7 cases, section 727(a)(8) of the Code provides:

(a) The court shall grant the debtor a discharge, unless –

. . .

(8) the debtor has been granted a discharge under this section, under

section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

(A) 100 percent of the allowed unsecured claims in such case; or

(B) (i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort.<sup>22</sup>

For Chapter 13 cases, section 1328(f) of the Code provides:

(f) Notwithstanding subsections (a) and (b), the court shall not grant a discharge of all debts provided for in the plan or disallowed under section 502, if the debtor has received a discharge –

(1) in a case filed under chapter 7, 11 or 12 of this title during the 4-year period preceding the date of the order for relief under this chapter, or

(2) in a case filed under chapter 13 of this title during the 2-year period preceding the date of such order.<sup>23</sup>

Therefore, if the debtor obtained a discharge in the previous case, and if the debtor is now filing a case under Chapter 7 or 13, there may (or may not) be a

11 11 U.S.C. § 362(c)(4)(A)(i).

12 11 U.S.C. § 362(c)(4)(B).

13 11 U.S.C. § 362(c)(3). *In re Norman*, 346 B.R. 181 (Bankr. N.D. W.Va., 2006).

14 334 B.R. 224, 228 (Bankr. S.D. Tex. 2005).

15 *In re Whitaker*, 341 B.R. 336 (Bankr. S.D. Ga. 2006).

16 11 U.S.C. § 707(b).

17 *Id.*

18 *In re Parker*, 336 B.R. 678 (Bankr. S.D. N.Y. 2006).

19 “[P]roperty of the debtor is property acquired after the commencement of the case, property that is exempted, and property that does not pass to the estate.” *In re Jupiter* 344 B.R. 754, 757 (Bankr. D.S.C., 2006), *In re Jones*, 339 B.R. 360 (Bankr. E.D. N.C., 2006), *In re Moon*, 339 B.R. 668 (Bankr. N.D. Ohio, 2006), *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn., 2006), *In re Harris*, 342 B.R. 274 (Bankr. N.D. Ohio, 2006).

20 344 B.R. 754 (Bankr. D.S.C., 2006).

21 *Id.* at 759-762.

22 11 U.S.C. § 727

23 11 U.S.C. § 1328(f).

required time gap between filing the previous case and eligibility to obtain another discharge in the new case. There is no waiting period for a new case filed under any chapter other than 7 or 13. If the debtor did not obtain a discharge in the earlier case, these waiting periods do not apply. Following is a summary of these BAPCPA discharge waiting periods, organized according to which chapter is currently under consideration.

A debtor filing under Chapter 7 cannot be granted a discharge if the debtor received a discharge in a Chapter 7 or 11 case commenced within eight years of the filing of the new case.<sup>24</sup> Nor can the debtor be granted a discharge in a Chapter 7 case if the debtor received a discharge in a prior Chapter 12 or 13 case filed within six years of the filing of the new case, unless in the previous Chapter 12 or 13 case the debtor paid into the plan an amount equal to “100 percent of the allowed unsecured claims” or 70 percent of allowed unsecured claims, and “the plan was proposed ... in good faith, and [the plan constituted] the debtor’s best effort.”<sup>25</sup>

In calculating the start date of this time period, § 727 refers to the date the earlier case was “commenced.” At least two cases have held that the bar runs from the date of “filing” of the earlier case, not the date the discharge was granted.<sup>26</sup> If the earlier case was converted from one chapter to another, there may be an issue as to whether the previous case was “under” the chapter under which it was filed or the chapter under which the discharge was granted. Several cases have held that the chapter under which the discharge was obtained controls, giving the statute a decidedly non-literal interpretation.<sup>27</sup>

The debtor filing under Chapter 13 cannot get a discharge if the debtor received a discharge in a Chapter 7, 11 or 12 case filed within four years of the filing of the new case. Nor can the debtor receive a discharge in a Chapter 13 case if it is filed within two years of the filing of a previous Chapter 13 case.<sup>28</sup>

To simplify this jumble of numbers, these waiting periods are summarized in the following table:

Previous Case	New Chapter 7	New Chapter 13
	Must Wait	Must Wait
Chapter 7	8 years	4 years
Chapter 11	8 years	4 years
Chapter 12	6 years*	4 years
Chapter 13	6 years*	2 years

\* Unless debtor’s previous plan paid 100 percent or 70 percent with good faith and best effort requirements met; then no waiting period is required for eligibility for discharge.

