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The Effects on Retail Bankruptcies of the Bankruptcy Abuse Preventions and Consumer Protection Act: Can Retailers Really Be Reorganized?

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NOTE:

“Current Law” as used herein refers to Bankruptcy Law that existed pre-October 17, 2005. “New Law” refers to BAPCPA, fully effective October 17, 2005

The Effects on Retail Bankruptcies of the Bankruptcy Abuse Preventions and Consumer Protection Act: Can Retailers Really Be Reorganized?

I. Assignment, Assumption and Rejection of Non-Residential Leases – Change in the Balance of Power Between Landlords and Retailers.

A. *Amendments to Section 365(d)(4):*

1. Current Law – Debtor must assume or reject leases within 60 days following the petition date. Extensions generally available “for cause”. Typically, multiple extensions permitted allowing retailer debtors to postpone the decision to assume or reject.

- Allows debtors to review store performance over at least one and often two or more holiday seasons.
- Allows retailers to try out new formats, merchandise categories, operating strategies, and changes to business plans.
- Allows leisurely negotiations with landlords for rent relief or lease modifications.
- Permits extended marketing periods for leases, fostering sales of “designations rights”.

2. New Law --

(a) Time Period for Assumption/Rejection. Debtor must assume or reject leases within 120 days following the petition date. Bankruptcy Court may issue one 90-day extension “for cause”. Additional extensions only permitted with the written consent of the affected landlord(s).

- Shorter period takes away or diminishes the above advantages:
 - May have only one or even no holiday seasons to evaluate.
 - May effect the value of designation rights if purchaser has less time to market and assume/reject.
- Debtors forced to evaluate leases pre-petition or immediately upon filing.
- Debtors forced to negotiate with landlords to extend the 210 day period, likely resulting in “extortion” payments to landlords.

(b) Administrative Claim for Lease Assumed then Rejected.

Under new section 503(b)(7), in the event the debtor assumes and then rejects a lease, the landlord has an administrative claim equal to all amounts due under the lease for two years from the date of rejection or turn over, whichever is later. Landlord has no duty to mitigate. Under current law, the landlord’s claim in this instance was a general unsecured claim.

B. *Amendments to Section 365(b):*

1. Current Law – Bankruptcy Courts have generally found that restrictive “use” clauses in leases are effectively constraints on assignment of executory contracts and have excised those clauses, permitting free assignment of such leases despite the use clause.

2. New Law – Under the new law, shopping center lease provisions are specifically applicable to lease assignees, so it is more difficult to argue that “use” clauses are “anti-assignment” provisions. In addition, debtors must now compensate landlords for breaches of non-monetary lease provisions

C. *Practical Effects on Retail Cases and Structuring of DIP Facilities.*

(a) Credit Facility Maturity. Lenders need to make sure that the debtor will have use of the stores for the period required to effectuate a liquidation exit from the credit. Must take into account the assumption/rejection deadline and anticipated time for approval and completion of liquidation sale in setting the maturity date.

(b) Liquidity Concerns. Retailers required to expend resources prior to filing or immediately upon filing to determine which stores to keep and which to reject. This impacts liquidity when it is typically the tightest.

(c) Collateral Value. Lease value has been an effective source of additional collateral in structuring retail credit facilities, especially tranche B loans. Shorter period to assume/reject limiting the potential period to market leases, as well as the enforcement of a “use” clause may impact value of designation rights, decreasing lease value as a potential source of repayment.

(d) Increased Administrative Claims. In the event the debtor prematurely assumes and later rejects leases, the new law results in much higher administrative claims. Undersecured lenders ability to get repaid is adversely impacted by higher administrative claims.

(e) Timing of Filings. Lenders must be aware of how the deadline to assume or reject will impact the timing of the filing of a bankruptcy case. Retailers with seasonal businesses will be reluctant to file in the first half of the year, needing to get through a holiday selling season.

II. Reclamation Claims – New Powers for Vendors.

A. *Amendments to Sections 503(b)(9) and 546(c).*

1. Current Law – Vendors have rights to reclaim goods received by an insolvent debtor upon written demand made within 10 days after debtor’s receipt of the goods or 20 days after receipt if the 10 day period expired following filing of the bankruptcy petition. Vendors properly asserting reclamation claims had a priority unsecured claim or a reclamation right.

