




# Postpetition claims in Chapter 13

Disasters for debtors  
in the Seventh Circuit?





# Postpetition claims that cause problems

- **Medical expenses** not covered by insurance.
- **Fines and penalties** may be in large amounts, as with Chicago parking, and red light tickets.
- **Not voluntary borrowing**, for two reasons:
  - New car loans, home mortgages, and home equity loans are generally approved by the court under § 364 on a showing that the debtor will be able to repay the loan.
  - Lenders are not likely to approve loans to a Chapter 13 debtor without court approval.

# The two postpetition claim problems

- 1. If the claim is **payable in full through the plan**, the plan will fail if the debtor's contributions can't pay both the new claim and existing priority claims (DSOs, administrative expenses, priority taxes).
- 2. If the claim is **immediately payable outside of the plan**, the plan will fail if necessary assets are lost:
  - Debtors usually don't have enough "extra" income or assets to pay a large postpetition claim.
  - Enforcing the claim against property needed for employment or family obligations will cause the debtor to stop making plan payments.



## 1. Is the claim payable in full through the plan?

- Seventh Circuit says “Yes.” *In re Steenes*, 942 F.3d 834 (7th Cir. 2019) (*Steenes II*):
  - As long as the claim arose from the debtor’s use of estate property, the claim is entitled to administrative priority under § 503(b)(1)(A), which applies to “the actual, necessary costs and expenses of preserving the estate.”
  - Fines are like the tort liability given administrative claim status in *Reading Co. v. Brown*, 391 U.S. 471 (1968).



1. Is the claim payable in full through the plan?

■ But does the “preserving the estate” analysis of *Reading Co.* apply in Chapter 13?

■ In a Chapter 11, if a postpetition claim is not an administrative expense, it will likely not be paid, since the assets go first to allowed claims.


■ Chapter 11 debtors are in competition with other companies, and immunity from postpetition tort claims would give them an unfair advantage.

■ In contrast, postpetition claims against Chapter 13 debtors would be payable from the debtors’ non-estate assets, certainly when the case ended.




## 1. Is the claim payable in full through the plan?

- Can a Chapter 13 debtor avoid administrative liability for postpetition claims?
  - Under *Steenes II*, the only way to prevent administrative liability may be to remove property from the bankruptcy estate. (*Steenes* holds that a vehicle fine is an administrative expense "when a car remains in an estate." 942 F.3d at 836.)
  - But if there is enough in plan payments to cover an administrative expense, the debtor benefits: plan payments to general unsecured creditors are reduced to pay the postpetition claim. The debtor makes no greater plan payments.



## 2. Can the creditor immediately collect a postpetition claim?


- The answer depends on the automatic stay.
- If the stay applies to postpetition claims, it would prevent collection activity unless the creditor obtained stay relief.
- Stay relief, under § 362(d), would not likely be granted unless property that the creditor would seize to enforce the claim either—
  - is not adequately protected (unlikely if secured debt payments are made) or
  - is not necessary to complete the plan.



## 2. Can the creditor immediately collect a postpetition claim?

- So no immediate collection activity—but only if the automatic stay applies to enforcing postpetition claims.
- Of the eight provisions of the stay in § 362(a), six prohibit enforcement only of claims that were incurred before the bankruptcy filing.





## 2. Can the creditor immediately collect a postpetition claim?


- However, **two provisions of §362(a)** are not limited to prepetition claims. These provisions **protect estate property from all claim enforcement**:
  - “(3) any act to obtain possession of property of the estate . . . or to exercise control over property of the estate;
  - “(4) any act to create, perfect, or enforce any lien against property of the estate . . . .”

## 2. Can the creditor immediately collect a postpetition claim?

- So protection from postpetition claims depends on whether the debtor's property is property of the estate.
- The Chapter 13 estate begins with the broad definition of **estate property** in § 541 (a) and increases the estate under § 1306(a) with "**all property . . . that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted.**"


## 2. Can the creditor immediately collect a postpetition claim?

- But § 1327(a) provides that **all the property of the estate vests in the debtor when the plan is confirmed**, unless the plan or the confirmation order provides otherwise.
- “Vesting” is commonly understood as removing existing property from the estate. See *In re Gonzales*, 587 B.R. 363, 369 (Bankr. D.N.M. 2018).
- So under § 1327(a), the debtor’s property loses the protection from postpetition claims unless the plan or order of confirmation delay vesting in the debtor.