## CHAPTER 20

The foregoing does not mean a debtor cannot file and obtain a stay during one of the gaps; only that, if he does, he cannot obtain a discharge. Ineligibility to obtain a discharge does not preclude confirmation of a Chapter 13 plan<sup>29</sup> and availability of a discharge may not, in some cases, be crucial.<sup>30</sup> Although a debtor may be unable to obtain a discharge, he may still benefit from an automatic stay and an affordable payment plan. Consider, for example, a debtor who has non-dischargeable debts, such as educational loans, along with medical bills and credit

card debts. Assume further that the debtor has a regular income,<sup>31</sup> but not enough to disqualify him for Chapter 7 relief under 11 U.S.C. § 707(b).

This hypothetical debtor might first obtain a discharge of his medical bills and credit card debts under Chapter 7, and then immediately file for protection from his student loan creditors under Chapter 13, and thus obtain the benefit of an automatic stay. The debtor could then concentrate his available resources on paying down his non-dischargeable debts through a Chapter 13 payment plan, which could run up to five years.<sup>32</sup> And, if the first plan did not pay off the debts, perhaps an additional plan (a Chapter 33) would be in order.

## CONCLUSION

A client inquiring about filing bankruptcy may need a stay, a discharge or both. An individual who filed a Chapter 7 case less than eight, but more than four, years ago may simply need protection from creditors and an affordable payment plan. Both of these may be available under Chapter 13. Occasionally, a repeat-filing debtor will need to file under Chapter 11 or 12. It is therefore incumbent upon counsel advising a client concerning how long he or she must wait to file bankruptcy again to determine and advise the client as to the availability of a stay, as well as eligibility for a discharge. A correct and useful response requires analysis of what was done previously and when, together with analysis of available options and their efficacy to deal with the debtor’s individual circumstances and needs, rather than, “You now have to wait eight years.”

<sup>24</sup> 11 U.S.C. § 727(a)(8).

<sup>25</sup> 11 U.S.C. § 727(a)(9). The Eighth Circuit Bankruptcy Appellate Panel recently held that, for purposes of calculating the percentages in this subsection, “payments under the plan” include payments to all creditors, included secured creditors, and the trustee, not merely payments to unsecured creditors. The debtor is not required to have paid those percentages to general unsecured creditors through the plan. *In re Griffin*, 352 B.R. 475 (B.A.P. 8th Cir. 2006).

<sup>26</sup> *In re West*, 352 B.R. 482 (Bankr. E.D. Ark. 2006).

<sup>27</sup> *In re Capers*, 347 B.R. 169 (Bankr. D.S.C. 2006), *In re Sours*, 350 B.R. 261 (Bankr. E.D. Va. 2006), *In re Grydzuk*, 353 B.R. 564 (Bankr. N.D. Ind. 2006), *In re Knighton*, 355 B.R. 922 (Bankr. M.D. Ga. 2006).

<sup>28</sup> 11 U.S.C. § 1328(f).

<sup>29</sup> See *In re Bateman*, 341 B.R. 540 (Bankr. D. Md. 2006), *In re Lewis*, 339 B.R. 814 (Bankr. S.D. Ga. 2006), *In re McGehee*, 342 B.R. 256 (Bankr. W.D. Ky. 2006), *In re Kahn*, 2006 WL 3716036 (D. Md., 2006), *In re Sanders*, 2007 WL 1454466 (Bankr. E.D. Mich. 2007).

<sup>30</sup> *In re Bateman*, 341 B.R. 540 (Bankr. D. Md., 2006).

<sup>31</sup> 11 U.S.C. § 109(e).