

COMMENTS

DOWN AND OUT AND NOW KICKED OUT: RESIDENTIAL LEASE EVICTIONS AND THE AUTOMATIC STAY[†]

INTRODUCTION

Included in the many changes that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) made to the Bankruptcy Code is a provision that affects the ability of a tenant to use a federal bankruptcy filing to delay or prevent a state law eviction action.¹ This reform touches upon the difficult and often acrimonious relationship between landlords and tenants, a relationship in which each side is wont to characterize itself as “the eternal victim.”² Landlords describe tenants “from hell”—“raucous partyers and wife-beaters to drug dealers and scam artists trying to live rent-free.”³ Horror stories abound, from the tenant who tried to run over his landlord with his car to the tenant who sacrificed neighborhood cats for satanic rituals.⁴ Less dramatic, but more common, is the “deadbeat tenant,” who fails to pay rent, forces the landlord to spend thousands of dollars on an eviction, causes serious damages to the leased premises in the meantime, and never pays a cent of the judgment the landlord eventually obtains.⁵ Tenants have their own horror stories, like that of a New York landlord who admitted to hiring a hit man to get rid of rent-controlled tenants.⁶ Countless tenants complain of landlords

[†] Sarah Keith-Bolden received the Keith J. Shapiro Consumer Bankruptcy Writing award for this Comment.

¹ 11 U.S.C.A. § 362(b) (West 2005).

² See Bob Baker, *Crowded Courtrooms Serve as Battleground for L.A.’s Eviction Wars*, L.A. TIMES, Jun. 11, 1989, at M5 [hereinafter Baker, *Crowded Courtrooms Serve as Battleground for L.A.’s Eviction Wars*].

³ Johanna Knapschaefer, *How to Handle the Tenant from Hell*, BUSINESS WEEK, Apr. 14, 1997, at 110, available at <http://www.businessweek.com/1997/15/b3522132.htm>.

⁴ *Id.*

⁵ See, e.g., Pat Curry, *Dealing with Tenants from Hell No Fun*, VENTURA COUNTY STAR, July 22, 2005, at 3; John Grogan, Commentary, *Tenant from Hell Burns New Landlords*, SUN SENTINEL, May 19, 1995, at 1B; Dennis Hevesi, *Buying is Easy Owning is Hard*, N.Y. TIMES, Sept. 11, 2005, § 11, at 1.

⁶ J.A. Lobbia, *Rent to Die For? Downtown Landlord Admits Murder Plot*, VILLAGE VOICE, Jan. 13–19, 1999, available at <http://www.villagevoice.com/news/9902,lobbia,3346,5.html>.

who fail to maintain the leased premises, forcing tenants to live in residences with substandard conditions, such as “leaking ceilings, moldy walls, gaping holes packed with reeking raw sewage, and no [heat].”⁷

At no time is the acrimony between landlords and tenants more bitter than during the eviction process, in which both sides face potentially devastating losses.⁸ Tenants face the loss of their current home and possibly the frightening prospect of homelessness.⁹ Landlords, who rarely receive any rental payments during an eviction action, face financial losses that could result in the foreclosure of one or more rental units.¹⁰ Bankruptcy intersects with this highly emotional area of law when a tenant who is in the process of being evicted files for bankruptcy, thus invoking the protection of the automatic stay.¹¹ The landlord now must contend not only with the state law eviction process but also with federal bankruptcy law before the eviction can be completed.¹²

This Comment first provides background information on residential evictions, the automatic stay, and bankruptcies that are filed solely for the purpose of delaying eviction (“unlawful detainer bankruptcies”). Part I provides an introduction to state law eviction procedures. Part II discusses the automatic stay and how it applied to eviction actions before BAPCPA.

The next three Parts of this Comment turn to the emergence of concern over unlawful detainer bankruptcies and previous legislative and judicial attempts to resolve the issues that they raise. Part III tells the story of Southern California in the 1990s, when the affect of bankruptcy on eviction actions was front page news, while Part IV addresses the question of whether the problem

⁷ Joe McGurk & Marsha Kranes, *Landlord from Hell is Evicted*, NEW YORK POST, Nov. 5, 2004, at 30; see generally A.J. Caliendo, *Zone Change Sought for Forgetful Landlords*, PITTSBURG POST-GAZETTE, July 16, 2003, at E6; Vanessa Hua, *Housing Riddled with Violations: Neighborhood Survey Shows Rampant Problems in Single-Room Occupancy Units*, S.F. CHRONICLE, Sept. 23, 2005, at F1.

⁸ See Baker, *Crowded Courtrooms Serve as Battleground for L.A.’s Eviction Wars*, *supra* note 2, at M5 (describing the scene at a Los Angeles eviction court: “The parties trickle out, each conscious of the other’s existence, wary of the other’s intentions, jaded by history, locked in one of life’s eternal conflicts, tenant versus landlord. It colors the eviction game an angry and often irrational red . . .”).

⁹ Chester Hartman & David Robinson, Fannie Mae Foundation, *Evictions: The Hidden Housing Problem*, 14 HOUS. POL’Y DEBATE 461, 468 (2003), available at <http://content.knowledgeplex.org/kp2/cache/documents/10950.pdf>.

¹⁰ Josh Meyer, *A Plague Visits the Landlords*, L.A. TIMES, Jan. 9, 1993, at 1 [hereinafter Meyer, *A Plague Visits the Landlords*].

¹¹ See *infra* Part II.

¹² See *infra* Part II.

was limited to that time period and locale. Part V then addresses various legislative reforms that have been considered in the U.S. Congress.

The last three Parts of this Comment address the recent changes to the automatic stay. Part VI describes BAPCPA provisions regarding the application of the automatic stay to residential lease evictions, and Part VII examines how these new provisions will affect landlords and tenants. In Part VIII, the Comment concludes by suggesting an alternative approach to unlawful detainer bankruptcies, based not on how far the eviction process had progressed before the tenant filed for bankruptcy but rather on whether the tenant makes postpetition rental payments.

I. INTRODUCTION TO RESIDENTIAL LEASE EVICTIONS

Although there are many reasons why a landlord might want to evict a tenant, the majority of eviction actions are based on the tenant's alleged failure to pay rent.¹³ Most states forbid landlords from engaging in "self-help" measures, such as changing the locks, and instead require landlords to resort to the courts to remove a "deadbeat" tenant.¹⁴ However, all fifty states have enacted summary eviction proceedings designed to make judicial evictions less onerous for landlords.¹⁵ The summary eviction process is relatively uniform in every state.¹⁶ In California, which follows the same general procedure as other jurisdictions,¹⁷ the process begins when a landlord who has not received a timely rental payment provides a tenant with a three-day notice to quit or pay rent.¹⁸ If the tenant fails to vacate the premises or pay the rent within the three-

¹³ See Steven Gumm, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 397 (1995) (finding that eighty-six percent of eviction actions in a study in New Haven, Connecticut were for nonpayment of rent); see also Hartman & Robinson, *supra* note 9, at 478 (quoting a legal aid staff attorney as saying "most cases involve nonpayment of rent"). This Comment focuses exclusively on eviction actions based on the tenant's failure to pay rent.

¹⁴ Hartman & Robinson, *supra* note 9, at 478.

¹⁵ Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 137 (2000).

¹⁶ See Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 791-92 (1994).

¹⁷ See *id.*

¹⁸ CAL. CIV. PROC. CODE § 1161 (West 2005); 1-5 Mathew Bender Practice Guide: CA Landlord-Tenant Litig. § 5.03 (2005) [hereinafter MB Practice Guide: CA Landlord-Tenant Litig.]. This Comment presents the basic California summary eviction procedure, but omits many details. For more information on the defenses and procedural safeguards available to tenants at each stage of the proceedings and the filing requirements for both parties, see the Matthew Bender Practice Guide: California Landlord Tenant Litigation. 1-5 MB Practice Guide: CA Landlord-Tenant Litig. §§ 5.01-5.84.

day period, the landlord may commence an unlawful detainer action by filling out and filing a form complaint provided by the court.¹⁹ After being served with this complaint, the tenant has five days to answer.²⁰

If the tenant does not respond, which has been estimated to occur about half the time,²¹ a default judgment is entered for the landlord.²² If the tenant does respond, the matter goes to trial.²³ If the landlord is victorious, either by default judgment or by prevailing at trial, the clerk issues a writ of possession.²⁴ The writ is delivered to the sheriff, who goes to the premises and posts a five-day notice to vacate.²⁵ After the five-day period has expired, the sheriff returns to the property to lock the tenant out, and the eviction is complete.²⁶

While the basic summary eviction process in other jurisdictions is very similar to the process outlined above, states vary in the amount of protection offered to tenants who are being evicted for failure to pay rent.²⁷ One variation is that the timeline for each step of the procedure may be extended or contracted according to state law.²⁸ For example, state law may give the tenant only two days to reply to the landlord's complaint²⁹ or allow the sheriff, after receiving a judgment for possession, to proceed with eviction without giving the tenant additional notice to quit.³⁰ Other statutes, however, provide tenants with more time than in California. Connecticut, for example, gives tenants a

¹⁹ 1-5 MB Practice Guide: CA Landlord-Tenant Litigation § 5.03.

²⁰ *Id.* § 5.14.

²¹ Gerchick, *supra* note 16, at 794 n.127, 820 n.244, 822 (1994) (citing an unpublished study from 1991 that found that tenants did not file answers almost 46% of the time, but also stating that the number of cases that result in a tenant default may vary and citing several other studies that found default rates ranging between 30 and 80%); *see also* David S. Schonfeld, The Real Estate Investor's Club of Los Angeles, *The Landlord's Guide to the Eviction Process*, <http://www.realestateclub-la.com/articles.html> (claiming that "[i]n most cases, the tenant will not respond to the unlawful detainer action") (last visited Jan. 25, 2007).

²² 1-5 MB Practice Guide: CA Landlord-Tenant Litig. § 5.48.

²³ Gerchick, *supra* note 16, at 792.

²⁴ CAL. CIV. PROC. CODE § 712.010 (West 2005).

²⁵ *Id.* § 715.010(b)(2).

²⁶ *Id.*

²⁷ *See, e.g.*, Gerchick, *supra* note 16, at 792 (explaining the summary eviction process in general and in California in particular); Lawrence R. McDonough, *Wait a Minute! Residential Eviction Defense is Much More Than "Did You Pay the Rent?"*, 28 WM. MITCHELL L. REV. 65, 68-70 (2001) (providing an explanation of the summary action in Minnesota); Lawrence Shoffner, *Evictions: A Basic Roadmap for Handling Nonpayment Actions*, 82 MICH. BAR JNL. 20, 22 (2003) (providing a summary of the summary eviction process in Michigan); Gunn, *supra* note 13, at 423-28 (explaining the summary eviction process in Connecticut).

²⁸ Gerchick, *supra* note 16, at 792.

²⁹ Gunn, *supra* note 13, at 423.

³⁰ Gerchick, *supra* note 16, at 792.

grace period at the beginning of the eviction process by requiring that the landlord wait nine days after the rent becomes due before serving the tenant with a notice to quit.³¹ Michigan, on the other hand, gives tenants a grace period at the end of the eviction process by providing a statutory right of redemption, which begins to run after a judgment for possession is ordered.³² If the tenant pays the amount of the judgment within the redemption period, the eviction is halted.³³ Varying rules on when a tenant may have a default judgment set aside or file an appeal or posttrial motion also affect tenant's rights in various states.³⁴

States also differ in whether and to what extent landlords have a duty to maintain the rented premises.³⁵ Almost every state has adopted a statutory or implied warranty of habitability that requires landlords to maintain rental units in a condition that, at a minimum, does not endanger tenants' lives, health, or safety.³⁶ However, the extent of the warranty "varies widely among the states,"³⁷ and a handful of states do not require the landlord to make any repairs whatsoever, unless contractually obligated to do so by the lease.³⁸

When states impose a duty on landlords to maintain the premises, that duty is often coupled with a tenant's right to withhold rent to make necessary repairs that the landlord fails to make after reasonable notice.³⁹ In such states, the tenant may be able to defend a summary eviction action by claiming that

³¹ CONN. GEN. STAT. § 47a-15a (2006); Gunn, *supra* note 13, at 423.

