

For Publication

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)
)
 THU THI DAO,) Case No. 20-20742-C-7
)
 Debtor.) Dkt. Control No. DNL-2
)

OPINION REGARDING STATUS OF AUTOMATIC STAY

CHRISTOPHER M. KLEIN, Bankruptcy Judge:

Bankruptcy Code provisions that apply in chapters 7, 11, and 13, should be interpreted to avoid dysfunction in all applicable chapters. That precept has been neglected in chapter 13 decisions holding that the 11 U.S.C. § 362(c)(3) 30-day automatic stay termination "with respect to the debtor" who files serial cases also, by inference, extends to "property of the estate." This needless inference works havoc in chapter 7.

This is no minor matter because stripping the estate of stay protection contradicts the central chapter 7 policy of maximum and equitable distribution for creditors, for which the § 362(a) stay of acts against property of the estate is a key tool.

Much ink has been spilled in chapter 13 cases, without attending to chapter 7, over the question whether § 362(c)(3) 30-day stay termination inferentially strips the automatic stay from property of the estate. The circuits are divided. The majority (50+ cases), now led by the Fifth Circuit, says the stay does not terminate with respect to property of the estate. E.g., Rose v. Select Portfolio Serv'g, Inc., 945 F.3d 226 (5th Cir. 2019), petition for cert. filed, (U.S. Feb. 20, 2020) (No. 19-1035). The

1 minority (20+ cases), led by the First Circuit, says the stay
2 ceases to protect property of the estate. E.g., Smith v. Me.
3 Bur. of Rev. Servs. (In re Smith), 910 F.3d 576 (1st Cir. 2018).

4 Although the Ninth Circuit has not ruled, its Bankruptcy
5 Appellate Panel has sided with the minority. Reswick v. Reswick
6 (In re Reswick), 446 B.R. 362 (9th Cir. BAP 2011).

7 The chapter 7 trustee, pursuant to the personal property
8 provisions of 11 U.S.C. § 362(h) (2), and fearing Reswick, asks
9 this court to assure the automatic stay continues unabated. He
10 believes unscheduled assets exist that need protection.

11 This court is granting the § 362(h) (2) motion so as to
12 preserve the automatic stay with respect personal property of the
13 estate of the individual debtor and denying it as unnecessary as
14 to real property as § 362(c) (3) does not end its stay protection.

15 The factual setting enables contrasts among the chapters to
16 which § 362(c) (3) applies and between § 362(c) (3) and § 362(h),
17 revealing that § 362(c) (3) does not modify or affect § 362(c) (1).

18 19 Facts

20 The self-represented debtor filed chapter 7 case No. 20-
21 20166-A-7 on January 13, 2020, which case was dismissed on
22 January 31, 2020, for failure timely to file schedules.

23 The debtor filed this case on February 10, 2020. Some of
24 the required schedules and statements have been filed, but not
25 the Statement of Intention required by § 521(a) (2).

26 The manner in which documents have been prepared invites
27 questions about whether there has been full, candid, and complete
28 disclosure of all of the debtor's financial affairs. Moreover,

1 there is no clear delineation among real and personal property.

2 The trustee has identified potential interests in properties
3 associated with the debtor's name that do not appear to have been
4 included on the schedules.

5 The trustee filed on March 11, 2020, the "Trustee's Motion
6 to Extend the Automatic Stay as to All Creditors and Order
7 [Debtor] to Deliver Collateral to the Trustee" under § 362(h)(2),
8 asserting that there is personal and real property of the estate
9 that is of consequential value or benefit to the estate that must
10 be delivered to the trustee.

11 Although § 362(h)(1) stay termination applies only to
12 "personal property of the estate" upon failure to file a timely
13 statement of intention within the 30 days specified by
14 § 521(a)(2)(A), the trustee, by also including real property in
15 the motion, was worried that Reswick could terminate the stay
16 regarding real property.

17 In the procedural posture of the case, the allegations
18 regarding unscheduled assets are accepted as true.

19

20 Jurisdiction

21 Subject-matter jurisdiction is based on 28 U.S.C. § 1334(a).
22 A trustee's motion to preserve the automatic stay concerns
23 estate administration and is a core proceeding that a bankruptcy
24 judge may hear and determine. 28 U.S.C. § 157(b)(2)(A).

25

26 Analysis

27 Analysis begins with the § 362(c)(3) controversy, notes the
28 dysfunction resulting in chapter 7 from stay termination for

1 property of the estate, contrasts § 362(c)(3) with § 362(h), and
2 looks through the prism of an exemplar scenario.

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4 I

5 It is axiomatic that the automatic stay protects multiple
6 interests. At a minimum there is the interest of the estate and
7 the interest of the debtor. Property may be simultaneously
8 property of the estate and property of the debtor. Cf. Schwab v.
9 Reilly, 560 U.S. 770, 782-85 (2010) (interest of estate and
10 debtor in exempt property). Thus, in stay relief matters, courts
11 commonly address those interests separately and may grant relief
12 as to one or the other or both.