2. New Law –

(a) Administrative priority status now automatically granted to any vendor supplying goods to the debtor in the ordinary course of business within 20 days before the date of commencement of the case.

(b) Section 546(c) establishes a new federal reclamation right for vendors providing goods to an insolvent debtor within 45 days before the date of commencement of the case.

(c) Section 546(c) eliminates the ability of the Bankruptcy Court to deny a reclamation claim by granting the vendor administrative claim priority. If this is the case, what is the remedy? Actual return of the goods only?

(d) Rights of reclamation creditors still subject to perfected secured creditors.

B. *Practical Effects on Retail Cases and Structuring of DIP Facilities.*

1. Confusion in Application of New Law. Application of the new law is confusing. If vendors selling goods within 45 days of the petition date are entitled to an absolute right to return of their goods, how does the senior lender lend on these goods? Lenders may need to build in reserves to the Borrowing Base to manage the risk of inventory being returned to reclamation creditors.

2. Increased Administrative Claims. By expanding the universe of reclamation claimants to those shipping within 45 days of the petition, the amount of administrative claims is dramatically increased.

- Admin creditors have the right to (i) immediate payment, (ii) adequate assurance, (iii) convert the case.
- A Plan cannot be confirmed without payment of all admin claims in full.
- Undersecured lender competes with additional admin claims for payment of deficiency.

Lenders may need to impose reserves to protect against being undersecured and competing with bigger admin claim pool for full recovery. Since the administrative claim pool is dramatically larger, professionals will likely seek larger retainers and carve-outs, affecting debtor's cash flow in the beginning of the case.

3. Potential Reclamation Creditor Committees. Conceivably, reclamation creditors may seek to form their own committees, resulting in an additional constituency to deal with, with additional professionals further increasing the administrative burden of the case. Theoretically, reclamation creditors may seek a "carve-out" from the secured lender similar to the professionals fee carve-out.

3. Debtors Unlikely to Load Up On Goods. Due to admin status of reclamation creditors, debtors are unlikely to want to load up on goods immediately prior to filing. Secured lenders previously benefited from enhanced inventory valuations as a result of prepetition shipments.

4. Cash Flow. Since administrative claims must be paid, the increase in reclamation claims will adversely affect cash flow in the beginning of the case, when liquidity is frequently tightest.

III. Beware of Ad Valorem Taxes.

A. *Amendment to Section 506(c)*. Section 506(c) allows a trustee to charge a secured lender's collateral the reasonable costs of preserving and disposing of the collateral to the extent of benefit to the secured lender (e.g., costs of insurance, security, auction fees, etc.)

1. Current Law – The types of expenses chargeable under 506(c) are not delineated.

2. New Law – Ad valorem property taxes are specifically included within expenses for which 506(c) can be used to charge the collateral.

B. *Practical Effect on Retail Cases and Structuring of DIP Facilities*.

1. Prior to the enactment of the new law, lenders were aware that in a few states, ad valorem taxes could prime the lender's lien. Now, both pre and post-petition ad valorem taxes can be charged to the collateral. Lenders need to quantify what this tax liability may be and take reserves, curtailing availability.

2. Bankruptcy judges have been leery of granting 506(c) waivers in DIP orders. It is likely that with the new law, we can presume that the Court will not grant the waiver over the objection of taxing authorities.

IV. New Leverage for Utility Providers.

A. *Amendments to Section 366*.

1. Current Law – Section 366 provides that the debtor must provide utilities, within 20 days of the petition date, with adequate of payment. Routinely, this was accomplished with the grant of administrative expense claim as part of the first day orders, as opposed to having to provide the utility company with a cash security deposit.

2. New Law –

(a) Revised Section 366(C)(3)(B)(iii) specifies that “assurance of payment” means (i) a cash deposit, (ii) a cash equivalent (e.g., letter of credit, certificate of deposit, surety bond), (iii) prepayment for utility service, or (iv) other security mutually agreed by the debtor and the utility provider. Specifically, an administrative expense priority is not adequate assurance of payment.

(b) A Utility can terminate service without needing to seek relief from automatic stay and without court approval if it does not receive adequate assurance within 30 days of the petition date.

(c) Utilities can offset prepetition security deposits without notice or bankruptcy court order.