³² MICH. COMP. LAWS § 600.5744(4) (2006); Shoffner, *supra* note 27, at 24.

³³ MICH. COMP. LAWS § 600.5744(6); Shoffner, *supra* note 27, at 24.

³⁴ See, e.g., Gerchick, *supra* note 16, at 831-32; Shoffner, *supra* note 27, at 24; Gunn, *supra* note 13, at 425.

³⁵ Barbara Jo Smith, Note, *Tenants in Search of Parity With Consumers: Creating A Reasonable Expectations Warranty*, 72 WASH. U. L.Q. 475, 475 (1994).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See, e.g., Propst v. McNeil, 932 S.W.2d 766, 769 (Ark. 1996) (holding that "only an express agreement or assumption of duty by conduct can remove a landlord from the general rule of nonliability"); Miles v. Shauntee, 664 S.W.2d 512, 518 (Ky. 1983) ("Absent legislation to the contrary the established doctrine in effect in Kentucky is that the tenant takes possession of the premises as he first finds them, and the landlord, absent an express covenant to the contrary, has no obligation to repair the premises. No implied warranty of habitability exists under Kentucky Law.") (citations omitted). Arkansas probably can claim the title of the least tenant-friendly state; not only is there no implied warranty of habitability, but it is the only state in the country that makes nonpayment of rent a criminal offense. Carol R. Goforth, *Arkansas Code § 18-16-101: A Challenge to the Constitutionality and Desirability of Arkansas' Criminal Eviction Statute*, 2003 ARK. L. NOTES 21, 22 (2003).

³⁹ Spector, *supra* note 15, at 171-76.

the tenant used all or a portion of the rent money to make repairs⁴⁰ or that no rent was due because the premises were not maintained in a habitable condition.⁴¹ Even if the tenant does not ultimately prevail, the use of such a defense may make it possible to significantly increase the amount of time the tenant can remain on the premises before the eviction is complete.⁴²

The amount of time it takes to evict a tenant varies widely, depending not only on the timeline set up under state law and the number of eviction defenses available to tenants but also on delays stemming from a backlog in the courts or at the sheriff's office.⁴³ In California, the summary eviction statute creates a system in which a tenant can be evicted in seventeen days.⁴⁴ However, according to one source, "the process often takes at least twice as long."⁴⁵ Studies of Los Angeles suggest that the summary eviction process took an average of between 51 and 108 days in the early 1990s.⁴⁶ Around the same time, a study in New Haven, Connecticut, found that evictions took an average of between 94 to 118 days to complete.⁴⁷ Sources from other states suggest an eviction process lasting at least a month and possibly extending for several months.⁴⁸

The summary eviction process is criticized both for being too pro-tenant and for being too pro-landlord. Landlords criticize the process for being excessively slow and allowing deadbeat tenants to live rent-free for months while raising only spurious defenses.⁴⁹ Tenants and tenants' rights activists

⁴⁰ Richard H. Chused, *Saunders (a.k.a. Javins) v. First National Realty Corporation*, 11 GEO. J. POVERTY L. & POL'Y 191, 193 (2004) (discussing the decision in which "the United States Court of Appeals for the District of Columbia Circuit became the first tribunal to unequivocally hold that a warranty of habitability was implied in all residential leases and that tenants could set off damages for violation of that warranty defensively in eviction cases"); Spector, *supra* note 15, at 171–76.

⁴¹ Sydney Knight, *Special Project On Landlord-Tenant Law in the District of Columbia Court of Appeals: Constructive Eviction—An Illusive Tenant Remedy?*, 29 HOW. L. J. 13 (1986) (discussing the availability of and limits to constructive eviction as a defense for not paying rent).

⁴² See generally Gerchick, *supra* note 16, at 792.

⁴³ *Id.*

⁴⁴ *Id.* at 796.

⁴⁵ *Id.*

⁴⁶ *Id.* at 808–09.

⁴⁷ Gunn, *supra* note 13, at 415.

⁴⁸ Hartman & Robinson, *supra* note 9, at 473 (stating that the eviction process takes "as little as 30 days" to complete in Baltimore but "up to several months" in Chicago); Shoffner, *supra* note 27, at 22 ("In most instances, an eviction for nonpayment [in Michigan] can be completed in about a month. However, if the tenant appears and raises a factual defense, the period can easily become several months.").

⁴⁹ See, e.g., Gerchick, *supra* note 16, at 793.

criticize the process for progressing extremely quickly and for creating an environment in which it is difficult for tenants to raise valid defenses.⁵⁰

II. THE AUTOMATIC STAY AND RESIDENTIAL LEASE EVICTIONS BEFORE BAPCPA

When a debtor files a bankruptcy petition, the debtor's assets become property of a newly created bankruptcy estate.⁵¹ The estate is protected by the automatic stay, which prevents, among other things, any action by creditors to "obtain possession of" or "exercise control over" property belonging to the estate.⁵² Before the 2005 modifications to the Bankruptcy Code, courts generally held that attempts to evict a bankrupt tenant were among those actions that were forestalled, at least initially, by the automatic stay.⁵³

A landlord, like any other creditor, may move for relief from the stay in the bankruptcy court.⁵⁴ In the context of residential lease evictions, some courts have approached the issue of whether to lift the automatic stay by examining whether the tenant has any remaining legal or equitable interest in the leased

⁵⁰ See, e.g., Hartman & Robinson, *supra* note 9, at 477–78 (noting the discrepancy between the number of landlords who are represented by counsel and the number of tenants who are represented by counsel and describing the summary eviction process as "a one sided, factory-like process in favor of landlords"); Spector, *supra* note 15, at 157 (noting the speed with which summary eviction actions take place and the limits that are sometimes placed on tenant defenses and counterclaims).

⁵¹ 11 U.S.C.A. § 541(a) (West 2005). Neither this provision nor the other provisions discussed in this section were modified by the BAPCPA. See 11 U.S.C. § 541(a) (2000).

⁵² 11 U.S.C.A. § 362(a) (West 2005); see 11 U.S.C. § 362(a) (2000) (containing provisions identical to those found in BAPCPA). By preserving the estate, the automatic stay allows the debtor relief from collection actions while the bankruptcy estate is organized and protects creditors by ensuring an orderly and equitable division of the bankruptcy estate. James R. Sack, *Recent Developments in Bankruptcy Law: Adequate Protection*, 2 BANKR. DEV. J. 21, 26–27 (1985).

⁵³ See *Brattleboro Hous. Auth. v. Stoltz (In re Stoltz)*, 197 F.3d 625, 628 (2d Cir. 1999); see also 1-5 MB Practice Guide: CA Landlord-Tenant Litig. § 5.54[6] (2004) (noting that the "provision does, by its terms, apply to a residential unlawful detainer proceeding"). Even if, under state law, the tenant is found to have no interest in the leased premises, this determination generally is made only after the landlord moves for relief from stay under 11 U.S.C.A. § 362(d) (West 2005). See Keith M. Baker, *Sudden Death In Overtime, Part I: Whether a Debtor Can Stop Eviction and Assume a Lease That Has Been Terminated Pre-petition*, AM. BANKR. INST. J., Nov. 2001, 12, 12 (noting that a landlord may file "an adversary proceeding seeking a declaratory judgment that the automatic stay does not stop eviction proceedings because the lease was terminated pre-petition or file[] a motion for relief from the automatic stay provisions of § 362") [hereinafter Baker, *Sudden Death in Overtime*]. But see *infra* Part III.B (discussing two California cases in which the court found that the automatic stay provisions did not operate as to certain residential evictions where the lease had been terminated before the commencement of the bankruptcy proceeding).

⁵⁴ § 362(d).

premises at the time of the bankruptcy filing.⁵⁵ If the court finds that the tenant has no interest in the leased premises, then the leased premises never become part of the bankruptcy estate, and the automatic stay is inapplicable.⁵⁶ Courts are split regarding when in the eviction process the tenant ceases to have any interest in the leased premises.⁵⁷

As one court has noted, there are two distinct stages in the eviction process: (1) “the time at which a lease is terminated” and (2) “the time at which there is a final judicial determination” that the lease was properly terminated under state law.⁵⁸ These two events do not necessarily occur at the same time.⁵⁹ For example, a lease may terminate upon the expiration of the three-day notice provided by a “notice to pay rent or quit.”⁶⁰ However, final judicial determination that the lease was validly terminated may not occur until a judgment for possession is entered in favor of the landlord.⁶¹

Many courts have found that the automatic stay applies to any eviction action, regardless of how far along in the eviction process the landlord has progressed.⁶² The Second Circuit, for example, has held that “mere possessory interest in real property, without any accompanying legal interest, is sufficient to trigger protection of the automatic stay.”⁶³ However, other courts have found that a tenant’s interest in leased property terminates long before the

⁵⁵ See *Marquand v. Smith (In re Smith)*, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989); *Lee v. Baca*, 86 Cal. Rptr. 2d 913, 914 (Cal. Ct. App. 1999); Baker, *Sudden Death in Overtime*, *supra* note 53, at 12 (discussing that, where a lease is in default, there is a question of whether the tenant has an interest that is protected under the automatic stay).

⁵⁶ *Smith*, 105 B.R. at 53; *Baca*, 86 Cal.Rptr.2d at 914; Baker, *Sudden Death in Overtime*, *supra* note 53, at 12.

⁵⁷ Baker, *Sudden Death in Overtime*, *supra* note 53, at 12. Many of the bankruptcy cases that deal with the termination of a lease agreement involve commercial leases and/or the assumption of the lease under § 365. Nonetheless, the principles encountered are similar to those encountered in applying the automatic stay to residential lease evictions. See *Stoltz*, 197 F.3d at 628; *Westside Apartments, LLC v. Butler (In re Butler)*, 271 B.R. 867, 870 (Bankr. C.D. Cal. 2002).

⁵⁸ *Vanderpark Props., Inc. v. Buchbinder (In re Windmill Farms, Inc.)*, 841 F.2d 1467, 1470 (9th Cir. 1988) (quoting *In re Escondido West Travelodge*, 52 B.R. 376, 379 (S.D. Cal. 1985)) (discussing the termination of a commercial lease for purposes of assumption under § 365).

⁵⁹ *Id.*

⁶⁰ *Id.* at 1471.

⁶¹ *Id.*

⁶² Baker, *Sudden Death in Overtime*, *supra* note 53, at 12.