13

14 II

15 The controversy that has arisen predominately in chapter 13
16 cases, and usually without reference to chapter 7, is whether the
17 phrase "shall terminate with respect to the debtor" in
18 § 362(c)(3)(A) should be construed implicitly to extend to the
19 "estate," hence to "property of the estate," even though neither
20 "estate" nor "property of the estate" appears in § 362(c)(3):

21 (3) if a single or joint case is filed by or against a
22 debtor who is an individual in a case under chapter 7, 11,
23 or 13, and if a single or joint case of the debtor was
24 pending within the preceding 1-year period but was
25 dismissed, other than a case refiled under a chapter other
26 than chapter 7 after dismissal under section 707(b) --

27 (A) the stay under subsection (a) with respect to
28 any action taken with respect to a debt or property
29 securing such debt or with respect to any lease shall
30 terminate with respect to the debtor on the 30th day
31 after the filing of the case;

32 11 U.S.C. § 362(c)(3)(A).

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1 Nor is there reasoned explanation of how § 362(c)(3) meshes
2 with the § 362(c)(1) property of the estate indefinite duration.

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4 B

5 Exacerbating the analytical flaws is a distortion created by
6 the fact that chapters 11 and 13 feature debtor in possession
7 provisions that do not exist in chapter 7. 11 U.S.C. §§ 1115(b)
8 & 1306(b).

9 If the purpose of Congress was to thwart manipulative
10 debtors, then it is easy to succumb to the temptation also to
11 thwart their management of property of the estate.

12 But, what may seem a benign check on shifty chapter 13
13 debtors turns malignant in chapter 7 where trustees, not debtors,
14 always control property of the estate and have a duty to maximize
15 its value. 11 U.S.C. § 704(a)(1).

16
17 C

18 Any convincing analysis of the effect of § 362(c)(3) on
19 property of the estate, in addition to overcoming its
20 contradiction of § 362(c)(1), must take into account how
21 § 362(c)(3) applies in chapter 7 cases where debtors never are in
22 possession of property of the estate.

23 Convincing analysis of § 362(c)(3) would also explain why
24 Congress chose not to use in § 362(c)(3) the language it used in
25 the same Act of Congress in the parallel provision at § 362(h)
26 expressly terminating the stay protecting secured personal
27 property of the estate in specified circumstances in a manner
28 that meshed perfectly with § 362(c)(1): "the stay provided by

1 subsection (a) is terminated with respect to personal property of
2 the estate or of the debtor securing in whole or in part a claim
3 ... and such personal property shall no longer be property of the
4 estate." 11 U.S.C. § 362(h) (1) (emphasis supplied).

5 Similarly, convincing analysis must explain how
6 § 362(c) (3) (C) functions for a chapter 7 trustee, who, if
7 property of the estate loses stay protection per § 362(c) (3) (A),
8 would be subjected to an impossibly short deadline to prove by
9 "clear and convincing evidence" that the chapter 7 case was filed
10 in good faith even though chapter 7 does not have a good faith
11 filing requirement.¹

12 A review of how § 362(c) (3) would apply in chapter 7 exposes
13 the absurdity of extending § 362(c) (3) to property of the estate.

14 Nor is the inclusion of chapter 7 in § 362(c) (3) a sideshow;
15 rather, chapter 7, which comprises 60 percent of all bankruptcy
16 filings, is the main event. It is the chapter 13 decisions that
17 amount to tail wagging dog.²

18 19 III

20 The background behind § 362(c) (3) was the abuse perceived in
21 the stratagem of some consumer debtors using repetitive filings
22 of bankruptcy cases to exploit the automatic stay as a delay
23 tactic invoked on the eve of a foreclosure or an eviction without

24
25 ¹See Marrama v. Citizens Bank, 549 U.S. 365, 374-75 & n.11
26 (2007) (Debtor's bad faith chapter 7 case filing leads to
forfeiture of right to convert from chapter 7 to chapter 13).

27 ²2019 Annual Report of U.S. Courts, Table F-2 (Bankruptcy
28 cases commence - 12-Month Period Ending March 31, 2019). Total
all chapters: 772,646. Chapter 7: 477,106 (61.75%). Chapter 11:
6,891 (.009%). Chapter 13: 288,039 (37.03%).

1 actually intending to complete the bankruptcy process.

2 Read as a whole, § 326(c)(3),³ with its sub-, subsub-, and

3

4 ³The full text of § 362(c)(3) is:

5 (3) if a single or joint case is filed by or against a
6 debtor who is an individual in a case under chapter 7, 11,
7 or 13, and if a single or joint case of the debtor was
8 pending within the preceding 1-year period but was
9 dismissed, other than a case refiled under a chapter other
10 than chapter 7 after dismissal under section 707(b) --

11 (A) the stay under subsection (a) with respect to any
12 action taken with respect to a debt or property securing
13 such debt or with respect to any lease shall terminate with
14 respect to the debtor on the 30th day after the filing of
15 the later case;

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

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

29 (i) as to all creditors, if --

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

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

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

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

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

45 (III) there has not been a substantial change in
46 the financial or personal affairs of the debtor since the
47 dismissal of the next most previous case under chapter 7,
48 11, or 13 or any other reason to conclude that the later

1 subsubsub-sections is a 489-word provision designed to forestall
2 serial filings intended to delay foreclosures or evictions.