B. Practical Effect on Retail Cases and Structuring of DIP Facilities.

1. Effects on Liquidity. Since the debtor will need to provide utilities with cash deposits within 20-30 days of the petition date, at the outset of the case, a lender should take reserves to insure that there will be adequate availability to allow the funding of these deposits. This is a liquidity drain at the beginning of the case when the debtor cannot afford it.

V. Additional Changes Effecting Retail Cases.

A. Limitations on Key Employee Retention Plans (“KERPs”).

1. New Law. The Act has made it much tougher for the debtor to implement generous KERPs which theoretically allow the debtor to attract and retrain key management talent. Under the new law, the debtor may not implement a KERP for senior managers unless (a) the affected employees have received bona fide offers of employment from third parties at the same or higher compensation, and (b) the benefits for an applicable employee under the KERP are no more than (i) 10 times the amount of retention benefits payable to non-management employees in the previous year, or (ii) 25% of any benefits paid to such employee in the previous year, and (c) the plan is essential for survival of the business.

2. Practical Effects.

(a) Positive Effects. The limit on KERPs shifts dollars from “retention” plans to actual “incentive plans” which are not subject to the above limitations, and will likely decrease the total dollars going out to management under these plans.

(b) Negative Effects. The limitations on retention payments to highly compensated managers will make it more difficult to retain key management necessary to engineer successful turnarounds and ch. 11 exits.

B. *Limitations on Debtor's Exclusivity Period.*

1. Current Law – Debtor has exclusive right to file a plan during the first 120 days of the case, and the exclusive right to seek confirmation of a plan during the first 180 days. Periods frequently extended by the Court.

2. New Law – 120 day period cannot be extended to more than 18 months after the petition date, and the 180 day period cannot be extend to more than 20 months after the petition date.

3. Practical Effects.

(a) Positive Effects. Cases will be speedier and will encourage prepackaged and prearranged cases.

(b) Negative Effects. More pressure on the debtor to quickly file and confirm a plan. Some key executives may look at this adversely and not want to be involved in a case in which success may be at risk. The balance of power shifts to creditors earlier than under the current law, where a longer exclusivity period and the ability of the court to extend, served to protect debtors' interests.

C. *Increased Wage Claims.*

1. Current Law – The amount an employee may claim as a priority unsecured claim limited to \$4925 in wages and benefits earned within 90 days of the petition date.

2. New Law – This amount is increased to \$10,000 earned within 180 days of the petition date. In addition, union workers awarded back pay pursuant to a judicial order or NLRB decision are afforded administrative claim priority.

3. Practical Effects. The increase creates an additional burden of claims to be paid in order to effect a restructuring.

D. *More Dismissals and Conversions.*

1. New Law – The Act provides additional grounds for the appointment of trustees, examiners, or for conversion or dismissal of a case.

2. Practical Effects. This could pit lenders against the creditors committee or even the debtor seeking to convert or dismiss the case, where the lender wants to use ch. 11 to liquidate its collateral. As a result, the creditors may have additional leverage with which to negotiate concessions from lenders who do not want to see the case convert.

Association of Commercial Finance Attorneys
Continuing Legal Education Weekend
Orlando, Florida
May 20-21, 2006

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Hon. Michael G. Williamson

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Lender Considerations In Individual
Chapter 11 Cases Filed Post-BAPCPA

Attorneys representing commercial lenders are at times faced with the chapter 11 filing of the corporate debtor's principal. This brings into play several new provisions added by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). Some of these new provisions give additional tools and leverage to commercial lenders.

I. Provisions Affecting Individual Ch. 11 Cases

A. Property of the Estate

1. Existing Law – Section 541(a)(6)

(a) the commencement of a case under section 301...creates an estate...comprised of all of the following property....

(6) Proceeds...or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

2. New Section 1115

(a) In a case in which the debtor is an individual, property of the estate includes, in addition to the property specified in section 541

(1) all property of the kind specified in section 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 12, or 13 whichever occurs first (b) Except as provided in section 1104 or a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

3. Section 1115 now includes post-petition earnings as property of the estate. As a consequence, post-petition earnings are protected by the automatic stay. While section 1115(a) adds additional property into the estate, section 1115(b) confirms

the debtor's presumptive right to remain in possession of that property as well as all other property of the estate.