⁶³ *48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 430 (2d Cir. 1987) (citing cases applying New York law). Other courts taking this approach include the Third and Sixth Circuits. *Convenient Food Mart No. 144, Inc. v. Convenient Indus. of America, Inc. (In re Convenient Food Mart No. 144)*, 968 F.2d 592, 593 (6th Cir. 1992); *Cuffee v. Atl. Bus. & Cmty. Dev. Corp. (In re Atl. Bus. & Cmty. Corp.)*, 901 F.2d 325, 328 (3d Cir. 1990).

physical eviction is complete. For example, the Ninth Circuit has held that, under California law, where “a proper three-days’ notice to pay rent or quit” was provided to the debtor, the filing of an unlawful detainer action serves to terminate the lease, provided that the “notice contained an election to declare the lease forfeited” and “the lessee has failed to pay the rent in default within the three day period.”⁶⁴ The court reserved judgment on whether the lease might terminate even before the filing of the unlawful detainer action.⁶⁵ The court explained its ruling, saying “[a] tenant who is guilty of unlawful detainer cannot possibly have the right to possession of the property. He still may be in possession of the property, but his possession is not rightful; it is unlawful.”⁶⁶

Even if a court determines that the tenant’s interest in the leased premises is protected by the automatic stay, a landlord can move for relief from the stay under § 362(d) of the Bankruptcy Code, which provides general relief provisions applicable to any creditor.⁶⁷ Relief from the automatic stay is granted if the debtor has no equity in the property in question and the property is “not necessary to an effective reorganization.”⁶⁸ Because of the nature of a typical lease agreement, a debtor is unlikely to have any equity in the leased premises.⁶⁹ In a chapter 7 bankruptcy proceeding, liquidation, not reorganization, is contemplated, and a landlord’s motion for relief from stay should be granted.⁷⁰ Even in a chapter 13 reorganization proceeding, it is unlikely a tenant will be able to argue successfully that continued possession of the leased residence is necessary for effective reorganization.⁷¹ Most commentators agree that a landlord who wishes to evict a bankrupt tenant will, in the vast majority of cases, be able to do so after a hearing on the landlord’s

⁶⁴ *Windmill Farms*, 841 F.2d at 1471.

⁶⁵ *Id.* at 1470.

⁶⁶ *Id.*

⁶⁷ 11 U.S.C.A. § 362(d) (West 2005).

⁶⁸ *Id.* § 362(d)(2).

⁶⁹ This Comment addresses the typical residential lease. A lease-to-own agreement would bring up separate issues that are not addressed. Even under a typical residential lease, a renter may be said to have equity in the premises if rental rates have increased since the lease was signed. See Bill Weinstein & Stewart Cohen, *The Value of Retail Real Estate Leases—New Perspectives to Consider*, AM. BANKR. INST. J., Nov. 1996, 30, 30.

⁷⁰ See § 362(d)(2); see also Maria Lerman Hutkin, Note, *Using Bankruptcy to Pay the Rent Via the Automatic Stay*, 63 S. CAL. L. REV. 181, 191 (1989–1990).

⁷¹ Even if the debtor successfully argued that the residence was necessary for reorganization, the landlord would have to be provided with adequate protection or the automatic stay could be lifted for cause. § 362(d)(1). Such adequate protection usually requires the payment of postpetition rent so that the landlord does not face continuing losses while a bankruptcy proceeding is pending. See Hutkin, *supra* note 70, at 191. Chapter 13 cases also bring up the issue of assumption of the lease under § 365, an issue that will not be addressed in this Comment. § 365.

motion for relief from stay.⁷² The controversy over the effect of bankruptcy filings on residential eviction turns, for the most part, not on whether a landlord should be able to evict a bankrupt tenant, but on the speed and ease with which a landlord can do so.⁷³

III. THE CALIFORNIA PROBLEM: AN EXTREME CASE STUDY OF THE STAKEHOLDERS IN UNLAWFUL DETAINER BANKRUPTCIES

Legislative interest in changing how the automatic stay applies to residential eviction proceedings has its roots in the Central District of California in the early 1990s.⁷⁴ The city of Los Angeles became home to a large number of “petition mills,” nonattorneys who filed bankruptcy petitions on behalf of clients almost exclusively for the purpose of delaying eviction.⁷⁵ The rise in these unlawful detainer bankruptcies coincided with a large and increasing number of bankruptcy filings,⁷⁶ with resulting heavy burdens on the bankruptcy courts.⁷⁷ Newspaper reporters, landlord associations, and bankruptcy court officials all decried these petition mills as a “plague” on the

⁷² *Marquand v. Smith (In re Smith)*, 105 B.R. 50, 53 (Bankr. C.D. Cal. 1989) (“These relief from stay motions are rarely contested and are never lost, as long as the moving party provides adequate notice of the motion and competent evidence to establish a *prima facie* case.”); 145 CONG. REC. S14369 (daily ed. Nov. 9, 1999) (statement of Sen. Sessions) (stating that courts hearing a landlord’s motion for relief from stay will “[u]niformly . . . rule in his favor”); Gerchick, *supra* note 16, at 837 (noting that if the landlord already has a judgment for possession, the motion will generally be granted because the “rental unit is not an asset of the tenant”). *But see* 145 CONG. REC. S14682 (daily ed. Nov. 17, 1999) (statement of Sen. Feingold) (citing a letter from an “expert in consumer bankruptcy cases” who said that in his experience he “doubt[ed] that landlords have prevailed in even 20% of the cases”).

⁷³ *Smith*, 105 B.R. at 53; 145 CONG. REC. S14369 (daily ed. Nov. 9, 1999); Gerchick, *supra* note 16, at 837.

⁷⁴ *See* 139 CONG. REC. E463 (daily ed. Mar. 1, 1993) (statement of Rep. Gallegly) (asking his colleagues to “help [him] end repeated abuses of Federal bankruptcy law”).

⁷⁵ *See, e.g., Meyer, A Plague Visits the Landlords, supra* note 10, at 1.

⁷⁶ *See id.* (estimating 85,000 bankruptcy filings in the Los Angeles County in 1992); Josh Meyer, *17 Charged With Bankruptcy Fraud Involving Tenants*, L.A. TIMES, Dec. 19, 1992, § B, at 1 (estimating 80,000 bankruptcy filings in Southern California every year as of 1992) [hereinafter Meyer, *17 Charged*]; Michael Connelly, *‘Petition Mills’ Dupe Many Into False Bankruptcies*, L.A. TIMES, May 8, 1989, at 1 (estimating 60,000 bankruptcy filings in the Central District of California every year as of 1989).

⁷⁷ *See Smith*, 105 B.R. at 51 (voicing frustration with the large number of petition mill filings and stating that “[t]here is no exact count of [how many of] these ‘unlawful detainer’ cases [are] pending in this district, but over the past several months, eighty percent of the motions for relief from Stay filed in Chapter 7 cases that I have heard involve residential unlawful detainer actions”); Leif M. Clark et al., *Consumer Bankruptcy: A Roundtable Discussion*, 2 AM. BANKR. INST. L. REV. 5, 6–8 (1994) (quoting the Honorable Geraldine Mund, a bankruptcy judge in Los Angeles, as she talked about the problem of judicial administration in her busy court).

city.⁷⁸ Bankruptcy court officials attributed at least 25% and possibly as many as 40% of the personal bankruptcy filings in the district to petition mills.⁷⁹

A. *The Scope of the Problem and an Introduction to the Stakeholders*

Landlords were vocal about the effect that petition mill filings had on the profitability of the residential rental market.⁸⁰ Estimates of the cost to a landlord for every tenant who filed for bankruptcy were largely anecdotal and varied significantly, with most sources agreeing that landlords “pay thousands in court costs for each tenant ultimately evicted.”⁸¹ A 1991 study sponsored by the California Apartment Law Information Foundation, a landlord advocacy group, estimated that California landlords lost at least \$338 million dollars per year because of renters who failed to pay their rent, but did not specify the portion of that amount attributable to fraudulent bankruptcy filings.⁸² Another study cited by officials estimated that bankruptcy filings cost California landlords a total of \$270 million in 1991.⁸³ Landlords also claimed that unlawful detainer bankruptcies increased the number of rental unit foreclosures.⁸⁴ One apartment broker in Southern California in 1993 claimed that “mills have been a major factor in dozens of foreclosures, especially

⁷⁸ See, e.g., Meyer, *A Plague Visits the Landlords*, *supra* note 10, at 1.

⁷⁹ Editorial, *Abusing Bankruptcy Filings: Unscrupulous Operators Use Court to Create Delays on Bank Foreclosure on Home Loans*, L.A. TIMES (VALLEY ED.), Mar. 19, 1995, at 18 (stating that “[f]ederal attorneys estimated that a staggering 30% to 40% of the filings in Los Angeles in 1991 were made by so-called petition mills”); Meyer, *17 Charged*, *supra* note 76, at 1 (citing Assistant U.S. Trustee Marjorie Lacking-Erickson as attributing twenty-five percent of personal bankruptcy filings to petition mills); Meyer, *A Plague Visits the Landlords*, *supra* note 10, at 1 (quoting Marcy J.K. Tiffany, U.S. Trustee for the Bankruptcy Court of the Central District of California).

⁸⁰ See, e.g., Meyer, *A Plague Visits the Landlords*, *supra* note 10, at 1 (quoting a Los Angeles landlord who claimed, “These people are teaching people to steal from others Most of our investors are small-time people who put their life savings into this. They could lose everything.”); see also Elston Carr, *U.S. Shuts Eviction-Aid Firms That Targeted Central L.A.*, L.A. TIMES, Jan. 10, 1993, at 3.

⁸¹ Meyer, *A Plague Visits the Landlords*, *supra* note 10, at 1; see also Carr, *supra* note 80, at 3 (citing Maureen Tighe, an Assistant U.S. Attorney, as estimating that “landlords often lose as much as \$10,000 in legal fees and unpaid back rent”); Clark et al., *supra* note 77, at 21 (quoting attorney Ford K. Elsaesser, who said that fraudulent filers “force[d] the landlord to spend \$2000, \$3000, \$4000 for legal assistance that they shouldn’t have to spend and a lot of these landlords are very poor themselves”).

⁸² Stephanie O’Neill, *Tenants From Hell: Professional Deadbeats, ‘Petition Mill’ Scam Artists Imperil Small Rental Property Owners Unfortunate Enough To Select Them As Renters*, L.A. TIMES (HOME ED.), Aug. 8, 1993, at Real Estate, at K1. Adjusting for inflation using the consumer price index, this is the equivalent of approximately \$407 million in 2004. See Federal Reserve Bank of Minneapolis, *Consumer Price Index Inflation Calculator*, <http://www.minneapolisfed.org/Research/data/us/cal/> (last visited Jan. 26, 2007) [hereinafter *CPI Calculator*].

⁸³ Meyer, *17 Charged*, *supra* note 76, at 1. Adjusting for inflation using the consumer price index, this is the equivalent of approximately \$374.5 million in 2004. See *CPI Calculator*, *supra* note 82.

⁸⁴ Meyer, *A Plague Visits the Landlords*, *supra* note 10, at 1.

among those landlords barely breaking even.”⁸⁵ The landlords’ claims garnered support, if not hard evidence, from city officials, with one Deputy City Attorney quoted in the *Los Angeles Times* as “suspect[ing] that mills are the number one source of apartment building foreclosures in the San Fernando Valley, and possibly in other areas.”⁸⁶

The length of time that a fraudulent bankruptcy filing delayed an eviction received widely varying and mostly speculative estimates.⁸⁷ At the height of the Los Angeles “petition mill crisis,” delays were estimated at between three weeks to six months when only one bankruptcy petition was filed.⁸⁸ Multiple filings by the same person or by other people living in the leased premises could create even longer delays.⁸⁹ The *Los Angeles Times* estimated that “[a] standard eviction takes at least two to three months to complete. But if a tenant knowledgeable about the system sets out intentionally to scam as much free rent as possible, it can go on for a year or more.”⁹⁰ By its own advertisement, one petition mill guaranteed seven months of free occupancy “no matter how far you are behind in your rent.”⁹¹

It might seem that the soon-to-be evicted tenants who utilized petition mills to file unlawful detainer bankruptcies would benefit from the service, but many sources portrayed them as victims of petition mill scams.⁹² The typical petition mill client was characterized as having a low income, little understanding of a tenant’s legal rights, and often a limited ability to speak English.⁹³ “In many cases,” stated one article, “victims are not even aware that they have filed for bankruptcy.”⁹⁴ The mills were said to “vastly overcharge” people for a fleeting reprieve from eviction that left them owing money to the landlord and with a “credit rating so tarnished that they [found] it hard to get a credit card, car loan or decent apartment for 10 years.”⁹⁵ Petition mills also were accused of filing “one legal document after the next” while ignoring legitimate defenses their

⁸⁵ *Id.*

⁸⁶ *Id.* at A20.