3

4 A

5 Legislative history is of little use in construing the
6 language "with respect to the debtor" in subsection (A), but the
7 intellectual history of the genesis of § 362(c)(3) is helpful to
8 understanding what Congress was talking about.

9 The serial filing problem was mainly a chapter 13 issue
10 because chapter 13 debtors may dismiss a case as of right, only
11 to file another case, triggering another automatic stay. 11
12 U.S.C. § 1307(b). To be sure, the stratagem also worked in
13 chapter 7. The debtor would file a case, default in chapter 7
14 duties to pay fees and file schedules, suffer dismissal of the
15 case after 30 or 60 days, and then file anew.

16 In 1997, the National Bankruptcy Review Commission flagged
17 repeat filings as a chapter 13 problem and suggested limiting the
18 automatic stay so as to discourage nonmeritorious petitions filed

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22 case will be concluded –

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

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

27 (ii) as to any creditor that commenced an action under
28 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;

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11 U.S.C. § 362(c)(3).

1 merely to stay foreclosure sale or eviction.⁴

2 In 1998, the House and Senate Judiciary Committees proposed
3 language that eventually became the basis for enactment of
4 § 362(c)(3) in the Bankruptcy Abuse and Consumer Protection Act
5 of 2005 Pub. L. 109-8, § 302, 119 Stat. 23 (Apr. 20, 2005); see
6 H.R. Rep. No. 105-540, at 80 (1998) (H.R. 3150, 105th Cong.
7 § 121); S. Rep. No. 105-253, at 39 (1998) (S. 1301, 105th Cong.
8 § 303) ("Bankruptcy Amendments of 2005").

9 One would expect that the language would have been refined
10 during the usual legislative process to eliminate ambiguities in
11 proposed § 362(c)(3). But the legislative process leading to the
12 2005 Bankruptcy Amendments was anything but ordinary.

13 Nothing in the Congressional materials indicates that there
14 was any thought given to whether proposed § 362(c)(3) would
15 affect a chapter 7 trustee.

16 The paucity of Congressional materials results from the
17 history of the 2005 Bankruptcy Amendments. The bill that was
18 enacted was pending in Congress from 1998 until 2005, with some
19 early committee consideration before 2000. For a number of years
20 it was stalled in a highly-partisan environment by various issues
21 unrelated to serial filings. No amendments in the nature of
22 technical corrections or refinements were entertained.

23 At final passage in 2005 – a point at which one would expect
24 comprehensive review – the legislation was placed under a "no
25 amendment" decree by Congressional leadership. H.R. Res. 211,
26

27 ⁴It was particularly troublesome in the Central District of
28 California. Nat'l Bankr. Rev. Comm'n, Report (Oct. 20, 1997)
§ 1.5.5, p. 279 & nn. 732-33, available at
<https://govinfo.library.unt.edu/nbrc/report/08consum.pdf>.

1 109th Cong. (2005); H.R. Rep No. 109-43 (2005). This truncated
2 the legislative process. See Susan Jensen, A Legislative History
3 of the Bankruptcy Abuse Prevention and Consumer Protection Act of
4 2005, 79 AM. BANKR. L.J. 485, 518-566 & n.507 (2005).

5 Throughout, Congress was silent about the effect of the 30-
6 day termination provision of § 362(c)(3) on a chapter 7 trustee.

7 Bottom line: any reasoning premised on inferences of
8 Congressional intent is unusually untrustworthy.

9
10 B

11 The genesis of § 362(c)(3) suggests three alternative views
12 about its effect on a chapter 7 trustee in the context of
13 § 362(c), which deals exclusively with duration of stay.

14 The first possibility is that the drafters of § 362(c)(3)
15 were mindful of the separate stay duration status for "property
16 of the estate" under § 362(c)(1)⁵ and the rights of a chapter 7
17 trustee and, by using the phrase "terminate with respect to the
18 debtor," were referring only to stay duration regarding the
19
20

21 ⁵The text of § 362(c)(1) is:

22 (1) the stay of an act against property of the estate
23 under subsection (a) of this section continues until such
24 property is no longer property of the estate.

25 11 U.S.C. § 362(c)(1).

26 Status as property of the estate may survive the closing of
27 the case. Compare 11 U.S.C. § 554(c), with id. § 554(d); In re
28 Dunning Bros. Co., 410 B.R. 877 (Bankr. E.D. Cal. 2009) (case
filed in 1935 reopened in 2009 to administer unscheduled asset);
see also, First Nat'l Bank v. Lasater, 196 U.S. 115,119 (1905)
(Bankruptcy Act).

1 debtor under § 362(c) (2),⁶ while taking care to preserve the stay
2 with respect to the trustee's interest in property of the estate.

3 The second possibility is that Congress intended to strip
4 chapter 7 trustees of automatic stay protection for property of
5 the estate but chose not to say anything about it.

6 The third alternative is that Congress gave no thought to
7 the issue of the trustee's rights in property of the estate.