B. Dismissal and Conversion

1. Section 1112(b)(4) - For purposes of this subsection, the term "cause" includes –

- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation;
- (B) gross mismanagement of the estate;
- (C) failure to maintain appropriate insurance that poses a risk to the estate or to the public;
- (D) unauthorized use of cash collateral substantially harmful to 1 or more creditors;
- (E) failure to comply with an order of the court;
- (F) unexcused failure to satisfy timely any filing or reporting requirement established by this title or by any rule applicable to a case under this chapter;
- (G) failure to attend the meeting of creditors convened under section 341(a) or an examination ordered under rule 2004 of the Federal Rules of Bankruptcy Procedure without good cause shown by the debtor;
- (H) failure timely to provide information or attend meetings reasonably requested by the United States trustee (or the bankruptcy administrator, if any);
- (I) failure timely to pay taxes owed after the date of the order for relief or to file tax returns due after the date of the order for relief;
- (J) failure to file a disclosure statement, or to file or confirm a plan, within the time fixed by this title or by order of the court;
- (K) failure to pay any fees or charges required under chapter 123 of title 28;
- (L) revocation of an order of confirmation under section 1144;
- (M) inability to effectuate substantial consummation of a confirmed plan;
- (N) material default by the debtor with respect to a confirmed plan;
- (O) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan; and

- (P) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

2. It is now easier for a creditor or the United States Trustee to secure the dismissal of a chapter 11 case, the conversion of a case to chapter 7, or the appointment of a trustee or examiner. The 2005 amendments expand the definition of "cause," and give courts less discretion to deny relief once the moving party establishes cause. The changes to section 1112 apply to all chapter 11 cases, not just cases filed by small businesses.

3. "Cause" now also expressly includes: unauthorized use of cash collateral; failure to file required financial reports; failure to attend the meeting of creditors or a Rule 2004 examination; failure to provide information requested by the United States Trustee; and failure to obey a court order. Under the 2005 amendments, "cause" also includes failure to file a plan "within the time fixed by this title."

4. This new language expressly makes conversion or dismissal an appropriate remedy for the failure to comply with the deadline for filing a plan imposed on small business debtors under section 1121(e). "Cause" now includes failure of the debtor to pay post-petition domestic support obligations.

5. The revised section 1121(b)(3) generally requires the court to commence the hearing on a motion to dismiss or convert within thirty days of filing, and to decide the motion within fifteen days after the hearing.

6. One of the drafting problems among many in BAPCPA is the substitution of the conjunctive "and" for the disjunctive "or" used in the pre-BAPCPA version of section 1112. In the recent case of *In re TCR of Denver, LLC*, 338 B.R. 494 (Bankr. D. Colo. 2006), Judge Sid Brooks opined that Congress, in amending statutory list of circumstances that might constitute "cause" for dismissal or conversion of Chapter 11 case in order to "expand" grounds for dismissal or conversion, could not have intended to require a "perfect storm" of all sixteen circumstances listed before case could be converted or dismissed. Judge Brooks concluded that notwithstanding the fact that Congress replaced the conjunction "or" with the conjunction "and" immediately before final circumstance in list, it was not necessary that all of the enumerated circumstances exist for a case to be dismissed or converted.

7. Under the revised section 1112, conversion or dismissal is an appropriate remedy for the failure to comply with the deadline for filing a plan imposed on small business debtors under section 1121(e) of the Bankruptcy Code. As a general proposition, under the 2005 Amendments, it is now easier for a creditor or the United States Trustee to secure the dismissal of a Chapter 11 case, the conversion of a case to Chapter 7, or the appointment of a trustee or examiner. *See generally* Thomas E. Carlson and Jennifer Frasier Hayes, *The Small Business Provisions of the 2005 Bankruptcy Amendment*, 79 Am. Bankr. L.J. 645 (2005).

II. Small Business Cases

A. Defined - section 101(51C) & (51D)

(51C) The term "small business case" means a case filed under chapter 11 of this title in which the debtor is a small business debtor.

(51D) The term "small business debtor" --

- (A) subject to subparagraph (B) means a person engaged in commercial or business activities ... that has aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition or the date of the order for relief in an amount not more than \$ 2,000,000 ... for a case in which the United States trustee has not appointed under section 1102(a)(1) a committee of unsecured creditors or where the court has determined that the committee of unsecured creditors is not sufficiently active and representative to provide effective oversight of the debtor; and
- (B) does not include any member of a group of affiliated debtors that has aggregate noncontingent liquidated secured and unsecured debts in an amount greater than \$ 2,000,000 (excluding debt owed to 1 or more affiliates or insiders).