## 2. Can the creditor immediately collect a postpetition claim?

- Two Seventh Circuit decisions make it difficult to overcome vesting under § 1327(a).
- *In re Steenes*, 918 F.3d 554 (7th Cir. 2019):
  - A confirmation limiting vesting under § 1327(b) is an exercise of discretion by the bankruptcy judge.
  - It is an abuse of discretion to limit vesting without case-specific findings that continuing estate property is necessary.
  - Keeping the stay in effect against postpetition claims would not be a sufficient reason. 918 F.2d at 557-58.



## 2. Can the creditor immediately collect a postpetition claim?

- Two Seventh Circuit decisions make it difficult to overcome vesting under § 1327(a).
- *In re Cherry*, No. 19-1534 (7th Cir. July 6, 2020):
  - A plan with a provision preventing vesting can only be confirmed if the judge makes case-specific findings that the provision is necessary.
  - *Steenes'* dicta repeated: Retaining the automatic stay would not be a basis for confirming the plan. "Immunity from traffic laws for the duration of a Chapter 13 plan does not seem to us an outcome plausibly attributed to the Bankruptcy Code."





## Five problems with the analysis in *Cherry*

1. Unlike an order of confirmation that continues the estate, which involves the exercise of a judge's discretion, a plan provision continuing estate property is expressly allowed by § 1322(b)(9):

“[T]he plan may . . . provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity . . . .”

The *Cherry* opinion does not discuss § 1322(b)(9), although it was argued at length in the briefs.



## Five problems with the analysis in *Cherry*

2. The national Chapter 13 plan, implemented by the Judicial Conference of the United States, expressly provides the choice of vesting of estate property in the debtor after confirmation, without requiring any statement of reasons from the debtor.



## Five problems with the analysis in *Cherry*

3. Section 1327(b) grants no authority to a bankruptcy judge to deny confirmation of a plan that conforms to the requirements of the Code. The requirements for confirmation are set out in §1325(a) and may not be expanded by a court. *Petro v. Mishler*, 276 F.3d 375, 378 (7th Cir. 2002).



## Five problems with the analysis in *Cherry*

4. If a debtor's plan did need a reason for continuing property of the estate, the reason is to maintain the protection of the automatic stay. See Keith M. Lundin, Lundin On Chapter 13, § 113.11, at ¶ 3 (“[A]lways including in the plan a provision continuing the estate . . . until completion of payments under the plan . . . puts the debtor in the strongest position to argue that the stay continues to protect all property and income after confirmation.”).

There is no other reason why a debtor would propose to continue the estate.



## Five problems with the analysis in *Cherry*

5. A postpetition creditor does not lack remedies for enforcing its claims. Most notably, *Steenes II* provides an administrative claim, requiring full payment through the plan. The debtor is not given immunity from postpetition claims.





## Future litigation?

- No other circuit has ruled that fines and penalties incurred by a Chapter 13 debtor postpetition are administrative expenses. That holding may be challenged in other circuits.
- No other circuit has ruled that § 1327(b) requires findings and reasons for continuing property of the estate. That holding may also be challenged in other circuits.
- The dicta in *Steenes II* and *Cherry* rejecting stay protection as a reason for continuing the estate may be challenged in the Seventh Circuit itself.



# Serial Filing and Stay Termination: § 362(c)(3)(A) Circuit Split

JUDGE DEBORAH L. THORNE  
BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS

## § 362(c)(3)

If a single or joint case is filed by or against a 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 a property securing such debt or with respect to any lease shall *terminate with respect to the debtor* on the 30<sup>th</sup> day after the filing of the later case;

# Compare:

- ▶ § 362(c)(3)(A): “the stay under subsection (a) . . . shall terminate *with respect to the debtor* “

With:

- ▶ § 362(c)(4): “. . . the stay under subsection (a) *shall not go into effect* upon the filing of the later case”
- ▶ §362(h): “. . . The stay provided by subsection (a) is terminated *with respect to personal property of the estate or of the debtor* securing in whole or in part a claim . . .”