8

9 1

10 The majority of § 362(c) (3) decisions align with the first
11 possibility.

12 The majority reasons as follows: (1) the language of
13 § 362(c) (3) (A) is not ambiguous; (2) nowhere in § 362 does
14 Congress use the phrase "with respect to the debtor" to encompass
15 property of the estate; (3) Congress knew how to specify the
16 "estate" and did not do so; (4) § 362(a) differentiates between
17 acts against the debtor and acts against property of the estate;
18 (5) construing "with respect to the debtor" as not applying to
19 property of the estate is consistent with fundamental bankruptcy
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21 _____
22 ⁶With respect to the debtor, the stay expires per
23 § 362(c) (2):

24 (2) the stay of any other act [i.e. not property of the
25 estate] under subsection (a) of this section continues until
26 the earliest of –

27 (A) the time the case is closed;

28 (B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this
title concerning an individual or a case under chapter 9,
11, 12, or 13 of this title, the time a discharge is granted
or denied;

28

11 U.S.C. § 362(c) (2).

1 policy of obtaining a maximum and equitable distribution for
2 creditors; (6) enabling an oversecured creditor to appropriate to
3 itself equity above the creditor's security interest impairs the
4 ability of the trustee to pay a dividend to creditors. Holcomb
5 v. Hardeman (In re Holcomb), 380 B.R. 813, 816 (10th Cir. BAP
6 2008) (chapter 13), cited with approval, Rose, 945 F.3d at 230;
7 accord, Rinard v. Positive Invs., Inc. (In re Rinard), 451 B.R.
8 12, 17 (Bankr. C.D. Cal. 2011) (chapter 7), cited with approval,
9 Rose, 945 F.3d at 230 n.10.

10 Of these majority cases, only Rinard presents a question
11 regarding a chapter 7 trustee concerned about stay protection for
12 property of the estate.

13
14 2

15 The minority of § 362(c)(3) decisions align with the second
16 possibility - that Congress intended to strip chapter 7 trustees
17 of automatic stay protection for property of the estate but not
18 say anything about it.

19 The reasoning goes as follows: (1) § 362(c)(3)(A) is
20 ambiguous; (2) Congressional intent is determinative; (3) an
21 ensuing exegetical examination of legislative history yields a
22 conclusion that Congress probably meant to terminate protection
23 for property of the estate. Smith, 910 F.3d at 589-91 (chapter
24 13); Reswick, 446 B.R. at 370-73 (chapter 13); In re Daniel, 404
25 B.R. 318, 327-29 (Bankr. N.D. Ill. 2009) (chapter 13, later
26 converted to chapter 7).

27 Swept under the carpet is the fact that Congress in the 2005
28 Amendments, at § 362(h), did expressly terminate the stay with

1 respect to certain personal property of the estate, using
2 language stating "such personal property shall no longer be
3 property of the estate." 11 U.S.C. § 362(h)(1). This meshes
4 precisely with the § 362(c)(1) provision that "the stay of an act
5 against property of the estate ... continues until such property
6 is no longer property of the estate." 11 U.S.C. § 362(c)(1).

7 The minority decisions neither mention nor attempt to
8 explain the asymmetry between § 362(h) and § 362(c)(3).

9 Often, the procedural context for the issue at hand is 11
10 U.S.C. § 362(j).⁷ There, a chapter 13 debtor, tainted by serial
11 filer status, resists a creditor's motion for confirmation that
12 the automatic stay has terminated by using the property of the
13 estate argument as a pretext to resist foreclosure or eviction.
14 Smith, 910 F.3d at 579 (§ 362(j)); Daniel, 404 B.R. at 320
15 (§ 362(j) in chapter 13 case, converted to chapter 7).

16 A § 362(j) motion typically is a two-party debtor-creditor
17 dispute not involving the chapter 7 trustee in which the parties
18 lack an incentive to make arguments characteristic of a trustee.

19 It is significant that none of the minority cases involve a
20 chapter 7 trustee concerned about preserving stay protection for
21 property of the estate.⁸

22

23 ⁷The text of § 362(j) is:

24 (j) On request of a party in interest, the court shall
25 issue an order under subsection (c) confirming that the
automatic stay has been terminated.

26 11 U.S.C. § 362(j).

27

28 ⁸Daniel was a two-party debtor-creditor § 362(j) contest in
a case filed under chapter 13 and later converted to chapter 7 in
which contest the chapter 7 trustee did not participate. The

1 IV

2 The importance of property of the estate to chapter 7 cases
3 warrants emphasis.

4

5 A

6 The first enumerated duty of a chapter 7 trustee is to
7 "collect and reduce to money the property of the estate." 11
8 U.S.C. § 704(a)(1).⁹

9 Property of the estate, in general, is comprised of all
10 legal or equitable interests of the debtor as of commencement of
11 the estate, together with interests in property recovered by the
12 trustee or preserved for the benefit of the estate, certain post-
13 petition acquisitions, and proceeds, product, offspring, rents or
14 profits of or from property of the estate. 11 U.S.C. § 541(a).

15

16 B

17 A crucial tool in the chapter 7 trustee's toolbox is the
18 automatic stay.

19 The automatic stay arising in consequence of the filing of a
20 petition initiating a bankruptcy case protects property of the

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22 _____
23 court ignored the chapter 7 problem with the comment, "The
conversion has no effect on the issues raised by the bank's
motion." Daniel, 404 B.R. at 320 n.1.