B. Changes

1. Under the 2005 amendment, the existence of a "small business case" is dependent on a chapter 11 debtor's status as a "small business debtor." The definition of a "small business debtor" requires that the person, at the time of the filing of the petition, be "engaged in commercial or business activities." On the other hand, a person who incurred \$ 2,000,000 in debts that arose from business activities before the date of the filing of the case, but as of the petition date has discontinued those business activities, would not be a small business debtor.

2. A chapter 11 debtor's status as a "small business debtor" depends in part on whether a creditors' committee is appointed, and on whether an appointed committee is sufficiently active and representative to provide oversight of the debtor. That uncertainty may make it difficult for chapter 11 debtors to know whether they must file the periodic reports required by section 308 or perform the duties required by section 1116.

C. Effect:

1. Additional Filing Requirements -- section 308(b). A small business debtor shall file periodic financial and other reports containing information including—

- (1) the debtor's profitability;
- (2) reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period;
- (3) comparisons of actual cash receipts and disbursements with projections in prior reports;
- (4) (A) whether the debtor is
 - (i) in compliance in all material respects with post-petition requirements imposed by this title and the Federal Rules of Bankruptcy Procedure; and
 - (ii) timely filing tax returns and other required government filings and paying taxes and other administrative expenses when due;(B) if the debtor is not in compliance with the requirements referred to in subparagraph (A)
 - (i) or filing tax returns and other required government filings and making the payments referred to in subparagraph (A)
 - (ii), what the failures are and how, at what cost, and when the debtor intends to remedy such failures; and(C) such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11.

2. As can be seen, the 2005 Amendments increase the amount of financial information required regarding small business debtors. Now, section 308 requires small business debtors to file periodic reports regarding: the debtor's "profitability"; the debtor's projected cash receipts and disbursements; and comparisons of actual cash receipts and disbursements with prior projections.

3. The debtor must also disclose whether it is materially complying with postpetition requirements of the Bankruptcy Code and Rules; and timely filing tax returns and "other required government filings" and paying taxes and other administrative expenses when due. Debtors who are behind in filing tax returns and other government filings, who are not paying administrative expenses when due, or who are otherwise not complying with postpetition Bankruptcy Code and Rules requirements, must file periodic

reports identifying these failures and explaining how, at what cost, and when the debtor intends to remedy such failures.

4. The small business debtor is also bound by a vague obligation to report on "such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under Chapter 11 of this title." The effective date of the new reporting requirements is sixty days after the date on which the Judicial Conference prescribes official bankruptcy forms directing small business debtors to file the periodic reports described above.

C. Additional DIP Duties – section 1116. In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall—

- (1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief—its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or (B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;
- (2) attend, through its senior management personnel and counsel, meetings scheduled by the court or the United States trustee, including initial debtor interviews, scheduling conferences, and meetings of creditors convened under section 341 unless the court, after notice and a hearing, waives that requirement upon a finding of extraordinary and compelling circumstances;
- (3) timely file all schedules and statements of financial affairs, unless the court, after notice and a hearing, grants an extension, which shall not extend such time period to a date later than 30 days after the date of the order for relief, absent extraordinary and compelling circumstances;
- (4) file all postpetition financial and other reports required by the Federal Rules of Bankruptcy Procedure or by local rule of the district court;
- (5) subject to section 363(c)(2), maintain insurance customary and appropriate to the industry;
- (6) (A) timely file tax returns and other required government filings; and
(B) subject to section 363(c)(2), timely pay all taxes entitled to administrative expense priority except those being contested by appropriate proceedings being diligently prosecuted; and
- (7) allow the United States trustee, or a designated representative of the United States trustee, to inspect the debtor's business premises, books, and records at reasonable times, after reasonable prior written notice, unless notice is waived by the debtor.

D. Exclusivity Limitations

1. Section 1121(d) & (e).

(d)

(1) Subject to paragraph (2), on request of a party in interest made within the respective periods specified in subsections (b) and (c) of this section and after notice and a hearing, the court may for cause reduce or increase the 120-day period for the 180-day period referred to in this section .