⁸⁷ See Clark et al., *supra* note 77, at 6; Connelly, *supra* note 76, at 1; Sam Enriquez, *4 Plead Guilty in Frauds*, L.A. TIMES, Feb. 20, 1993, at 8.

⁸⁸ See Clark et al., *supra* note 77, at 6 (quoting Judge Mund, who estimated the delay in the eviction process as “two, three, four, or six months without paying rent”); Connelly, *supra* note 76, at 1.

⁸⁹ Connelly, *supra* note 76, at 1.

⁹⁰ O’Neill, *supra* note 82, at 8.

⁹¹ Meyer, *A Plague Visits the Landlords*, *supra* note 10, at 1.

⁹² See, e.g., Connelly, *supra* note 76, at 1.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Meyer, *A Plague Visits the Landlords*, *supra* note 10, at 1.

clients might have to justify withholding rent, such as substandard living conditions.⁹⁶

On the other hand, the operators of petition mills portrayed themselves as providing a valuable service to people in desperate situations, who were willing to trade “possible long-term damage to their credit record for the short-term help.”⁹⁷ One such owner said, “These people that come to me have no place to go They want a little more time to get on their feet. It lets them walk out with dignity without all the neighbors looking. I get people that call me up four months later and say thank you.”⁹⁸ He dismissed complaints of abuse of the system, saying, “Big corporations use bankruptcy as a tool for their gain all the time. So what’s good for them is not good for the average guy who has a problem? That isn’t right.”⁹⁹ One client of a petition mill credited the service with allowing her to stay in her apartment rent free for more than four months after being served with the first eviction papers, thereby giving her time to find a more desirable apartment.¹⁰⁰

Some of the most vociferous detractors of the Los Angeles petition mills were the overworked officials of the bankruptcy court. When a number of bankruptcy judges, practitioners, and scholars met in 1994 for a “roundtable discussion” of consumer bankruptcy, they focused primarily on the burden that petition mills, pro se filings, and unlawful detainer bankruptcies were placing on the courts.¹⁰¹ The Honorable Geraldine Mund, a bankruptcy judge in Los Angeles, complained of the heavy burden that hearing relief from stay motions placed on her and her staff.¹⁰² She found this heavy case load was hard to justify based on benefit to tenants when “ninety-nine percent of the time, I grant relief from the stay.”¹⁰³

⁹⁶ Meyer, *17 Charged*, *supra* note 76, at 1 (quoting Rod Field, an attorney with the Legal Aid Foundation of Los Angeles).

⁹⁷ Connelly, *supra* note 76, at 1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Baker, *Crowded Courtrooms Serve as Battleground for L.A.’s Eviction Wars*, *supra* note 2, at M5.

¹⁰¹ Clark et al., *supra* note 77, at 7 (quoting Judge Mund as saying “I am running relief from stay calendars of 100 matters in an hour with many people showing up, having no idea why there are there, unable to speak English [W]e have no translators in the court; we’re opening masses of files; we’re dealing with masses of paperwork.”).

¹⁰² *Id.*

¹⁰³ *Id.* at 8.

Not only those directly involved in unlawful detainer bankruptcies were affected by the Los Angeles “crisis.”¹⁰⁴ One U.S. Attorney explained that “the costs to taxpayers is enormous because they end up paying for the backlog of court cases.”¹⁰⁵ Delaying eviction has also been characterized as forcing rent-paying, low-income tenants to subsidize the housing costs of those who abuse the system.¹⁰⁶ As one bankruptcy court noted, the cost incurred by landlords “necessarily increases the rent that must be paid by low-income tenants in the Los Angeles area, which is one of the most expensive urban rental markets in the country.”¹⁰⁷

B. Judicial and Legislative Attempts to Resolve the Problem

As the case load in bankruptcy courts grew, so did the pressure on California bankruptcy courts and the California legislature to find a way to cope with or reduce the number of unlawful detainer filings.¹⁰⁸ One way that the courts responded to this pressure was by “establish[ing] special procedures dismissing these cases as quickly as possible.”¹⁰⁹ Judge Mund noted that she often heard relief from stay motions at the rate of a hundred an hour.¹¹⁰

One bankruptcy court in the Central District of California decided to take a more direct approach to addressing the problem of unlawful detainer bankruptcy filings.¹¹¹ The case, *Marquand v. Smith (In re Smith)*, arose during a routine motion for relief from stay by a landlord who had already pursued an unlawful detainer action and had been awarded a judgment for possession.¹¹² Before the judgment could be enforced, the debtor filed for bankruptcy.¹¹³ The court complained of hearing “over one hundred such motions . . . each month . . . involv[ing] facts identical to those [in the case at bar].”¹¹⁴ The opinion estimated that eighty percent of the relief from stay motions before the court involved residential unlawful detainer actions, which were “rarely contested and . . . never lost, as long as the moving party provide[d] adequate

¹⁰⁴ See *Marquand v. Smith (In re Smith)*, 105 B.R. 50, 55 (Bankr. C.D. Cal. 1989); Meyer, *17 Charged*, *supra* note 76, at 1.

¹⁰⁵ Meyer, *17 Charged*, *supra* note 76, at 1 (quoting U.S. Attorney Terree Bowers).

¹⁰⁶ *Smith*, 105 B.R. at 55.

¹⁰⁷ *Id.*

¹⁰⁸ See Clark et al., *supra* note 77, at 7.

¹⁰⁹ *Smith*, 105 B.R. at 53.

¹¹⁰ Clark et al., *supra* note 77, at 7.

¹¹¹ *Smith*, 105 B.R. at 51.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

notice of the motion and competent evidence to establish a prima facie case.”¹¹⁵ The court cited four characteristics common to cases in which debtor-tenants filed for bankruptcy solely for the purpose of “us[ing] (or misus[ing]) the bankruptcy court system to delay the landlord’s efforts to evict them for several months while paying no rent”:

[T]he filing of a “bare bones” petition without any schedules or statement of affairs ever being filed; the listing of no, few, or false creditors, if schedules are indeed filed; the failure of the debtor to appear at the mandatory . . . meeting of creditors; the refusal of debtors . . . to comply with the requirements of the Bankruptcy Code . . . thereby failing to obtain a discharge.¹¹⁶

Relying on Ninth Circuit precedent that a tenant’s leasehold interest terminates under California law when a tenant fails to cure a rent default within the three days provided by a properly served notice to quit or pay rent, the court went on to craft a solution to the problem of unlawful detainer bankruptcies.¹¹⁷ The court found that a “[d]ebtor’s retention of physical possession of the apartment is not a property interest recognized by law,”¹¹⁸ and that, therefore, “the unlawful detainer judgment extinguishe[d] the residential tenant’s interest in the property”¹¹⁹ Because the debtor had no interest in the property at the time the bankruptcy petition was filed, the stay did not enjoin the continuation of the eviction proceeding.¹²⁰ The court fully intended the decision to be a departure from settled law and admitted that it might “be viewed by some as judicial legislation.”¹²¹ The opinion ends with the recommendation that:

[R]esidential landlords, and the attorneys who represent them, call [the opinion] to the attention of the state courts that issue unlawful detainer judgments and convince those state courts to order the proper state law enforcement officials to evict debtor-tenants without first requiring residential landlords to obtain relief from the Stay. If this chain of events results, there is a chance that this wide-spread and daily abuse of the Bankruptcy Court system and the shameless defrauding of thousands of tenant victims will cease.¹²²

¹¹⁵ *Id.* at 53.

¹¹⁶ *Id.* at 51–52.

¹¹⁷ *Id.* at 53.

¹¹⁸ *Id.* at 54.

¹¹⁹ *Lee v. Baca*, 86 Cal. Rptr. 2d 913, 914 (Cal. Ct. App. 1999).

¹²⁰ *Smith*, 105 B.R. at 54.

¹²¹ *Id.* at 55.

¹²² *Id.* at 56.

A few years later, in 1994, with bankruptcy reform floundering in the U.S. Congress, the California legislature took it upon itself to address the problem of unlawful detainer bankruptcies. In 1994, California enacted California Code of Civil Procedure § 715.050, which attempted to override the automatic stay as it applied to residential leases.¹²³ The legislature noted that residential landlords were losing “millions of dollars” every year because of unlawful detainer bankruptcies and that these losses were “added to the rent of rent paying tenants.”¹²⁴ In response, the legislature enacted legislation providing that a judgment for possession should be enforced “without delay, notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding.”¹²⁵

In 1999, in the case of *Lee v. Baca*, a California appellate court was called upon to determine whether the recently enacted California statute was preempted by federal bankruptcy law.¹²⁶ The court approved of the opinion in *Smith*,¹²⁷ finding it to be “legally correct, logical and fair under the circumstances.”¹²⁸ Following *Smith*, the court found there was no conflict between federal bankruptcy law and the California legislation, because where a judgment for possession had been issued, there was no longer any interest in the property to become part of the bankruptcy estate.¹²⁹

C. Rejection of These Attempts

Other courts, however, soundly rejected both the *Smith* approach and the California legislature’s enactment of section 715.050.¹³⁰ Reviewing the decision of a bankruptcy court, one district court in California denounced the *Smith* decision as judicial legislation, saying, “Where Congress has declined to enact such exceptions [allowing eviction from residential property to proceed

¹²³ CAL CIV. CODE PROC. § 715.050 (West 1995).

¹²⁴ 1994 CAL. S.B. 690.

¹²⁵ § 715.050 (stating that “except with respect to enforcement of a judgment for money, a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action shall be enforced pursuant to this chapter without delay, notwithstanding receipt of notice of the filing by the defendant of a bankruptcy proceeding”).

¹²⁶ 86 Cal. Rptr. 2d 913, 913 (Cal. Ct. App. 1999).

¹²⁷ *Smith*, 105 B.R. at 50; see *supra* text accompanying notes 111–22 (discussing the reasoning and holding of *Smith*).

¹²⁸ *Baca*, 86 Cal. Rptr. 2d at 916–17.

¹²⁹ *Id.* at 914.

¹³⁰ *Smith*, 105 B.R. at 50.

notwithstanding a bankruptcy filing], it is not the Court's province to do so."¹³¹ The court said that California statute and common law recognized "mere possession of real property" as "a protected interest."¹³² Therefore, section 715.050 was preempted by the automatic stay provided by federal bankruptcy law, and a landlord was required to move the bankruptcy court for relief from stay whether or not the landlord had obtained a judgment for possession before the debtor-tenant filed for bankruptcy.¹³³

In 2002, one bankruptcy court in the Central District of California joined in denouncing the *Smith* and *Baca* decisions.¹³⁴ The court found that, under California law, mere possession constituted an equitable interest even when the legal right to possession has been extinguished by a judgment for possession.¹³⁵ This equitable interest, said the court, was protected by the automatic stay.¹³⁶ The court chastised those who sought to circumvent federal law, saying that "[i]t is not the province of this Court or any other court to engage in judicial legislation as a means to solve this social and economic dilemma. No state legislature is empowered to legislate around the automatic stay provisions of [federal bankruptcy law]."¹³⁷

IV. OUTSIDE OF THE 1990S CALIFORNIA: A PROBLEM OF NONCRISIS PROPORTIONS

After the mid-1990s, unlawful detainer bankruptcy filings ceased to be headline news in Southern California. Beginning in 1994, data collected by the United States Bankruptcy Court for the Central District of California showed a gradual decline in the number of unlawful detainer bankruptcy filings as well as the number of bankruptcy petitions prepared by petition mills.¹³⁸ In 2001, studies found that only 2.2% of bankruptcy petitions

¹³¹ *Di Giorgio v. Lee (In re Di Giorgio)*, 200 B.R. 664, 673 (C.D. Cal. 1996), *vacated as moot*, 134 F.3d 971 (9th Cir. 1998).