24 ⁹The full text of § 704(a)(1) is:

25 (a) The trustee shall -

26 (1) collect and reduce to money the property of the
27 estate for which such trustee serves, and close such estate
as expeditiously as is compatible with the best interests of
28 parties in interest;

11 U.S.C. § 704(a)(1).

1 estate from judgment enforcement, acts to obtain possession of
2 property of the estate, and acts to create, perfect, or enforce a
3 lien. 11 U.S.C. § 362(a).

4 The automatic stay of an act against property of the estate
5 continues until such property is no longer property of the
6 estate. 11 U.S.C. § 362(c)(1).

7 Unless the court orders otherwise, property scheduled in
8 accordance with the debtor's duty to file schedules of assets and
9 not otherwise administered at the time of closing of the case is
10 abandoned and deemed administered, but unscheduled property that
11 is neither formally abandoned nor administered remains property
12 of the estate in perpetuity. 11 U.S.C. §§ 554(c)-(d); Lasater,
13 196 U.S. at 119; Dunning Bros. Co., 410 B.R. at 888.

14 It follows under § 362(c)(1) that the automatic stay remains
15 in effect to protect property that remains property of the estate
16 after the case is closed.

17 This post-closing continuation of the stay against acts
18 against property of the estate has proved to be a vital tool for
19 policing cheating and enforcing compliance with the requirement
20 of disclosure of all interests in property wherever located and
21 by whomever held. 11 U.S.C. § 541(a); Lasater, 196 U.S. at 119;
22 Dunning Bros. Co., 410 B.R. at 888.

23 Acts in violation of the automatic stay are either void ab
24 initio or voidable. Compare, e.g., Schwartz v. United States (In
25 re Schwartz), 954 F.2d 569, 571-72 (9th Cir. 1992), and Soares v.
26 Brockton Credit Union (In re Soares), 107 F.3d 969, 975-76 (1st
27 Cir. 1997), with Jones v. Garcia (In re Jones), 63 F.3d 411, 412
28 (5th Cir. 1995).

1 All of this adds up to powerful protection for property of
2 the estate in chapter 7 cases. This shield can be crucial in
3 enabling the chapter 7 trustee to perform the duty to collect and
4 reduce to money the property of the estate.

5 It would be extraordinary for Congress to have eviscerated
6 this fundamental protection for property of the estate without so
7 much as an explanatory comment.

8
9 V

10 An essential tool for chapter 7 trustees in performance of
11 their duties is not likely to have been stripped away merely
12 because the debtor earlier filed a case that was not completed.

13 Yet, that is the gravamen of what the minority in the
14 § 362(c)(3) debate contends when it says the stay terminates with
15 respect to property of the estate in chapter 7 cases. And, it
16 does so with zero analysis of how the chapter 7 trustee fits in.

17 They hold that § 362(c)(3) implicitly modifies § 362(c)(1).
18 Smith, 910 F.3d at 588-89.¹⁰ No mention is made of § 554(c),
19 § 554(d), or of the chapter 7 trustee.

22 ¹⁰The First Circuit asserted, ex cathedra:

23
24 Specifically, under § 362(c)(1), the stay "continues until
25 [estate] property is no longer property of the estate." And
26 under § 362(c)(2), "the stay of any other act under
27 subsection (a) continues until ... the case is closed" or
28 "the time the case is dismissed" or a "discharge is granted
or denied." These instructions are applicable only so long
as the stay has not otherwise lifted under § 362(c)(3)(A),
or some other provision.

Smith, 910 F.3d at 589 (citations omitted, ellipsis in original).

1 The § 362(c)(3)(B) motion to extend must be made in time for
2 notice and a hearing that must be completed within 30 days after
3 the filing of the case. 11 U.S.C. § 362(c)(3)(B).

4 That rigid 30-day post-filing deadline for completing a
5 hearing on a § 362(c)(3)(B) request to preserve the stay
6 contradicts basic chapter 7 procedure.

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8 1

9 Until the debtor files the various required schedules and
10 statements, a chapter 7 trustee knows only the names and
11 addresses of the creditors, codebtors, and parties to executory
12 contracts and unexpired leases that must be filed with the
13 petition. 11 U.S.C. § 521(a); Fed. R. Bankr. P. 1007(a)(1).

14 The debtor is not required until the 14th day after filing a
15 voluntary petition to file schedules of assets and liabilities,
16 current income and expenditures, executory contracts and
17 unexpired leases, statement of financial affairs, payment
18 advices, record of interest in certain education accounts,
19 statement of current monthly income on the prescribed Official
20 Form. 11 U.S.C. § 521(a); Fed. R. Bankr. P. 1007(c).

21 The 14-day deadline may be, and often is, extended on motion
22 for cause on notice to the United States trustee and the
23 chapter 7 trustee. Fed. R. Bankr. P. 1007(c).

24 The filing of those schedules and statements is the point at
25 which a chapter 7 trustee begins to see the picture of the case.

