



# Getting your injury case out of bankruptcy

*Bankruptcy can stop your case in its tracks. Here's how to seek relief from an automatic stay caused by a bankruptcy filing.*

BY ARA JABAGCHOURIAN

If you are like me, you have faced the unfortunate event of an automatic stay in your injury case as a result of the defendant filing for bankruptcy. If the defendant was insured, you may be in some luck. Instead of having your case stuck in bankruptcy court, you can seek relief from the stay and get your injury case back on track. Below is a brief analysis that would be needed to be undertaken to seek relief from the stay.

## Federal law on relief from bankruptcy stay

As a general rule, the filing of a bankruptcy petition operates to stay litigation involving prepetition claims against the debtor. (*Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.* (1986) 474 U.S. 494, 503.) However, the automatic stay can be lifted, so long as an interested party can demonstrate "cause." (See (2006) 11 U.S.C. §362(d)(1). The Ninth Circuit has explained that "[b]ecause there is no clear definition of what constitutes 'cause,' discretionary relief from the stay must be determined on a case by case basis." (*MacDonald v. MacDonald (In re Macdonald)* (9th Cir. 1985) 755 F.2d 715, 717; see also *Egwineke v. Robertson (In re Robertson)* (N.D. Ga 2000) 244 B.R. 880, 882; *Baldino v. Wilson (In re Wilson)* (3d Cir. 1997) 116 F.3d 87, 90.) The decision whether to grant relief from a stay is "within the broad discretion of the bankruptcy court." (*Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.)* (C.D. Cal. 2004) 311 B.R. 551, 558.) As the Ninth Circuit has confirmed, relief from a stay

may be granted to allow litigation pending in another forum to proceed to conclusion. (See, e.g., *Packerland Packing Co. v. Griffith Beverage Co. (In re Kimble)* (9th Cir. 1985) 776 F.2d 802, 807.) Where litigation is pending, courts may weigh twelve nonexclusive factors, known as the "Curtis" factors, in deciding whether to grant relief from an automatic stay:

1. Whether the relief will result in a partial or complete resolution of the issues;
2. The lack of any connection with or interference with the bankruptcy case;
3. Whether the foreign proceeding involves the debtor as a fiduciary;
4. Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;
5. Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
6. Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;
7. Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;
8. Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c);
9. Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f)10;
10. The interests of judicial economy and the expeditious and economical determination of litigation for the parties;

11. Whether the foreign proceedings have progressed to the point where the parties are prepared for trial, and  
12. The impact of the stay on the parties and the "balance of hurt."

*In re Plumberex* 311 B.R. at 559 (quoting *In re Curtis* (D. Utah 1984) 40 B.R. 795, 799-800.) Not every factor will be relevant in every case, and a court is not required to give each factor equal weight. (*Id.* at 560.) Typically, only Curtis Factors One, Two, Five, Seven, Ten, and Twelve are relevant to the Court's determination related to an insured party in an injury case. These six factors weigh heavily in favor of courts lifting the stay so that you can pursue the injury claims against debtor/defendant.

## Complete resolution of issues

*Curtis* Factor One asks whether permitting relief from the stay would result in complete resolution of the issues between the parties. (See *In re Plumberex*, 311 B.R. at 559, 562.) Here, this factor obviously weighs in favor of relieving the stay. Indeed, the *only* issue between movant/plaintiff and debtor/defendant is the underlying personal injury action. If the relief is granted and movant/plaintiff can litigate his personal injury action to conclusion, the relationship between the parties will be over and each can move forward with his respective life.

## Lack of interference with bankruptcy case

*Curtis* Factor Two favors relief from the stay where the state court proceedings are not connected or would not interfere,



with the bankruptcy proceedings. (See *In re Plumberex*, 311 B.R. at 559, 561-62.) This factor again favors relief from the stay. In order to successfully argue this factor, your client has to be informed that he/she will have to give up seeking personal assets of the defendant and only proceed against the insurance proceeds. This way, the personal injury action is in no way related to the bankruptcy action. Thus, the personal injury action in no way relates to, nor would it in any way interfere with, the bankruptcy proceedings.