(2)

(A) The 120-day period specified in paragraph (1) may not be extended beyond a date that is 18 months after the date of the order for relief under this chapter.

(B) The 180-day period specified in paragraph (1) may not be extended beyond a date that is 20 months after the date of the order for relief under this chapter.

(e) In a small business case—

(1) only the debtor may file a plan until after 180 days after the date of the order for relief, unless that period is—

(A) extended as provided by this subsection , after notice and a hearing; or

(B) the court, for cause, orders otherwise;

(2) the plan and a disclosure statement (if any) shall be filed not later than 300 days after the date of the order for relief; and

(3) the time periods specified in paragraphs (1) and (2), and the time fixed in section 1129(e) within which the plan shall be confirmed, may be extended only if

(A) the debtor, after providing notice to parties in interest (including the United States trustee), demonstrates by a preponderance of the evidence that it is more likely than not that the court will confirm a plan within a reasonable period of time;

(B) a new deadline is imposed at the time the extension is granted; and

(C) the order extending time is signed before the existing deadline has expired.

2. In small business cases, the debtor has a different exclusivity period. The 2005 amendments provide the small business debtor an exclusivity period of 180 days, during which only the debtor may file a plan. This is a significantly longer exclusivity period than the one applicable to a standard chapter 11 debtor, who has only 120 days to file a plan.

3. The court can extend the exclusivity period if the small business debtor can show that it is more likely than not that the plan will be confirmed within a reasonable time. A new deadline is imposed concurrently with the grant of the extension and the court signs the order extending the time before the old deadline expires. If a trustee is appointed, exclusivity is lost and any party in interest, including the debtor, may file a plan.

4. Case law under existing section 1121 are still instructive with respect to the factors a court will consider in dealing with motions to extend exclusivity:

a. In *Continental Casualty Co. v. Burns & Roe Enters (In re Burns & Roe Enters.)*, 2005 U.S. Dist. LEXIS 26247 (D.N.J. 2005), the district court concluded that the bankruptcy court granted the fourteenth and fifteenth extension of exclusivity for good cause based on the size and complexity of the case, the debtor's good faith progress toward reorganization, and the absence of any showing that the debtor was seeking to pressure creditors. The court held the requests for extensions did not breach the debtor's fiduciary duty as a debtor-in-possession.

b. In *In re Adelpia Communs. Corp.*, 336 B.R. 610 (Bankr. D.N.Y. 2006), the court discussed factors to consider within the context of section 1121(d), when determining whether "cause" exists to extend or terminate a debtor's statutory period of exclusivity. Those factors are:

1. the size and complexity of the case;
2. the necessity of sufficient time to permit the debtor to negotiate a plan of reorganization and prepare adequate information to allow a creditor to determine whether to accept such plan;
3. the existence of good faith progress towards reorganization;
4. the fact that the debtor is paying its bills as they become due;
5. whether the debtor has demonstrated reasonable prospects for filing a viable plan;
6. whether the debtor has made progress in negotiations with its creditors;

7. the amount of time which has elapsed in the case; whether the debtor is seeking an extension of exclusivity in order to pressure creditors to submit to the debtor's reorganization demands; and
8. whether an unresolved contingency exists.

III. Relief from Stay – Serial Filings

A. Small Business Cases

1. Section 362(n)

1) Except as provided in paragraph (2), subsection (a) does not apply in a case in which the debtor—

A) is a debtor in a small business case pending at the time the petition is filed;

B) was a debtor in a small business case that was dismissed for any reason by an order that became final in the 2-year period ending on the date of the order for relief entered with respect to the petition;

C) was a debtor in a small business case in which a plan was confirmed in the 2-year period ending on the date of the order for relief entered with respect to the petition; or

(D) is an entity that has acquired substantially all of the assets or business of a small business debtor described in subparagraph (A), (B), or (C), unless such entity establishes by a preponderance of the evidence that such entity acquired substantially all of the assets or business of such small business debtor in good faith and not for the purpose of evading this paragraph.

2. A serial filer is not permanently deprived of the benefits of the automatic stay. To claim the protections of section 362(a), a debtor must establish by a preponderance of the evidence that the second petition filing resulted from circumstances beyond the control of the debtor that were not foreseeable at the time the prior case was filed and that it is more likely than not that the court will confirm a feasible non-liquidating plan within a reasonable period of time. These serial-filing provisions do not apply to an involuntary petition in which there was no collusion between the involuntary debtor and its creditors.