26 Those who maintain that the stay protecting property of the
27 estate evaporates on day 31 of a chapter 7 case do not explain
28 how a chapter 7 trustee can be expected to meet the

1 § 362(c) (3) (B) deadline without having had a meaningful
2 opportunity to examine the schedules and statements.

3

4 2

5 The next chapter 7 event is the meeting of creditors
6 pursuant to 11 U.S.C. § 341 at which the chapter 7 trustee and
7 creditors interrogate the debtor under oath and assesses whether
8 the case is likely to have assets, i.e. property of the estate,
9 sufficient to enable a dividend for creditors.

10 The United States trustee must call the meeting of creditors
11 "within a reasonable time after the order for relief." 11 U.S.C.
12 § 341(a).

13 As implemented by Rule 2003(a), § 341(a) "reasonable time"
14 in chapter 7 cases is no fewer than 21 days and not more than 60
15 days after the order for relief. Fed. R. Bankr. P. 2003(a)

16 Those who contend that the stay protecting property of the
17 estate evaporates on day 31 of a chapter 7 case do not explain
18 how a chapter 7 trustee can be expected to meet the
19 § 362(c) (3) (B) deadline before the meeting of creditors is held.

20 The reality is that the timing is impossibly contradictory.

21

22 B

23 The § 362(c) (3) (C) burden of proof for requests to preserve
24 the stay is impossible for a chapter 7 trustee to satisfy.

25 Proof and burden of proof under §§ 362(c) (3) (B) and (C)
26 would require a chapter 7 trustee to run a course of high hurdles
27 in order to preserve the stay.

28

1 1

2 If § 362(c)(3) applies to property of the estate, then the
3 chapter 7 trustee would have to prove that the filing of the case
4 was "in good faith as to the creditors to be stayed." 11 U.S.C.
5 § 362(c)(3)(B). But, the Bankruptcy Code does not require "good
6 faith" for filing a chapter 7 case.¹²

7 How is a chapter 7 trustee at the outset of a case in a
8 position to assess the good faith of the debtor? If the
9 trustee's suspicions about unscheduled property turn out to be
10 correct, there will be substantial grounds to question the
11 debtor's good faith.

12 So what? Regardless of the debtor's good or bad faith, it
13 is still a chapter 7 case with property of the estate controlled
14 by a trustee who has a duty to collect and reduce to money the
15 property of the estate. 11 U.S.C. § 704(a)(1).

16
17 2

18 Proving "good faith" begins with a statutory presumption
19 that every subsequent case filed within one year after dismissal
20 is "filed not in good faith." 11 U.S.C. § 362(c)(3)(C).

21 Rebutting the presumption of "filed not in good faith" must
22 be by "clear and convincing evidence to the contrary." 11 U.S.C.
23 § 362(c)(3)(C).

24

25

26 ¹²Marrama, 549 U.S. at 374-75 & n.11. But, to be precise,
27 "good faith" is not always irrelevant. If a § 707(b) motion to
28 dismiss the case as a substantial abuse of chapter 7 is made,
factors for the court to consider include "whether the debtor
filed the petition in bad faith," along with "totality of the
circumstances." 11 U.S.C. § 707(b)(3).

1 Viewing the remaining requirements of § 362(c)(3)(C)(i) so
2 as to enable the trustee to sidestep some of the statutory
3 hurdles, the chapter 7 trustee would still need to prove by clear
4 and convincing evidence that the chapter 7 case "will be
5 concluded ... with a discharge." § 362(c)(3)(C)(i)(III)(aa).

6 An internal contradiction emerges. Requiring the chapter 7
7 trustee to prove by clear and convincing evidence that the case
8 will be concluded with a chapter 7 discharge conflicts with the
9 trustee's statutory duty "if advisable" to "oppose the discharge
10 of the debtor." 11 U.S.C. § 704(a)(6).

11 If the trustee's suspicions about this case are borne out,
12 there is a nontrivial chance that the trustee actually will
13 successfully oppose the discharge of the debtor.

14 Indeed, this court's order under § 362(h)(2) will direct the
15 debtor to deliver to the trustee personal property collateral in
16 the debtor's possession. Noncompliance with any such order is an
17 independent ground to deny discharge. 11 U.S.C. § 727(a)(6)(A).

18 There is a canon against construing a statute to achieve
19 absurd results. Extending "against the debtor" in § 362(c)(3) to
20 encompass the chapter 7 trustee's interest in "property of the
21 estate" is Exhibit A for absurdity.

22
23 VII

24 Contrast with § 362(c)(3) the regime created by its cousin
25 at § 362(h)(2) relating to stay termination regarding personal
26 property of the estate in chapter 7 cases, which affords a
27 chapter 7 trustee a reasonable opportunity to preserve the stay.

