BAPCPA'S CHANGES TO THE AUTOMATIC STAY: THE 2005 AMENDMENTS AND COURT DECISIONS

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I.

INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23, made numerous changes to the automatic stay provisions of the Bankruptcy Code. Most of these were designed to restrict the scope of the stay. *See In re Rios*, 336 B.R. 177 (Bankr. S.D.N.Y. 2005) ("In writing this opinion, the Court considers that under the BAPCPA version of § 362, the stay is considerably 'less automatic'"). For example, BAPCPA expanded the number of exceptions to the automatic stay under § 362(b) from 18 to 28. Many of these changes were designed to curb what had been seen as abusive filings, while others were intended to benefit particular classes of creditors. *See In re Salazar*, 339 B.R. 662 (Bankr. S.D. Tex. 2006) (discussing the proliferation of exceptions to and limitations on the applicability of the automatic stay).

This paper will attempt to analyze the major modifications of the automatic stay that Congress enacted in 2005 and to discuss the decisional law that the new legislation has generated thus far. The intent to limit the applicability of the stay is clear. In many instances, however, the statutory drafting is puzzling, and, in some cases, one cannot escape the conclusion that it is downright incompetent. *See, e.g., In re Trejos*, 352 B.R. 349 (Bankr. D. Nev. 2006) (stating that applying some of BAPCPA's provisions requires judges to follow the lead of the White Queen and to believe as many as six impossible things before breakfast); *In re Donald*, 343 B.R. 524 (Bankr. E.D.N.C. 2006) (noting that many of BAPCPA's changes are "confusing, overlapping, and sometimes self-contradictory."); *see also* Hon. Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195 (2007) (discussing the difficulties of construing many of BAPCPA's provisions).

deposit to satisfy a prepetition debt was a setoff in the strict sense, and therefore a postpetition offset was prohibited by the automatic stay, 11 U.S.C. § 362(a)(7), unless the court granted relief from the stay. *In re Village Craftsman, Inc.*, 160 B.R. 740 (Bankr. D.N.J. 1993); *In re Cole*, 104 B.R. 736 (Bankr. D. Md. 1989). The majority of decisions, however, and the better reasoned ones, held that an offset against a utility deposit to satisfy a prepetition debt constituted recoupment rather than setoff and thus did not fall within the scope of § 362(a)(7). *In re McMahon*, 129 F.3d 93 (2d Cir. 1997); *Brooks Shoe Mfg. Co. v. United Tel. Co.*, 39 B.R. 980 (E.D. Pa. 1984); *In re Norsal Indus., Inc.*, 147 B.R. 85 (Bankr. E.D.N.Y. 1992); *In re Miner Indus., Inc.*, 119 B.R. 6 (Bankr. D.R.I. 1990); *see In re Public Serv. Co. of New Hampshire*, 107 B.R. 441 (Bankr. D.N.H. 1989); Gary E. Sullivan, *In Defense of Recoupment: Why "Setoff" of Prepetition Utility Deposits Against Prepetition Debt Is Not Subject to the Automatic Stay*, 15 BANKR. DEV. J. 63 (1998).

The new § 366(c)(4) does not so much resolve the split of authority as render the question moot. Regardless of whether utility's postpetition satisfaction of a prepetition debt out of a security deposit is characterized as "setoff" or "recoupment," the utility may "recover or set off" without violating § 362(a)(7). Of course, § 366(c)(4) says nothing about the postpetition recovery of a prepetition debt against other sorts of security deposits. In such cases, prior decisional law — including decisions concerning utility deposits — remains highly relevant in determining whether such an offset is a setoff prohibited by § 362(a)(7) or a recoupment outside the scope of the automatic stay.

The scope of § 366(c)(4) may not be as broad as one might first suppose. First, the Bankruptcy Code does not define "utility," and, prior to BAPCPA, several courts had taken the term to refer to basic and essential services. *See In re Hanratty*, 907 F.2d 1418 (3d Cir. 1990); *In*

re Moorefield, 218 B.R. 795 (Bankr. M.D.N.C. 1997). Since BAPCPA was enacted, at least one court of appeals has held that § 366 does not apply to cable television services because cable television is not a "utility" within the purview of that statute. *In re Darby*, 470 F.3d 573 (5th Cir. 2006); *see* Gilbert L. Hamberg, *New Section 366(c) of the U.S. Bankruptcy Code: Safeguard for Utilities That Use Its Protections*, 45 No. 4 INFRASTRUCTURE 6 (2007). Presumably, then, § 366(c)(4) may be employed only by water, electricity, and similar providers that fall within the traditional understanding of what a utility is.

Second, subsection (c)(2) of § 366, which deals with adequate assurance of payment, is limited to Chapter 11 cases. Subsection (c)(2) explicitly cross-references subsections (c)(3) and (c)(4). The logical conclusion is that § 366(c), including § 366(c)(4), is applicable only in Chapter 11 cases. *In re Astle*, 338 B.R. 855 (Bankr. D. Idaho 2006) (holding that § 366(c) does not apply in Chapter 12); *see* Hamberg, *New section 366(c)*, 45 No. 4 INFRASTRUCTURE at 6. If this interpretation is correct, there would be a rather significant limitation on the exception to the stay provided by § 366(c)(4).

VII.

FINANCIAL MARKETS CONTRACTS AND RELATED PROVISIONS

A. AMENDMENTS PROTECTING RIGHTS UNDER FINANCIAL MARKETS CONTRACTS: 11 U.S.C. § 362(b)(6), § 362(b)(7), AND § 362(b)(17).

A number of bankruptcy statutes give special protections to financial markets contracts. *See* Rhett G. Campbell, *Financial Markets Contracts and BAPCPA*, 79 AM. BANKR. L.J. 697 (2005); Christopher J. Redd, *Treatment of Securities and Derivatives Transactions in Bankruptcy Part I*, 24-Aug. AM. BANKR. INST. J. 36 (2005). With respect to the automatic stay, § 362(b)(6) protects the setoff, termination, acceleration or liquidation rights of a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency if such rights