¹³² *Id.* at 671.

¹³³ *Id.* at 672.

¹³⁴ *Westside Apartments, LLC v. Butler (In re Butler)*, 271 B.R. 867, 873 (Bankr. C.D. Cal. 2002).

¹³⁵ *Id.* at 870.

¹³⁶ *Id.*

¹³⁷ *Id.* at 873.

¹³⁸ U.S. BANKR. CT., CENT. DIST. OF CAL., ANN. REP. 46 (2001), *available at* <http://www.cacb.uscourts.gov> (follow "News/Notices/Publications" hyperlink; then follow "Annual Reports" hyperlink; then follow "2001" hyperlink) (listing the following data for the number of bankruptcy cases that involved unlawful detainer filings in each year: 1991 - 16.9%; 1992 - 11.0%; 1993 - 8.3%; 1994 - 9.5%, 1995 - 3.0%; 1996 - 8.8%; 1997 - 8.0%; 1998 - 7.1%; 1999 - 5.4%; 2000 - 8.5%; 2001 - 2.2%).

involved unlawful detainers.¹³⁹ In 2002 and 2003, the district's annual reports did not even mention unlawful detainer filings.¹⁴⁰ This decline may have been related to the enactment of the Bankruptcy Reform Act of 1994, which made it easier to prosecute the operators of petition mills.¹⁴¹

Nonetheless, there is evidence to suggest that the problem of unlawful detainer filings was not confined to Los Angeles or the mid-1990s. In 1997, a commission created by Congress to study potential bankruptcy reforms reported receiving over three hundred letters expressing concern over unlawful detainer filings, including letters from Members of Congress from California, Illinois, Kansas, Maryland, North Carolina, South Carolina, and Texas, and letters from landlords in "virtually every state."¹⁴² Moreover, in 1999, Senator Jeff Sessions entered into the Congressional Record a number of advertisements promising to delay eviction for months without having to pay any rent.¹⁴³ More recently, one attorney who represents landlords in California called bankruptcy "probably the worst thing that a tenant can do to delay the eviction" and noted a continuing problem with repeat filers.¹⁴⁴ The National Association of Home Builders also considered unlawful detainer bankruptcies a serious problem for landlords in 2005.¹⁴⁵ This public interest was sufficient to maintain Congressional interest in modifying the application of the automatic stay, although the amount of attention these reforms received on the House and Senate floor decreased significantly after 2000.¹⁴⁶

¹³⁹ *Id.*

¹⁴⁰ U.S. BANKR. CT., CENT. DIST. OF CAL., ANN. REP. 39–43 (2002), available at <http://www.cacb.uscourts.gov> (follow "News/Notices/Publications" hyperlink; then follow "Annual Reports" hyperlink; then follow "2002" hyperlinks); U.S. BANKR. CT., CENT. DIST. OF CAL., ANN. REP. 51–54 (2003), available at <http://www.cacb.uscourts.gov> (follow "News/Notices/Publications" hyperlink; then follow "Annual Reports" hyperlink; then follow "2003" hyperlinks).

¹⁴¹ See *infra* notes 148–50 and accompanying text.

¹⁴² NAT'L BANKR. REVIEW COMM'N FINAL REP., *Bankruptcy: The Next Twenty Years, Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissioners*, 1107–09, Oct. 20, 1997, available at <http://govinfo.library.unt.edu/nbrcreport/24commvi.pdf>.

¹⁴³ 145 CONG. REC. S14669–70 (daily rep. Nov. 19, 1999) (statement of Sen. Sessions).

¹⁴⁴ Schonfeld, *supra* note 21.

¹⁴⁵ Press Release, Nat'l Ass'n of Home Builders, House-Passed Bill Will Halt Tenant, Home Owner Bankruptcy Abuse, Builders Say (Apr. 18, 2005), available at www.azobuild.com/news.asp?newsID=908 (quoting NAHB President, David Wilson, who claimed that fraudulent bankruptcy filings for the purpose of delaying eviction "are . . . threatening the economic viability of rental properties, particularly subsidized housing properties that have thin operating margins").

¹⁴⁶ See *infra* Part V (discussing various debates on the House and Senate floor in the 1990s). The author's search of legislative history after this time found little debate over modification to the application of the automatic stay to eviction actions. One exception was an amendment proposed by Representative Maxine Waters of California, who did not want the exception to the automatic stay to apply to victims of domestic

V. LEGISLATIVE HISTORY

By 1993, concern over the applicability of the automatic stay to residential lease evictions had reached the United States Congress, and the Senate considered bankruptcy reform that provided for expedited hearings on motions for relief from stay.¹⁴⁷ By 1994, the proposed bill had been amended to make it easier to go after “bankruptcy petition preparers who are negligent or commit fraud in preparing petitions.”¹⁴⁸ Senator Howard Metzenbaum of Ohio described this amendment as necessary to prevent abuse by petition mills “who entice a debtor into believing that . . . (s)he will be able to avoid eviction by filing a bankruptcy petition.”¹⁴⁹ When the Bankruptcy Reform Act of 1994 was passed, it provided new tools for prosecuting the petition mills that were causing California bankruptcy courts so much difficulty.¹⁵⁰

In 1994, Congress also established the National Bankruptcy Review Commission (“Commission”) for the purpose of studying bankruptcy reform.¹⁵¹ Three years later, in October of 1997, the Commission issued its final report.¹⁵² The Commission noted “[s]erious concerns about repeated bankruptcy filings . . . for purposes other than financial reorganization,” such as preventing eviction.¹⁵³ To address these concerns, the Commission proposed a very limited exception to the automatic stay, which would allow a bankruptcy court to issue an in rem order “barring the application of a future automatic stay to identified property . . . for a period of six years.”¹⁵⁴ However, these in rem orders would be available only where “the debtor had transferred [a] . . . leasehold interest[] to . . . avoid . . . eviction.”¹⁵⁵ In addition, a future tenant who was “not a part of the scheme . . . to hinder . . . eviction” could, upon filing for bankruptcy, file a petition to include the

violence. She proposed an amendment to “provide a safe harbor for those victims who face the threat of more violence and extreme danger if their homes were taken.” H.R. REP. NO. 109-31, pt. 1 (2005).

¹⁴⁷ S. 540, 103rd Cong. (1993).

¹⁴⁸ 140 CONG. REC. S14597 (daily ed. Oct. 7, 1994) (statement of Sen. Metzenbaum).

¹⁴⁹ *Id.*

¹⁵⁰ Maureen Tighe, *Bankruptcy Fraud: A Guide to Making A Criminal Bankruptcy Fraud Referral*, 6 AM. BANKR. INST. L. REV. 409, 432 (1998) (saying that “[one of the provisions of the Bankruptcy Reform Act] was . . . enacted to combat the repeated filing of bankruptcies to stop an eviction”).

¹⁵¹ Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 486 (2005).

¹⁵² NAT’L BANKR. REVIEW COMM’N FINAL REP., *supra* note 142.

¹⁵³ *Id.* at 81.

¹⁵⁴ *Id.* at 102.

¹⁵⁵ *Id.*

property in the stay.¹⁵⁶ Four of the nine Commissioners objected to the narrow scope of the proposed reform.¹⁵⁷ The dissenters suggested a broad provision that would exempt eviction actions from the automatic stay “when the lease or rental agreement . . . has terminated, whether by [the terms of the lease] or because of the eviction process.”¹⁵⁸

Members of Congress apparently found the dissenters’ proposed reforms more appropriate than the majority view.¹⁵⁹ In 1998, the Senate considered bankruptcy reforms that would have made the automatic stay inapplicable to “any eviction, unlawful detainer action, or similar proceeding” against a debtor in relation to residential property where the debtor resided.¹⁶⁰ This provision would have answered the complaints of landlords and overburdened bankruptcy courts by making a bankruptcy filing completely ineffectual as a means of delaying eviction.¹⁶¹ However, it drew criticism for preventing tenants who were willing to pay postpetition rent from using bankruptcy to cure prepetition rent defaults.¹⁶² Proponents of the bill responded that state eviction procedures provided ample protection for tenants without extending extra protection through federal bankruptcy law.¹⁶³

The House of Representatives also considered reforming the automatic stay in 1998, but its proposed provisions were more favorable to tenants.¹⁶⁴ The House’s reforms would have left the automatic stay in effect as long as: (1) the tenant paid the rent that became due after the bankruptcy petition was filed, (2) the tenant had not filed for bankruptcy within the last year and failed to pay postpetition rent during that case, and (3) the residential lease had not been terminated “pursuant to the lease agreement or applicable State law.”¹⁶⁵ By referring to state law to determine when a lease expired, the provision would have allowed landlords who received postpetition rent to proceed with an eviction if local courts found that the tenant’s interest had expired prepetition.¹⁶⁶

¹⁵⁶ *Id.* at 103.

¹⁵⁷ *Id.* at 1043.

¹⁵⁸ *Id.* at 1056.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 145 CONG. REC. S14367 (daily ed. Nov. 9, 1999) (statement of Sen. Feingold).

¹⁶³ 145 CONG. REC. S14683 (daily ed. Nov. 17, 1999) (statement of Sen. Sessions); *see supra* Part I.

¹⁶⁴ Consumer Bankr. Reform Act of 1998, H.R. 3150, 105th Cong. § 709 (1998).

¹⁶⁵ *Id.*

¹⁶⁶ *See supra* Part II (describing various approaches taken by courts regarding when in the eviction process a tenant’s interest in the premises terminates).

Congress failed to pass any bankruptcy reform legislation in 1998, and the same provisions were debated in subsequent years. Senator Russ Feingold of Wisconsin objected to the extremely broad exemption to the automatic stay provided by the Senate's proposed reforms.¹⁶⁷ As an alternative, he proposed reforms that were similar to those being debated in the House but provided more procedural safeguards for a tenant who failed to pay postpetition rent.¹⁶⁸ Senator Feingold's proposal required a landlord who did not receive a postpetition rent payment to file a certification with the court.¹⁶⁹ The landlord also was required to serve the tenant with a copy of the certification.¹⁷⁰ The tenant then had fifteen days to pay the rent or the stay exemption would go into effect.¹⁷¹ While this procedure might have been easier for landlords than moving for relief from the stay, it still entailed effort, delay, and legal fees. It is not hard to imagine a landlord being forced to go through this procedure every month, with the tenant paying rent only after being served with notice that the automatic stay was about to expire.¹⁷² Senator Feingold's proposal also essentially did away with the provision that allowed a landlord to proceed with eviction if the lease expired prepetition, by limiting it to situations in which the landlord intended to reside in the premises after the eviction was complete.¹⁷³ Senator Feingold justified his proposals by arguing:

The problem of abusive bankruptcy filings by tenants in a few jurisdictions can be addressed by more limited, carefully targeted provisions I agree that we should not let tenants take advantage of the bankruptcy laws to live "rent free." But if a debtor is able to put together enough money to pay rent during the pendency of the bankruptcy, that goal is satisfied. Certainly, the landlord is not losing anything financially by allowing the tenant to stay.¹⁷⁴

Even the more tenant-friendly House proposal drew fire from those who thought it provided too little protection for tenants. The National Bankruptcy

¹⁶⁷ 145 CONG. REC. S14367-68 (daily ed. Nov. 9, 1999) (statement of Sen. Feingold).

