

**IMPACT OF AUTOMATIC STAY WHEN A
DEBTOR IN BANKRUPTCY IS A DEFENDANT IN A CIVIL ACTION
OR FILES A COMPLAINT OR COUNTERCLAIM IN THE DISTRICT COURT**

1. Automatic Stay:

a. Claims Asserted Against the Debtor as a Defendant:

i. General Rule. With exceptions noted below, it is unnecessary for the defendant to seek a stay. The stay of 11 U.S.C. § 362(a) generally is an automatic stay arising by virtue of the filing of the debtor's bankruptcy petition (or of an involuntary petition against the debtor). Once the District Court learns that a bankruptcy case is pending in which an automatic stay *has* arisen, it should treat the continuation of the action against the debtor as stayed by § 362(a)(1) (staying "the . . . continuation . . . of a judicial . . . action . . . against the debtor that was . . . commenced before the commencement of the [bankruptcy] case . . .") until the stay is terminated. By way of illustration:

- It does not matter that the pending matter before the District Judge is a motion filed by the debtor: all aspects of the civil action against the debtor are stayed. (Similarly, if an appeal by the debtor had been pending before the bankruptcy case commenced, the automatic stay would apply to that appeal.)
- The automatic stay does not apply to claims against co-defendants in the civil action who are not themselves debtors in a bankruptcy case.
- But in chapter 13, a co-debtor stay under 11 U.S.C. § 1301 may apply to a co-defendant in the civil action.

ii. Exceptions:

The automatic stay does not arise in every case and can lapse in certain cases.

- A stay does not arise in a case of an individual filed after two other cases were dismissed within the last year. See 11 U.S.C. § 362(c)(4).
- Also, the stay may lapse if an individual (as opposed to, *e.g.*, corporate) debtor had a case dismissed within the last year and failed to obtain an extension of the stay after notice and a hearing completed before the expiration of day 30 of the case. See 11 U.S.C. § 362(c)(3).

So check PACER to see if the debtor is a repeat filer after dismissal of a case or cases within the last year.

In addition, there are various exceptions to the automatic stay in 11 U.S.C. § 362(b), for example:

- § 362(b)(2) (principally addressing certain domestic relations proceedings); and
- § 362(b)(4) (a proceeding by a governmental unit to enforce a police or regulatory power).

iii. Termination of Automatic Stay:

- The stay of acts against the debtor terminates upon the entry of a discharge (or denial of a discharge) or upon the closing or dismissal of the case. 11 U.S.C. § 362(c).
- Entry of a discharge theoretically can occur as early as Day 82 to Day 101 of the case. See:
 - Fed. R. Bankr. P. 2003(a) (requiring a meeting of creditors to be held within 21 to 40 days after the order for relief (i.e., after the voluntary petition date); and
 - Fed. R. Bankr. P. 4004 (setting 60 days after the first date set for the meeting of creditors as the deadline for objecting to discharge).
- But there is usually a lag time between the debtor being ripe for a discharge and the clerk's office entering the discharge. Moreover, certain events stall the entry of a discharge under Rule 4004(c).

So check PACER in the debtor's bankruptcy case every four weeks or so to see if it has been dismissed or closed or a discharge has been entered or denied.

b. Debtor's Counterclaims:

Chapter 7 Cases. As to any counterclaim the debtor may have made against the plaintiff, the debtor's exercise of control over the counterclaim *in a chapter 7 case* is barred by § 362(a)(3) (barring "any act to . . . exercise control over property of the estate") so long as the counterclaim remains property of the estate. (Chapters 11, 12, and 13 are different because a debtor in those chapters is generally authorized to pursue claims of the estate.)

But if the debtor exempts the counterclaim on his Schedule B, and no one timely objects to the exemption under 11 U.S.C. § 522(l), then the counterclaim becomes exempt and no longer property of the estate. At that juncture, the stay of § 362(a)(1) would not apply to the counterclaim because the counterclaim is not an action or proceeding against the debtor.

As long as the counterclaim remains property of the estate, the chapter 7 trustee is the appropriate party to pursue the counterclaim. Upon her being substituted as the counterclaimant, the trustee is free to pursue the counterclaim: the automatic stay does not apply to her because under 11 U.S.C. § 323 she is the representative of the estate and vested with authority to sue.

Chapter 13 Cases. In a *chapter 13 case*, a debtor remains in possession of the property of the estate, and is thus authorized to sue on the debtor's claims against other entities.

Chapter 11 Cases. The same is true in a *chapter 11 case* so long as the debtor remains a debtor in possession and is not displaced from being entitled to remain in possession of the property of the estate via the appointment of a trustee.

2. **Listing Claims:**

a. **Listing Lawsuit on Statement of Financial Affairs.** The debtor is required to file a *Statement of Financial Affairs* within 14 days after the commencement of the bankruptcy case, but the time can be enlarged. Question 4 (**Suits and administrative proceedings . . .**) states:

a. List all suits . . . to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. . .

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION
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b. **Scheduling Claims Against the Debtor.** Also, the debtor is required to file Schedules within 14 days after the commencement of the case (but the time for filing can be enlarged). On *Schedule F - Creditors Holding Unsecured Nonpriority Claims*, the debtor is required to schedule claims even if contingent, unliquidated, or disputed.

c. **Scheduling Counterclaims.** On *Schedule B - Personal Property*, the debtor is required under item 21 to schedule any counterclaims.

3. **Effect of Failure to List Claims Against Debtor .**

Even if the debtor fails to list the pending lawsuit on his *Statement of Financial Affairs* or fails to schedule the claims against him on *Schedule F*, any automatic stay still applies until it is terminated under 11 U.S.C. § 362(c) or (d).

4. **Effect of Failure to Schedule a Counterclaim.**

If the debtor fails to schedule a counterclaim on his *Schedule B*, it still remains property of the estate protected by the automatic stay. Of course, a debtor who fails to disclose a counterclaim and who tries to pursue the counterclaim after the bankruptcy case faces an invocation of the doctrine of judicial estoppel, but the trustee (as representative of the estate) would, under the better view of the issue, not be subject to judicial estoppel. If the debtor never schedules the counterclaim, it remains property of the estate even once the case is closed (unless the trustee affirmatively abandons the counterclaim). See 11 U.S.C. § 554(d).