### Debtor's insurance carrier has assumed full responsibility

*Curtis* Factor Five looks to whether a debtor's insurance carrier has assumed full responsibility for defending the litigation. (See *In re Plumberex*, 311 B.R. at 559.) Here, you would need to demonstrate through a declaration that the debtor/defendant's insurance carrier has assumed full financial responsibility for the cost of debtor/defendant's defense in the personal injury litigation. Indicate which firm and attorney was hired and show that a policy is at issue. You may argue that the debtor/defendant will not suffer financially at all from defending the personal injury action, and thus this factor also weighs strongly in favor of lifting the stay. (*Foust v. Munson S. S. Lines* (1936) 299 U.S. 77, 87-88 (bankruptcy injunction should be lifted to permit wrongful death suit to go forward since claimant's only interest is establishing liability under the existing insurance policy); *Holtkamp v. Littlefield (In re Holtkamp)* (7th Cir. 1982 669 F.2d 505, 508) (stay lifted to allow civil action to go forward since bankruptcy estate not jeopardized, as insurer assumed full financial responsibility for defending litigation); *Elliot v. Hardison* (E.D. Va. 1982) 25 B.R. 305, 308 ("Where the claim is one covered by insurance or indemnity, continuation of the action should be permitted since hardship to the debtor is likely to be outweighed by hardship to the plaintiff." (quoting 2 Collier on Bankruptcy ¶ 362.07(3) (15th ed. 1980)).

### No prejudice to other creditors

*Curtis* Factor Seven examines whether the state court litigation would prejudice the interests of other creditors or interested parties. (See *In re Plumberex*, 311 B.R. at 559, 562.) In injury matters involving insurance, there is clearly no possibility of prejudice to other creditors. The movant/plaintiff in the injury case seeks to recover only from debtor/plaintiff's insurance carrier, and thus any recovery plaintiff receives in the personal injury action can have no impact on the defendant's assets, and thus no impact on other creditors or similarly interested parties.

### Judicial economy

*Curtis* Factor Ten asks whether the interests of judicial economy and expeditious resolution of the issues would be served by relief from the stay. (See *In re Plumberex*, 311 B.R. at 559.) You would need to argue that the personal injury litigation is already well underway in state court, and it would be decidedly inefficient to halt it due to the bankruptcy proceedings. Moreover, requiring a bankruptcy judge to determine discreet personal injury claims, which turn on state law, would not promote judicial economy.

### "Balance of the hurts"

Finally, *Curtis* Factor Twelve looks to the "impact of the stay on the parties and the 'balance of the hurts.'" (See *In re Plumberex*, 311 B.R. at 559 (quoting *In re Curtis*, 40 B.R. at 799-800).) The argument here should revolve around delay. If relief from the stay is not granted, movant/plaintiff will have to wait an inordinately long time simply to resolve a personal injury claim. If facts indicate you have a strong case, lay those out also. In fact, if the stay is not lifted, movant/plaintiff could lose his claim entirely. (See *Egwineke*, 244 B.R. at 883 ("Movant[s] claim for damages will evaporate if the stay is not lifted . . .").)

If the stay is lifted, however, debtor/defendant will not suffer at all:

their insurance carrier has already assumed defense of the action, and any judgment movant/plaintiff receives will be paid out through the insurance policy proceeds, *not* through debtor's personal assets. Indeed, the only party "that stands to benefit financially if the stay is not lifted is [the insurance company]." (*Ibid.* (noting that it would be "grossly unfair for [the insurance company] to benefit financially at Movant's expense"); see also *Owaski v. Jet Fla. Sys., Inc. (In re Jet Fla. Sys., Inc.)* (11th Cir. 1989) 883 F.2d 970 ("The 'fresh start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured.")).

### Concluding remarks

The unfortunate choice your client needs to make in the situation of the defendant filing for bankruptcy during his case is to forego anything above policy limits. If your client is fortunate enough to have had been injured by a defendant with sufficient coverage, this should not be a problem. The motion to be relieved from the stay should be filed as soon as you get notice of the bankruptcy. This way, your injury case will face very little disruption.

*Ara Jabaghourian is a senior associate at Cotchett, Pitre & McCarthy, where he practices civil litigation in numerous areas. He has served as a judicial extern for Presiding Justice James Ardaiz of the California Court of Appeal, Fifth Appellate District and Justice Marvin Baxter of the California Supreme Court. He has also served as a staff attorney for the Federal Trade Commission's Bureau of Competition in Washington, D.C.*



Jabaghourian

*He has tried numerous trials to verdict in the areas of personal injury, medical malpractice, contract disputes, corporate dissolutions, and fraudulent investment schemes.*