¹⁶⁸ *Id.* at 14367.

¹⁶⁹ *Id.* at 14368.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* Senator Feingold later changed his proposal to reduce the amount of time the tenant had to cure the default to ten days. *Id.* at 14682.

¹⁷² *See generally* 145 CONG. REC. S14684 (daily ed. Nov. 17, 1999) (statement of Sen. Sessions) (noting that "if a debtor owes rent and files for bankruptcy, he can wait until after his rent is due and then file it and have 15 days before his first rent payment is due").

¹⁷³ 145 CONG. REC. S14367 (daily ed. Nov. 9, 1999). Senator Feingold later changed his proposed amendment to include situations where a member of the landlord's family would be residing at the premises. 145 CONG. REC. S14684 (daily ed. Nov. 17, 1999) (statement of Sen. Sessions).

¹⁷⁴ 145 CONG. REC. S14368 (daily ed. Nov. 9, 1999) (statement of Sen. Feingold).

Conference¹⁷⁵ decried the proposed legislation for allowing eviction actions to proceed where the lease expired prepetition.¹⁷⁶ Allowing evictions to proceed without the supervision of bankruptcy courts, said the Conference, “could severely undercut the bankruptcy process and the relief available for individual debtors” as well as harming the interests of other creditors.¹⁷⁷

The House and Senate proposals, with various modifications, were debated each year from 1998 to 2001.¹⁷⁸ None of these proposed modifications were enacted into law.¹⁷⁹ In 2003, however, an amendment to the automatic stay was proposed that eventually was enacted as part of BAPCPA.¹⁸⁰

VI. THE AUTOMATIC STAY AND RESIDENTIAL EVICTIONS UNDER BAPCPA

The newly enacted 11 U.S.C. § 362(b)(22) (“eviction exception”) carves out a limited exception to the applicability of the automatic stay to eviction actions.¹⁸¹ Section 362(a), which creates the automatic stay, contains eight subsections, each of which lists actions that are precluded by the stay.¹⁸² However, the eviction exception refers to only one of them, § 362(a)(3), which prohibits “any act to obtain possession of” or “exercise control over” property of the estate.¹⁸³ Under the eviction exception, § 362(a)(3) does not prevent

¹⁷⁵ The National Bankruptcy Conference is “[a] non-profit, non-partisan, self-supporting organization of . . . leading scholars and practitioners in the field of bankruptcy law. Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.” National Bankruptcy Conference Website, <http://www.nationalbankruptcyconference.org/mission.cfm> (follow the “About the Conference,” “History” hyperlinks) (last visited Feb. 16, 2007).

¹⁷⁶ Mary Davies Scott, *Pending Bankruptcy Legislation: More to Follow?, The National Bankruptcy Conference Section-by-Section Analysis of H.R. 3150*, ALI-ABA Course of Study Materials, Resource Materials: Banking and Commercial Lending Law, Course Number SC78 (1998).

¹⁷⁷ *Id.*

¹⁷⁸ See S. 420, 107th Cong. (2001); S. 220, 107th Cong. (2001); H.R. 333, 107th Cong. (2001); S. 3186, 106th Cong. (2000); S. 625, 106th Cong. (1999); H.R. 833, 106th Cong. (1999); S. 1301, 105th Cong. (1998); H.R. 3150, 105th Cong. (1998).

¹⁷⁹ See Jensen, *supra* note 151, at 485–549 (discussing the various proposed reforms that were discussed, but not enacted, between the 1993 and 2005 sessions).

¹⁸⁰ See 11 U.S.C.A. § 362(b) (West 2005); H.R. 975, 108th Cong. (2003).

¹⁸¹ § 362(b)(22). The new provisions also address eviction actions “based on endangerment [to the] property or [person] or the illegal use of controlled substances,” *id.* § 362(b)(1)(23), and change the effect of the automatic stay in certain situations where a debtor is a repeat filer, *id.* § 362(c)(3). Both of these provisions may have a significant effect on landlords and tenants but are outside of the scope of this Comment.

¹⁸² For example, § 362(a)(1) prohibits the “commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor” for claims arising before the bankruptcy filing, while § 362(a)(2) prohibits “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case.” § 362(a)(1), (2).

¹⁸³ *Id.* § 362(b)(22).

“the continuation of any eviction, unlawful detainer action, or similar proceeding” if: (1) the action relates to “residential property in which the debtor resides as a tenant under a lease or rental agreement”,¹⁸⁴ and (2) the landlord obtained a judgment for possession against the debtor-tenant *before* the debtor-tenant filed for bankruptcy.¹⁸⁵

However, the eviction exception does not apply in all circumstances.¹⁸⁶ The debtor-tenant can maintain the protection of the automatic stay for thirty days after filing for bankruptcy by: (1) filing along with the bankruptcy petition a certification that a judgment for possession has been obtained and that nonbankruptcy law in the debtor’s jurisdiction allows the debtor to cure the entire monetary default that gave rise to the judgment¹⁸⁷ and (2) depositing with the court “any rent that would become due during the 30-day period after” the bankruptcy filing.¹⁸⁸ In addition to being filed with the court, a copy of the certification must be served on the landlord.¹⁸⁹

The debtor-tenant also is directed to indicate the existence of the landlord’s judgment on the bankruptcy petition.¹⁹⁰ However, it is the certification, not the indication of the judgment on the bankruptcy petition, which is essential to maintaining the automatic stay. If the debtor-tenant fails to file the required certification, merely indicating the judgment for possession on the bankruptcy petition is insufficient to maintain the automatic stay protection.¹⁹¹ On the

¹⁸⁴ *Id.*; see *In re McCray*, 342 B.R. 668, 669 (Bankr. D.D.C. 2006) (holding that § 362(b)(22) did not apply where there was no lease or rental agreement); *In re Anderson*, 341 B.R. 365, 371 (Bankr. D.D.C. 2006) (noting that § 362(b)(22) only applies where there is a lease agreement).

¹⁸⁵ § 362(b).

¹⁸⁶ *Id.* § 362(l).

¹⁸⁷ *Id.* § 362(l)(1)(A), (5)(B). One example of such nonbankruptcy law would be the statutory redemption period granted to Michigan renters. Under this statutory right of redemption a tenant has a certain time period after the judgment for possession is granted to pay the entire amount of the debt and thereby prevent eviction. MICH. COMP. LAWS § 600.5744(4), (6) (2003). A claim by the debtor, which, if successful, would allow the debtor to rescind the rental contract also could qualify under § 362(l)(1)(A). *In re Weinraub*, No. 06-143636, 2006 Bankr. LEXIS 3916, at *2–4 (Bankr. S.D. Fla. Dec. 21, 2006) (holding that where the debtor-tenant was being evicted under an agreement that the landlord characterized as a “sale and lease back” agreement but the debtor-tenant characterized as a “disguised consumer credit transaction,” the debtor-tenant’s Truth in Lending Act Claim qualified under § 362(l)(A)).

¹⁸⁸ § 362(l)(1)(B).

¹⁸⁹ *Id.* § 362(l)(1).

¹⁹⁰ *Id.* § 362(l)(5)(A) (stating that “[w]here a judgment for possession of residential property in which the debtor resides as a tenant under a lease or rental agreement has been obtained by the lessor, the debtor shall so indicate on the bankruptcy petition and shall provide the name and address of the lessor that obtained that pre-petition judgment on the petition”).

¹⁹¹ *Id.* § 362(l)(4)(A) (stating that “[i]f a debtor . . . indicates on the petition that there was a judgment for possession . . . and does not file a certification . . . relief from the stay . . . shall not be required to enable the

other hand, if the debtor-tenant files the certification, failure to indicate the judgment on the bankruptcy petition does not affect the existence of the automatic stay.¹⁹²

To maintain the automatic stay after the initial thirty-day period following the bankruptcy filing, the debtor-tenant must comply with nonbankruptcy law to cure “the entire monetary default that gave rise to the judgment [for possession].”¹⁹³ The debtor-tenant must file a certification that the default has been cured and serve it on the landlord.¹⁹⁴ If the debtor-tenant fails to file such a certification, the automatic stay is lifted with respect to the eviction action.¹⁹⁵ If the landlord files an objection to either of the debtor-tenant’s certifications, the bankruptcy court is required to hold a hearing within ten days to determine whether the certification is true.¹⁹⁶ If the court upholds the landlord’s objection, the stay is lifted immediately.¹⁹⁷

VII. THE EFFECT OF THE ENACTED PROVISIONS

After appearing in its current form, the eviction exception inspired little Congressional debate.¹⁹⁸ This was, perhaps, an indication that unlawful detainer bankruptcies had ceased to be an issue of major concern around the country¹⁹⁹ or that the enacted provisions made no tremendous change to the status quo.²⁰⁰ As of yet, it is unclear how much of an effect, if any, the eviction exception will have on landlords and tenants.

lessor to complete the process to recover full possession of the property”). The provision also calls for the clerk of the court to serve the landlord with documentation “indicating the absence of a filed certification and the applicability of the exception to the stay” *Id.* § 362(1)(4)(B).

¹⁹² *Id.* § 362(1)(1); see Alan M. Ahart, *The Inefficacy of the New Eviction Exceptions to the Automatic Stay*, 80 AM. BANKR. L.J. 125, 128–30 (2006). The broad equitable discretion of bankruptcy courts may, however, provide relief to a tenant who has failed to file the required certification or deposit a month’s rent with the court. While acknowledging that the failure to comply with these requirements results in the immediate inapplicability of the automatic stay, one bankruptcy court has found that a court may “waive the requirements of § 362(1) and re-impose the automatic stay.” *Weinraub*, 2006 Bankr. LEXIS 3916, at *5.

¹⁹³ § 362(1)(2).

¹⁹⁴ *Id.* § 362(1).

¹⁹⁵ *Id.* § 362(1)(4)(A). The provision also calls for the clerk of the court to serve the landlord with documentation “indicating the absence of a filed certification and the applicability of the exception to the stay” *Id.* § 362(1)(4)(B).

¹⁹⁶ *Id.* § 362(1)(3)(A).

¹⁹⁷ *Id.* § 362(1)(3)(B)(i). The clerk of the court also is required to immediately serve the landlord and debtor-tenant with a copy of the court order. *Id.* § 362(1)(3)(B)(ii).

¹⁹⁸ See *supra* note 146 and accompanying text.

¹⁹⁹ See *supra* Part IV.

²⁰⁰ See *infra* Part VII.A-B.

A. *The Enacted Provisions May Fail to Provide Complete Relief from the Automatic Stay*

One of the first commentators on the enacted provision, Judge Alan M. Ahart, has questioned whether the eviction exception will have any effect whatsoever on residential lease evictions.²⁰¹ While other exceptions refer to all eight provisions of the automatic stay,²⁰² the eviction exception refers exclusively to the automatic stay created by § 362(a)(3).²⁰³ Judge Ahart argues that two other provisions of the automatic stay are applicable to evictions and that landlords are thereby enjoined from proceeding with an eviction regardless of whether they are relieved from the § 362(a)(3) stay.²⁰⁴

Although Judge Ahart provides a convincing reading of the eviction exception, it is unclear to what extent his approach ultimately will be embraced by the courts. In the few cases that have interpreted the new provisions, the parties do not seem to have questioned whether the eviction exception provides complete relief from the automatic stay.²⁰⁵ Because debtors have not raised this issue, there have been no reported decisions explicitly adopting or rejecting Judge Ahart's position. Courts, like debtors, seem to have taken for granted that the eviction exception provides complete relief from the automatic stay.²⁰⁶

²⁰¹ Ahart, *supra* note 192, at 128–30. Judge Ahart is a bankruptcy judge for the Central District of California.