# Majority View

- ▶ Followed by *Rose v. Select Portfolio Services*, 945 F.3d 226 (5<sup>th</sup> Cir. 2019), *cert. denied*.
- ▶ § 362(c)(3)(A) does not terminate the stay with respect to property of the estate, only with respect to actions against the debtor/debtor's property after 30 days
- ▶ Rests interpretation on the “plain meaning” of the statute
- ▶ “With respect to debtor” was included to specifically terminate the stay with respect to actions against the debtor/debtor's property
- ▶ Statute, however, never mentions the estate





# Majority View (cont.)

- ▶ Inclusion of language regarding the debtor implies an intentional exclusion of reference to the estate
- ▶ Therefore, the stay does not terminate with respect to the estate
- ▶ Language in other sections of the statute unambiguously terminate the stay
- ▶ Majority supports interpretation by arguing that if Congress intended to terminate the stay in its entirety, they would have used similar language



# Majority View (cont.)

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Precludes a “race to the courthouse”</li><li>• More equitable distribution to creditors</li><li>• Best for chapter 7 trustee</li></ul>	<ul style="list-style-type: none"><li>• Does not align with congressional intent to deter repeat filing</li><li>• Makes section “relatively toothless”</li></ul>



# Minority View

- ▶ Followed by *Smith v. Maine Bureau of Revenue Services*, 910 F.3d 576 (1st Cir. 2018)
- ▶ § 362(c)(3)(A) terminates the stay in its entirety after 30 days, including with respect to property of the estate
- ▶ Statutory language ambiguous
- ▶ “With respect to the debtor” distinguishes between serial and first-time filing spouses in joint cases
- ▶ Minority focuses on legislative history and congressional intent to correct abuses of the Bankruptcy Code and deter repeat filing
- ▶ Total termination of the stay is a much stronger deterrent to repeat filing than partial termination, so section should be interpreted accordingly



# Minority View

- ▶ Logical progression of termination of the stay for repeat filers
  - ▶ First Time Filer → Automatic Stay in Full Effect
  - ▶ 1 Case Dismissed in Past Year → Temporary Stay for 30 Days
  - ▶ 2+ Cases Dismissed in Past Year → Immediate Termination of Stay
- ▶ Total termination of the stay after 30 days is a proper middle ground
- ▶ 30-day period gives parties the opportunity to extend the stay if they can meet the statutory requirements

# Minority View

- Termination of the stay in its entirety after 30 days likewise accomplishes some policy goals, but has its weaknesses as well

Advantages	Disadvantages
<ul style="list-style-type: none"><li>• Helps correct potential abuses of Bankruptcy Code</li><li>• Strong deterrent to repeat filing</li><li>• Makes section concerning extension of stay meaningful</li></ul>	<ul style="list-style-type: none"><li>• May harm creditors by creating a race to the courthouse</li><li>• Makes chapter 7 trustee's job difficult, if not impossible, to execute</li></ul>





# 7<sup>th</sup> Circuit Approach

- ▶ 7<sup>th</sup> Circuit has not ruled on the issue
- ▶ Has been appealed to 7<sup>th</sup> Circuit but was dismissed
- ▶ Issue has arisen in lower courts a number of times
  - ▶ *In re Curry*
  - ▶ *In re Daniel*
  - ▶ *In re Furlong*
  - ▶ *In re Wade*
- ▶ All have adopted the minority approach



# Chapter 7 Implications

- ▶ Termination of the automatic stay affects the trustee more than the serial filing debtor because the trustee handles property of the estate
- ▶ Automatic stay generally helps the trustee carry out duty to “collect and reduce to money the property of the estate”
- ▶ Trustee’s duty is impossible to carry out if the stay is not in effect because the first creditors to the courthouse could take any potential property of the estate
- ▶ Minority view could lead to inequitable distribution of assets
- ▶ Majority view would allow trustee to carry out its duty by protecting property of the estate



# Chapter 7 Implications

Why the trustee cannot simply extend the stay...

## ▶ 30-Day Deadline

- ▶ Trustee usually does not know much about case within 30 days
- ▶ Meeting of creditors generally does not occur within that time frame
- ▶ Debtor's deadline to file schedules often gets extended beyond 30 days

## ▶ Clear and Convincing Burden of Proof

- ▶ Little information to support such a high burden
- ▶ Good faith requirement that is not even necessary to file chapter 7 case
- ▶ Requirement that case will conclude with discharge, but trustee also has duty to oppose discharge in some instances

- ▶ *See Thu Thi Dao*, 616 B.R. 103, (Bankr. E.D.Cal. 2020)