1 If certain conditions regarding debts secured by personal
2 property of the estate are not satisfied by the debtor in chapter
3 7 cases, then "the stay provided by subsection (a) is terminated
4 with respect to personal property of the estate ... and such
5 personal property shall no longer be property of the estate." 11
6 U.S.C. § 362(h) (1) (emphasis supplied).¹³

7 The trustee, however, may prevent stay termination by
8 persuading the court that the subject personal property is of
9 consequential value or benefit to the estate and providing
10 adequate protection of the secured interest. 11 U.S.C.
11 § 362(h) (2).¹⁴

12
13 ¹³Section 362(h) (1) provides:

14 (1) In a case in which the debtor is an individual, the
15 stay provided by subsection (a) is terminated with respect
16 to personal property of the estate or of the debtor securing
17 in whole or in part a claim, or subject to an unexpired
18 lease, and such personal property shall no longer be
19 property of the estate if the debtor fails within the
20 applicable time set by section 521(a) (2) –

21 (A) to file timely any statement of intention required
22 under section 521(a) (2) with respect to such personal
23 property or to indicate in such statement that the debtor
24 will either surrender such personal property or retain it
25 and, if retaining such personal property, either redeem such
26 personal property pursuant to section 722, enter into an
27 agreement of the kind specified in section 524(c) applicable
28 to the debt secured by such personal property, or assume
such unexpired lease pursuant to section 365(p) if the
trustee does not do so, as applicable; and

 (B) to take timely the action specified in such
statement, as it may be amended before expiration of the
period for taking action, unless such statement specifies
the debtor's intention to reaffirm such debt on the original
contract terms and the creditor refuses to agree to the
reaffirmation on such terms.

11 U.S.C. § 362(h) (1).

¹⁴Section 362(h) (2) provides:

1 The touchstone in § 362(h) is § 521(a)(2) regarding a duty
2 of individual chapter 7 debtors requiring a Statement of
3 Intention regarding retention or surrender of secured property.
4 11 U.S.C. § 521(a)(2).¹⁵

5 The first thing to note is that, by the terms of
6

7 (2) Paragraph (1) does not apply if the court determines,
8 on the motion of the trustee filed before the expiration of
9 the applicable time set by section 521(a)(2), after notice
10 and a hearing, that such personal property is of
11 consequential value or benefit to the estate, and orders
12 appropriate adequate protection of the creditor's interest,
13 and orders the debtor to deliver any collateral in the
14 debtor's possession to the trustee. If the court does not
15 so determine, the stay provided by subsection (a) shall
16 terminate upon the conclusion of the hearing on the motion.
17 11 U.S.C. § 362(h)(2).

18 ¹⁵Section 521(a)(2) provides:

19 (2) if an individual debtor's schedule of assets and
20 liabilities includes debts which are secured by property of
21 the estate –

22 (A) within thirty days after the date of the filing of
23 a petition under chapter 7 of this title or on or before the
24 date of the meeting of creditors, whichever is earlier, or
25 within such additional time as the court, for cause, within
26 such period fixes, file with the clerk a statement of his
27 intention with respect to the retention or surrender of such
28 property and, if applicable, specifying that such property
is claimed as exempt, that the debtor intends to redeem such
property, or that the debtor intends to reaffirm debts
secured by such property; and

(B) within 30 days after the first date set for the
meeting of creditors under section 341(a), or within such
additional time as the court, for cause, within such 30-day
period fixes, perform his intention with respect to such
property, as specified by subparagraph (A) of this
paragraph;

Except that nothing in subparagraphs (A) and (B) of this
paragraph shall alter the debtor's or the trustee's rights
with regard to such property under this title, except as
provided in section 362(h).

11 U.S.C. § 521(a)(2).

1 § 521(a)(2), unscheduled property is not affected by § 362(h) and
2 is not at risk of loss of stay protection.

3 Next, the timing for a chapter 7 trustee to act, which
4 derives from the deadlines imposed by § 521(a)(2), is
5 considerably more flexible than § 362(c)(3). If the debtor has
6 filed the requisite Statement of Intention, which typically is
7 included in the package of schedules and statements, the
8 § 521(a)(2) deadline will not be until 30 days after the first
9 date set for the meeting of creditors, and the trustee has an
10 opportunity to obtain an extension.

11 The § 362(h)(2) burden of proof is likewise more forgiving
12 than § 362(c)(3). Instead of "clear and convincing evidence," a
13 chapter 7 trustee need only persuade the court, that the subject
14 personal property is of consequential value or benefit to the
15 estate and that adequate protection is being provided. If so
16 persuaded, the court grants the motion and orders the debtor to
17 deliver personal property in the debtor's possession to the
18 trustee. 11 U.S.C. § 362(h)(2).

19

20 VIII

21 Rinard provides an illustration of how value could sneak out
22 the door if § 362(c)(3) were to extend to property of the estate
23 in a chapter 7 case.

24 As with the present case, Rinard began with a chapter 7 case
25 that was dismissed on day 21 for missing the deadline to file
26 schedules and was followed 15 days later with a second chapter 7
27 case in which schedules were filed timely.

28

1 Property of the estate included the surplus value in real
2 property. More than 30 days after the filing of the second case,
3 California nonjudicial foreclosure proceedings were commenced
4 with respect to a debt of \$889,000.00 secured by a property
5 valued at \$1,500,000.00. In other words, there was surplus value
6 potentially in excess of \$610,000.00.