²⁰² See § 362(b)(1)-(3), (6)-(21), (24)-(28).

²⁰³ Ahart, *supra* note 192, at 137.

²⁰⁴ *Id.* Specifically, Judge Ahart indicates that § 362(a)(1), which prohibits “the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor,” and § 362(a)(2), which prohibits “the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case,” apply to eviction actions. *Id.*

²⁰⁵ In one case, the debtor challenged the applicability of the eviction exception to her case, but did not claim that the provision never provided relief from the automatic stay. *In re Kelly*, No. 06-15519, 2006 Bankr. LEXIS 3484, at *5 (Bankr. S.D. Fla. Dec. 1, 2006) (holding that § 525(a), which allows tenants of public housing to maintain possession of their apartments even if their prepetition default is discharged, rather than cured, “eliminates the need for a public housing debtor to cure a prepetition default as a condition to rendering the stay exception in § 362(b)(22) inapplicable”). In another case, a debtor who had deposited a month's rent under § 362(l)(1)(B) unsuccessfully moved for return of that money after being evicted. *In re Silverman*, No. 06-10010, 2006 WL 686854, at *1 (Bankr. S.D.N.Y. Mar. 10, 2006).

²⁰⁶ *In re Sutton*, No. 06-11184, 2006 Bankr. LEXIS 2450, at *1 (Bankr. S.D. Fla. Apr. 7, 2006) (holding that a landlord was relieved from the automatic stay where the debtor-tenant failed to certify that rent had been deposited pursuant to § 362(l)(4)); *In re Baird*, No. 05-38198, 2006 Bankr. LEXIS 3556, at *10–11 (Bankr. E.D. Tenn. Jan. 27, 2006) (“[e]viction proceedings which have resulted in a judgment for possession prepetition are not subject to the automatic stay unless [the debtor complies with the provisions of § 362(l)]”); *In re Tucker*, No. 05-15001, 2005 Bankr. LEXIS 2679 (Bankr. N.D. Ga. Nov. 18, 2005) (declining to use the

One court has, however, noted that the eviction exception does not apply to attempts to exercise control over a debtor-tenant's personal property.²⁰⁷ The court found that a landlord, who had obtained a prepetition judgment for possession, had not violated the automatic stay by evicting the debtor-tenants and changing the locks.²⁰⁸ Nonetheless, the court found that the landlord had subsequently violated the automatic stay by failing to make reasonable accommodations for the debtor-tenants to retrieve their personal property from the premises.²⁰⁹ Although it was not at issue in the case, the court also noted that any attempt by the landlord to collect the money judgment he had obtained against the debtor-tenants would have violated the automatic stay.²¹⁰

B. The Effect of the Eviction Exception If It Does Provide Complete Relief from the Automatic Stay

The publication of Judge Ahart's article makes it likely that courts will be confronted directly with the applicability of the eviction exception to all parts of the automatic stay. Some courts are likely to adopt Judge Ahart's analysis of the plain language of statute. Other courts may find it "absurd" to construe the statute in a manner that renders the eviction exception meaningless.²¹¹ One alternate reading of the statute is that Congress applied the eviction exception only to § 362(b)(3) because it wanted to clarify that physical dispossession of the premises was excepted from the automatic stay, but any action on the part of a landlord to collect a money judgment from a debtor-tenant still was subject to the automatic stay.²¹² Until courts universally embrace Judge Ahart's interpretation, the eviction exception may have important ramifications for landlords and tenants.

broad equitable authority granted by § 105 to extend the stay to an eviction action to which the debtor conceded that the eviction exception applied).

²⁰⁷ *Baird*, 2006 Bankr. LEXIS 3556, at *12.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ See Ahart, *supra* note 192, at 144 (noting that "[b]ecause the language of these exceptions is plain" courts must construe the eviction exception to provide incomplete relief from the automatic stay "unless the courts would find that the disposition required by the text is absurd"). Judge Ahart argues that "[w]hile it would have been prudent for Congress to provide an exception to all of the automatic stays of § 362(a), the fact that Congress neglected to do so does not mean that it is absurd for the new [eviction exception and another exception outside the scope of this Comment] to be limited in scope to the automatic stay of § 362(a)(3)." *Id.* at 145.

²¹² Judge Ahart suggests that Congress may have intended such a result, but argues that it does not render the plain meaning interpretation absurd. *Id.*

1. *Where There Has Been a Prepetition Judgment for Possession*

If the enacted provision is interpreted to provide complete relief from the automatic stay, it eliminates the need for individual bankruptcy courts to determine when in the eviction process a tenant ceases to have any interest in the leased premises.²¹³ In place of the convoluted body of case law that surrounds the application of the automatic stay to eviction actions, a uniform statutory standard recognizes all of a tenant's state law property rights except that of bare possession.²¹⁴ In states where a judgment for possession terminates all of a tenant's legal interest in the property, a landlord with such a judgment can enforce it without further delay, notwithstanding a tenant's bankruptcy filing.²¹⁵ However, in states that do recognize a legal way for a tenant to prevent eviction after a judgment for possession, the eviction exception allows the tenant to maintain the automatic stay protection for thirty days.²¹⁶ In such states, the potential harm to landlords is mitigated by creating a relatively simple way for a landlord to contest the tenant's claim that postjudgment remedies are available.²¹⁷ The new provisions also protect landlords from incurring additional rental income losses during the thirty day cure period by requiring the debtor-tenant to deposit all rents that will become due during that period with the court.²¹⁸

Although the new provisions do much to preserve the rights of tenants, tenants who file for bankruptcy after a judgment for possession are in a less advantageous position than under the pre-BAPCPA provisions.²¹⁹ Before the enactment of the new provisions, the bare possessory interest of a tenant served to delay eviction while the landlord moved for relief from the stay. Under the new provisions, a tenant with a bare possessory interest cannot delay eviction by filing a postjudgment-for-possession bankruptcy petition.²²⁰ Where state law couples the tenant's possessory interest with an opportunity to cure the rent default, a tenant can still use bankruptcy to forestall eviction.²²¹ However,

²¹³ § 362(b)(22); *see also supra* Part II (discussing various courts that have addressed this issue).

²¹⁴ § 362(b)(22); *see also Baker, Sudden Death in Overtime, supra* note 53, at 12 (noting that some courts recognized a bare right of possession before the 2005 amendments).

²¹⁵ § 362(b)(22).

²¹⁶ *Id.* § 362(l)(1), (2); *see also supra* note 187 and accompanying text (discussing one example of such a postjudgment remedy—the statutory right of redemption in Michigan).

²¹⁷ § 362(l)(3).

²¹⁸ *Id.* § 362(l)(1)(B).

²¹⁹ *See supra* Part II.

²²⁰ § 362(l)(1)(A).

²²¹ *Id.* § 362(l)(1).

the eviction is delayed for only thirty days,²²² and the tenant must prepay the rent that is due during that period.²²³ Regardless of whether state law provides a postjudgment cure period, a tenant no longer can use a postjudgment-for-possession bankruptcy filing to maintain possession of her home without immediately (or in fact ever) curing the entire amount of back due rent, an opportunity that might have been available to some debtor-tenants under the old Code.²²⁴

One of the first cases interpreting the new provisions was decided by a bankruptcy court in Georgia in November of 2005.²²⁵ Two days after a judgment for possession, the debtor-tenant filed for bankruptcy.²²⁶ While acknowledging that the new provisions relating to the automatic stay rendered the stay inapplicable to her landlord's eviction action, the debtor moved the court "for the imposition of a stay that would permit the Debtor to remain in the property and to cure the pre-petition arrearage through her chapter 13 plan."²²⁷ The debtor-tenant claimed that the court had the power to do this under § 105(a) of the Bankruptcy Code, which grants bankruptcy courts "broad equitable discretion."²²⁸ The court rejected the debtor-tenant's argument, saying that it is "not appropriate to employ section 105(a) when doing so would subvert the clear provisions of [the new sections relating to residential evictions] and would impair rights or create additional rights that are not provided by the Code."²²⁹ The court noted that the eviction exception provides no avenue for a postjudgment-for-possession debtor to cure rent arrearages over time.²³⁰ Rather, under limited circumstances, the best that a debtor-tenant

²²² *Id.* § 362(l)(1)(A).

²²³ *Id.* § 362(l)(1)(B). However, note that, where state law provides for a postjudgment cure period, state law will prevent eviction during that period, thereby eliminating the tenant's need for the automatic stay. Ahart, *supra* note 192, at 132. In addition, a bankruptcy filing may allow a court to extend the state law cure period. *Id.* at 133. The usefulness of the eviction exception is limited, therefore, to situations in which state law provides a cure period of less than thirty days and a court declines to extend that period. In such a situation, a debtor-tenant who failed to cure the default within the state law cure period could maintain possession of the premises for a full thirty days despite her failure to cure. *See* § 362(l)(1).

²²⁴ § 362(1)(1); *see* 145 CONG. REC. S14683 (daily ed. Nov. 17, 1999) (statement of Sen. Feingold) (quoting a letter from a debtor's attorney that says "[t]he automatic stay does what it is intended to do . . . the family that was facing eviction cures the rent arrears and remains in its apartment").

²²⁵ *In re Tucker*, No. 05-15001, 2005 Bankr. LEXIS 2679 (Bankr. N.D. Ga. Nov. 18, 2005).

²²⁶ *Id.* at *1.

²²⁷ *Id.* at *2.

²²⁸ *Id.* at *3 (citation omitted); *see* 11 U.S.C. § 105(a) (2000) (granting bankruptcy courts the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title").

²²⁹ *Tucker*, 2005 Bankr. LEXIS 2679, at *4-5.

²³⁰ *Id.* at *6.

can receive is an extra thirty days in which to cure the entire amount of the arrearage.²³¹

In sum, where there has been a prepetition judgment for possession, landlords may be significantly better off under the new provisions than under the old automatic stay provisions.²³² The landlords' gains are at the expense of those tenants who have only bare possessory interest in the leased property at the time of the bankruptcy filing.²³³ The new provisions also favor efficient judicial administration by eliminating the convoluted and uncertain body of case law surrounding the automatic stay.²³⁴

2. *Where There Has Been No Prepetition Judgment for Possession*

The new provisions fail to provide similar clarity for landlords and tenants who have not reached the judgment for possession stage of eviction proceedings. In this situation, the landlord still would be required to file a motion for relief from stay, to be decided on a case-by-case basis by the various courts.²³⁵ In this regard, both tenants and landlords are in the same position as before the reforms—a position that was bitterly resented by some landlords.²³⁶ Nevertheless, the National Association of Home Builders called the new provisions “a significant improvement over current law.”²³⁷ Without data regarding the percentage of bankruptcies that are filed before and after a judgment for possession, it is difficult to determine the total effect that the new provisions could have on tenants and landlords. If tenants generally wait until they are only a few days away from physical removal from their rental unit before filing for bankruptcy, the new provisions may have a substantial effect on both tenants and landlords.²³⁸

²³¹ *Id.*

²³² See *supra* notes 220–25 and accompanying text.

²³³ See *supra* notes 220–25 and accompanying text.

²³⁴ See *supra* notes 214–15 and accompanying text.

²³⁵ See 11 U.S.C.A. § 362(b)(22) (West 2005) (lifting the automatic stay only where there has been a prepetition judgment for possession).