B. Single Asset Real Estate Debtors

1. Section 362(d)(3).

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(3) with respect to a stay of an act against single asset real estate under subsection (a), by a creditor whose claim is secured by an interest in such real estate, unless, not later than the date that is 90 days after the entry of the order for relief (or such later date as the court may determine for cause by order entered within that 90-day period) or 30 days after the court determines that the debtor is subject to this paragraph, whichever is later—

(A) the debtor has filed a plan of reorganization that has a reasonable possibility of being confirmed within a reasonable time; or

(B) the debtor has commenced monthly payments that—

(i) may, in the debtor's sole discretion, notwithstanding section 363(c)(2), be made from rents or other income generated before, on, or after the date of the commencement of the case by or from the property to each creditor whose claim is secured by such real estate (other than a claim secured by a judgment lien or by an unmatured statutory lien); and

(ii) are in an amount equal to interest at the then applicable nondefault contract rate of interest on the value of the creditor's interest in the real estate;

2. The 2005 amendments removed the monetary cap in the definition of "single asset real estate." Before the 2005 Amendments, section 362(d)(3) required the court to grant relief from stay in a single asset real estate case if the debtor did not, within ninety days after the order for relief:

(1) file a plan that had a reasonable possibility of being confirmed within a reasonable time;

(2) begin making postpetition interest payments; or (3) obtain an extension of the deadlines to file a plan or begin making payments.

3. The 2005 Amendments make three adjustments to section 362(d)(3):

a. First, they clarify that the debtor may use cash collateral to make the postpetition interest payments required by section 362(d)(3).

b. Second, postpetition interest is to be paid at the non-default rate of interest, rather than the "current fair market rate."

c. Third, the debtor generally now has until the later of ninety days after the entry of the order for relief or thirty days after the

court determines that such debtor is a single asset real estate debtor to begin making interest payments, file a plan, or obtain an extension of time.

C. One & Two Strike Cases

1. Sections 362(c)(3) & (4)

Except as provided in subsections (d), (e), (f), and (h) of this section --

(3) if a single or joint case is filed by or against 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, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)

(A) 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;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(A) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if—

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—

(aa) file or amend the petition or other documents as required by this or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded—

(aa) if a case under chapter 7 with a discharge; or

(bb) if a case under chapter 11 or 13 with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor; and

(4)(A) (i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(B) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—

(i) as to all creditors if—

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7 with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

2. The 2005 amendments limit the extension of the stay for so-called "serial" filers. If a debtor has had a prior case dismissed during the year preceding the most recent filing, the stay will last for only 30 days. If the debtor has had two or more bankruptcy cases dismissed during the year preceding the most recent filing, the stay will not apply at all. In each case, however, the debtor may request the full automatic stay to apply if the debtor can show, within 30 days of the filing of the most recent bankruptcy case, that the filing of the new case was done in good faith with respect to all creditors to be stayed.

3. In *In re Taylor*, 334 B.R. 660 (Bankr. D. Minn. 2005) the debtors sought continuation of the automatic stay pursuant to section 362(c)(3)(B). The debtors were not entitled to relief because they did not give their creditors appropriate notice of their request for relief. Although the debtors' counsel had served the full list of creditors, the length of time that the creditors were on actual notice was not enough, especially since a sizable number of the creditors were out of state.

4. The case of *In re Ellis*, 2006 Bankr. LEXIS 337 (Bankr. D. Pa. 2006) illustrates the court's application of the changes in the new law under section 362(c)(3)(4) when a serial filer sought to continue the stay past the thirty days. The court denied the continuance of the stay. The court held the debtor's latest case was presumptively not filed in good faith. The debtor was unable to offer clear and convincing evidence to overcome the presumption that the case was not filed in good faith.

5. Rather than bar serial filing, the 2005 amendment alters the availability of the automatic stay. The debtor may move to continue the stay past thirty days upon notice and hearing provided such motion is made and heard before the stay expires by operation of law. The court may grant such motion only if the movant demonstrates that the filing of the later case is in good faith as to the creditors to be stayed.

6. A case is presumptively filed not in good faith but such presumption may be rebutted by clear and convincing evidence. A different test applies whether the stay is being continued as to all creditors or a specific creditor.