7 The court, agreeing with the majority view and declining to
8 follow Reswick, ruled that the § 362(c)(3)(A) 30-day stay
9 termination did not extend to property of the estate and that the
10 subject property remained property of the estate that the chapter
11 7 trustee could liquidate. Rinard, 451 B.R. at 14-20.¹⁶

12 Among other things, it noted that the foreclosing creditor
13 could obtain a windfall by way of obtaining title through a
14 nonjudicial foreclosure at the expense of other creditors if the
15 chapter 7 trustee was not able to administer the subject
16 property. Rinard, 451 B.R. at 20.

17 Noting that the opportunity for a windfall would incentivize
18 a creditor race to the courthouse that bankruptcy is designed to
19 obviate, the Rinard court reasoned the ensuing race would
20 contravene key premises of federal bankruptcy law favoring a
21

22 ¹⁶Rinard did not, and was not required to, follow the BAP
23 Reswick decision, which suffers from tunnel vision defects
24 including disregard of chapter 7 and of §§ 362(c)(1) & (h).
25 Rinard, 451 at 20-21. In appeals before it, the Ninth Circuit
26 BAP follows its own precedents so as to promote consistency.
27 Thus, appellants facing adverse BAP precedent often elect to
28 route appeals through the District Court, which is not bound by
the BAP. The reason that BAP decisions are de facto influential,
even though not de jure controlling, is that the Court of Appeals
and District Courts often agree with and adopt BAP analysis.
This reality dictates sobriety when bankruptcy judges question
BAP precedents. Nonetheless, as Reswick shows, the BAP is
fallible. Rinard is correct.

1 fresh start for an honest debtor and equal treatment among
2 classes of creditors. Rinard, 451 at 19.

3

4

IX

5 Is there a way to harmonize the chapter 13 minority view
6 with chapter 7? Not really.

7

8 One might attempt to draw a distinction between property of
9 the estate under the control of a chapter 7 trustee and property
10 of the estate under the control of a debtor in possession in
11 chapter 11 or 13. But such an effort seems doomed to create more
12 problems than it resolves.

12

13

A

14 A basic problem is that a firm boundary between chapter 7
15 and chapters 11 and 13 cannot be drawn. Every chapter 11 and 13
16 case has the potential to be converted to chapter 7 by court
17 order. Upon conversion, a chapter 7 trustee would come into
18 control of property of the estate.

19

20 If the stay has previously been terminated under § 362(c)(3)
21 with respect to property of the estate, then the trustee would
22 still have been shorn of a key tool going forward. Moreover, any
23 stay-violating activity that may have occurred between the date
24 of the § 362(c)(3) 30-day termination and the subsequent
25 conversion would be more difficult to correct.

25

26

B

27 It may be objected that it is inconvenient, once the stay
28 has terminated "with respect to the debtor," for a creditor to

1 need to overcome the stay protecting property of the estate.

2 Congress answered that objection by creating, in tandem with
3 § 362(c)(3), a remedy in the form of the § 362(j) motion to
4 confirm that the automatic stay has terminated. In chapter 11
5 and 13 cases in which the debtor is in possession, the § 362(j)
6 motion enables the court to police whether any argument by the
7 debtor based on property of the estate is a mere pretext.

8 In chapter 7 cases, trustees may stipulate to stay relief or
9 to abandonment of property that is burdensome or of
10 inconsequential value and benefit to the estate so as to avoid
11 needless expense.¹⁷

12 13 Conclusion

14 The phrase "shall terminate with respect to the debtor" in
15 § 362(c)(3) cannot be construed by inference to extend to "with
16 respect to the estate and property of the estate" because the
17 consequences in chapter 7, to which § 362(c)(3) also applies, are
18 so far at odds with basic chapter 7 administration that Congress
19 would not have intended such dramatic consequences without
20 unambiguous explanation.

21 The putative safety valve at §§ 362(c)(3)(B) and (C)
22 establishes a regime in terms of time and proof that is
23 impossible for a chapter 7 trustee to satisfy.

24

25

26 ¹⁷There is no filing fee for a stipulation for court
27 approval of an agreement for relief from a stay or for a
28 trustee's Fed. R. Bankr. P. 6007(a) notice of proposed
abandonment. 28 U.S.C. § 1930, Bankruptcy Ct. Misc. Fee Schedule,
Item 19 (Sept. 1, 2018).

1 Congress well knew how to terminate the automatic stay with
2 respect to property of the estate and, actually did so in plain
3 language at § 362(h), which was enacted as part of the same Act
4 of Congress that enacted § 362(c)(3).

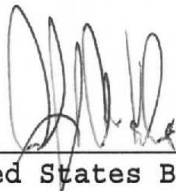
5 The safety valve at § 362(h)(2) is tailored to the needs of
6 a chapter 7 trustee.

7 The asymmetry between § 362(c)(3) and § 362(h) further
8 confirms that Congress did not intend the phrase "with respect to
9 the debtor" to sweep in the estate and property of the estate.

10 An appropriate order will issue granting the chapter 7
11 trustee's § 362(h)(2) motion regarding personal property of the
12 estate and denying the relief requested regarding real property
13 because § 362(c)(3) does not terminate the automatic stay
14 protecting property of the estate.

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Dated: May 11, 2020


United States Bankruptcy Judge