²³⁶ See *supra* Parts III–IV.

²³⁷ Press Release, Multi-Hous. News, Senate Passes Bankruptcy Bill That Ends “Free Ride” for Tenants; Enactment Expected Soon (Mar. 28, 2005), available at http://www.multi-housingnews.com/multihousing/search/article_display.jsp?vnu_content_id=1000856047.

²³⁸ Other provisions of the BAPCPA may exacerbate this effect by making it more difficult to file for bankruptcy quickly. For example, § 109(h)(1) requires a debtor to seek counseling from “an approved nonprofit budget and credit counseling agency” before filing a bankruptcy petition. § 109(h)(1). *But see In re Childs*, 335 B.R. 623, 630 (Bankr. Md. 2005) (holding that, provided procedural requirements were met, an eminent eviction was sufficient to show “exigent circumstances” and thereby obtain a waiver of prepetition credit counseling).

VIII. AN ALTERNATE APPROACH TO UNLAWFUL DETAINER EVICTION ACTIONS

Although the enacted provisions attempt to improve judicial efficiency and strike a balance between the rights of landlords and those of tenants, an examination of the fundamental philosophy behind the automatic stay suggests that another method of reform would have been more desirable. By stopping collection actions for prepetition debts, the automatic stay serves the dual purpose of: (1) providing the debtor with a reprieve from collection actions while her financial affairs are sorted out, and (2) protecting creditors from each other by ensuring a fair distribution of the estate.²³⁹ The automatic stay does not, however, force creditors to incur further losses by extending additional postpetition credit to the bankrupt individual.²⁴⁰

A. The Landlord's Role as Creditor: Three Alternate Approaches

The appropriate treatment of landlords in bankruptcy depends on the nature of the landlord's role as a creditor of the tenant. There are at least three plausible ways to characterize this role. The first characterization is that a landlord does not extend credit to a tenant whose lease agreement specifies prepayment of rent, because the tenant pays first and is provided with housing later. For example, the rent for December is due on December 1, and only after this payment does the tenant receive the December housing. If this characterization is accepted, a landlord who continues leasing to the debtor-tenant is not extending any postpetition credit, regardless of any prepetition rent that may be owed.

This characterization fails because it does not take into account the delays entailed in an eviction action.²⁴¹ Unless the rent is due significantly in advance, the landlord effectively is extending credit to the tenant for the amount of time that it would take to complete an eviction. The reality of the landlord-tenant relationship demonstrates the landlord's role as a creditor. Many debtors enter bankruptcy with, or even because of, significant back-due rent payments.²⁴² In addition, tenants often fail to make rental payments while the bankruptcy action is pending.²⁴³ Therefore, the landlord who cannot evict

²³⁹ H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.A.N. 5963, 6296-97.

²⁴⁰ § 362(a).

²⁴¹ *See supra* Part I.

²⁴² *See supra* Part III.

²⁴³ *See supra* Part III.

a bankrupt tenant is in fact extending credit, which takes the form of housing.²⁴⁴

A second way of categorizing the landlord's role as creditor is that the landlord extends the tenant credit of a full lease-term of housing upon the signing of the lease. The tenant then repays this credit in periodic rental installments. This categorization recognizes that a rental agreement gives the tenant a property interest in the leased property for the term of the lease.²⁴⁵ The new provisions implicitly adopt this approach to the landlord's role as creditor by allowing the landlord to continue with an eviction action only if the tenant's legal interest has been extinguished by a judgment for possession before the commencement of the bankruptcy case.²⁴⁶

The tenant's interest in the leased premises for the term of the lease should not be disregarded. However, characterizing the landlord's role as creditor as solely involving an advance of credit upon the signing of the lease results in excessively harsh treatment for landlords. Landlords in certain jurisdictions or who participate in certain governmental programs cannot refuse to continue leasing to a tenant at the end of a lease term except under very limited circumstances.²⁴⁷ If signing a lease constitutes advancing credit for the entire time the tenant has a legal right to occupy the premises, the landlord is, in effect, extending an indefinite and virtually unlimited amount of credit.

A third categorization of the landlord's role as creditor is that the landlord extends housing credit to the tenant on a periodic basis. Strictly speaking, the amount of credit the landlord extends is a function of the unknown amount of time that it would take to evict the tenant, rather than the period between rental payments.²⁴⁸ However, for the sake of simplicity, it is logical to look at the landlord as extending "housing credit" each time a rental payment is due. This approach to the landlord's role avoids excessively harsh treatment of the

²⁴⁴ See 145 CONG. REC. S14683 (daily ed. Nov. 17, 1999) (statement of Sen. Sessions) ("We are asking a landlord for certain periods of time to extend free rent, when the grocer is not required to give free groceries and the gas station is not required to give free gas.").

²⁴⁵ See *supra* Part II.

²⁴⁶ 11 U.S.C.A. § 362(b)(22) (West 2005).

²⁴⁷ See, e.g., N.H. REV. STAT. ANN. § 540:2 (1978) (delineating the reasons for which certain New Hampshire landlords may terminate a tenancy, including "good cause"); N.J. STAT. ANN. § 2A:18-61.1 (West 2005); AIMCO Props., LLC v. Dziewisz, 883 A.2d 310, 312 (N.H. 2005) (finding that the expiration of a lease does not constitute good cause under § 540:2); Rev. Rul. 04-82, 2004-2 C.B. 350 (prohibiting landlords who participate in the federal Low-Income Housing Tax Credit Program from evicting a tenant without cause).

²⁴⁸ See *supra* Part I.

landlord by recognizing that the landlord who continues to rent to a bankrupt tenant is in fact extending postpetition credit.

To treat both landlords and tenants in a way that is consistent with the fundamental goals of bankruptcy, both the second and third categorizations of the landlord's role of creditor must be considered. The second categorization protects the tenant's leasehold interest in the premises.²⁴⁹ The third protects the landlord from extending unlimited amounts of credit to the bankrupt tenant.

B. The Appropriate Treatment of Landlords During a Tenant's Bankruptcy

A landlord's eviction action involves two distinct purposes. First, the landlord is trying to pressure the tenant to pay the back due rent. This component of the eviction is analogous to a collection action by a bank or credit card company. Second, the landlord is trying to stop future losses by removing a nonpaying tenant and replacing her with someone who will make future rental payments. This component of the eviction is not a collection action but is instead analogous to a refusal to extend future credit to the tenant, who has proven not to be creditworthy.

If a landlord is to be treated in the same way as other creditors, an eviction action taken because a tenant has failed to make prepetition rental payments should be terminated by the bankruptcy petition, regardless of how far along in the eviction process the landlord has proceeded. On the other hand, the landlord should not be forced to continue to extend an unlimited amount of future credit to the debtor-tenant in the form of free housing. By deviating from this model, the eviction exception fails to treat either landlords or tenants in a way that is consistent with the goals of bankruptcy law.²⁵⁰ The tenant still can be evicted based on prepetition debt if the landlord has a prepetition judgment for possession. The landlord, on the other hand, is placed in the position of extending potentially unlimited postpetition credit to the debtor-tenant if the bankruptcy filing takes place before the landlord receives a judgment for possession.

A more appropriate reform to the automatic stay was envisioned by various proposals that applied the automatic stay to eviction actions as long as the tenant continued to make postpetition rental payments. This approach has

²⁴⁹ To the extent that the lease has value to the estate, this categorization also protects the interest of other creditors in a chapter 13 proceeding.

²⁵⁰ This is, of course, assuming that the eviction exception has any effect at all. See *supra* Part VII.A.

been embraced by at least one consumer advocacy group²⁵¹ and also has been the subject of bankruptcy reform provisions considered by Congress.²⁵² This approach strikes a fair balance between the interests of the tenant and those of the landlord. It recognizes the tenant's interest in the leased premises and allows the tenant to maintain possession of the premises regardless of the amount of back due rent. However, it also recognizes that allowing the tenant to maintain possession of the premises places the landlord in the position of extending postpetition credit to the debtor-tenant. The landlord's potential postpetition losses are mitigated by limiting the amount of time housing credit has to be extended to the tenant without payment. Because they are forced to extend a measure of postpetition credit, landlords are susceptible to repeat bankruptcy filings in a way that other creditors are not. Therefore, fair treatment of landlords requires an additional provision making the stay inapplicable where a tenant makes multiple bankruptcy filings.

The provisions considered by the House in 1998 ("1998 House Proposal") contained exactly such provisions.²⁵³ The House's reforms would have left the automatic stay in effect so long as (1) the tenant paid the rent that became due after the bankruptcy petition was filed, and (2) the tenant had not filed for bankruptcy within the last year and failed to pay postpetition rent during that case.²⁵⁴ These provisions balance the rights of tenants and landlords in a way that advances the goals of the automatic stay.

However, the 1998 House Proposal also made the stay inapplicable where the residential lease had been terminated "pursuant to the lease agreement or applicable State law."²⁵⁵ This is unsatisfactory for two reasons. First, it fails to provide clarity to the convoluted body of state law regarding when a leasehold interest terminates.²⁵⁶ Second, and more fundamentally, it makes tenants susceptible to eviction for postpetition debt if a court determines that the lease terminated according to state law before the bankruptcy petition was

²⁵¹ NAT'L CONSUMER LAW CTR, CRITIQUE OF S.1301 "CONSUMER BANKRUPTCY REFORM ACT OF 1998" 10 (1998), available at http://www.consumerlaw.org/initiatives/bankruptcy/content/s1301_content.html (suggesting that an appropriate reform would be to "[r]ewrite the provisions so that landlords can obtain expedited relief from stay, if the debtor fails to resume making monthly payments within 30 days").

²⁵² See *supra* Part V (discussing 105 H.R. 3150, § 709 (1998) as well as the proposed Feingold amendment to 105 S. 1301, § 409 (1998)).

²⁵³ H.R. 3150, 105th Cong. § 709 (1998).

²⁵⁴ *Id.* This bill, like the eventually enacted BAPCPA, also addressed eviction actions "based on endangerment to the property or person or the use of illegal drugs." 11 U.S.C.A. § 362(b)(1)(23) (West 2005). However, that issue is outside the scope of this Comment.

²⁵⁵ H.R. 3150, 105th Cong. § 709.

²⁵⁶ See *supra* Part II.

filed. Given the generally broad applicability of the automatic stay,²⁵⁷ bankruptcy law should recognize even a bare possessory interest in property and extend the automatic stay to any incomplete eviction action. A more appropriate provision would have clarified such recognition of a bare possessory interest.

CONCLUSION

It is possible that, whether by Congressional intent or faulty drafting, the eviction exception fails to provide complete relief from the automatic stay and will be interpreted by the courts to be meaningless.²⁵⁸ If they do have any effect, the provisions of BAPCPA that relate to evictions are reasonably fair and balanced and do not go to either extreme in protecting tenants at the expense of landlords or vice-versa.²⁵⁹ The provisions also may clarify an issue that was the subject of considerable litigation under the pre-BAPCPA provision: when in the eviction process a tenant ceases to have any interest in the leased premises.²⁶⁰ Nonetheless, the way that the rights of tenants and landlords are balanced against each other does not advance the purposes of the automatic stay.²⁶¹ A more appropriate reform would have based the application of the automatic stay on the tenant's payment of postpetition rent and not on how far along in the eviction process the landlord had progressed before the bankruptcy filing.²⁶²

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²⁵⁷ See § 362(a).

²⁵⁸ See *supra* Part VII.A.

²⁵⁹ See *supra* Part VII.B.

²⁶⁰ *Id.*

²⁶¹ See *supra* Part VIII.B.

²⁶² *Id.*

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