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NOTE

COMBATING THE CHAPTER 13 SERIAL FILER: AN ARGUMENT FOR ORDERS CONTAINING PROSPECTIVE RELIEF FROM THE AUTOMATIC STAY PROVISION

I. INTRODUCTION

Over the past several years, bankruptcy courts have seen the rise of waivers of the automatic stay provision with increasing frequency. Such waivers usually purport to grant a creditor relief from the automatic stay in the event a debtor files for bankruptcy protection in the future. One setting in which this issue has gained some attention is prepetition waiver agreements.1 These agreements are usually reached when an individual debtor defaults on a loan obligation to a lender. Rather than immediately resorting to a foreclosure proceeding, the two parties will typically attempt to renegotiate or “work-out” the terms of the loan. However, even a “work-out” on the most favorable of terms can be substantially altered in the event a borrower files for bankruptcy protection in the future. Hence, in an attempt to protect their investment from the effects of bankruptcy, a lender may demand that the borrower agree to waive the automatic stay imposed by section 362 of the Bankruptcy Code2 in any

1. For a general discussion of prepetition waiver agreements and a comprehensive analysis of the overall importance of waivers to the bankruptcy system in general, see Marshall E. Tracht, Contractual Bankruptcy Waivers: Reconciling Theory, Practice, and Law, 82 CORNELL L. REV. 301 (1997).
2. Upon the filing of a petition, 11 U.S.C. § 362(a) imposes an automatic stay applicable to (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before [the debtor filed a bankruptcy petition]; (2) the enforcement . . . of a judgment obtained before the [filing of the petition against the debtor]; (3) any act to obtain possession of . . . or to exercise control over [the debtor’s property]; (4) any act to create, perfect, or enforce any lien against property of the [debtor’s] estate; (5) any act to create, perfect, or enforce against property of the debtor . . .

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future bankruptcy case. Courts that have confronted these waiver agreements have disagreed as to their enforceability.3

Putting aside the issues surrounding the enforceability of prepetition waivers of the automatic stay, the other context in which this issue regularly arises is postpetition, where a debtor previously filed, possibly several times, for bankruptcy protection. In this setting, a bankruptcy judge enters a prospective order for relief, forcing a debtor to relinquish the protections afforded by the automatic stay against a particular creditor should they again file. This drastic order is intended to combat what has become an increasingly common problem for bankruptcy courts around the country: abusive Chapter 13 "serial filers."4 A "serial filer" is a debtor who abuses the bankruptcy process by filing successive petitions after earlier petitions are dismissed, repeatedly using the automatic stay to forestall creditors.5

Bankruptcy courts have attempted to deal with the problem of serial filers in two basic ways. One is to dismiss the case and bar a serial filer


4. Although the focus of this Note is the use of orders containing prospective relief from the automatic stay to guard against the Chapter 13 serial filer, such orders might also be applicable to prevent serial Chapter 11 filings. This Note, however, will be limited to a discussion of judicial waiver orders in the context of Chapter 13 cases since the serial filer problem is much more common in the Chapter 13 context where individuals utilize multiple bankruptcy filings to fend off foreclosing mortgagees. For a detailed examination of the issues and implications surrounding Chapter 11 serial filings, see James D. Key, Comment, The Advent of the Serial Chapter 11 Filing and Its Implications, 8 BANKR. DEV. J. 245 (1991).

5. For a more detailed explanation of the automatic stay and of the serial filer problem, see infra Part II.
from filing another petition for a certain period of time. 6 A second, less drastic, solution is an order containing prospective relief from the automatic stay. Few cases, however, address court orders for prospective relief from the automatic stay, and those that do only provide a cursory analysis of the issue. 7 The purpose of this Note is to (1) analyze the sections of the Bankruptcy Code which pertain to judicial orders that limit a debtor's automatic stay protection in a subsequent bankruptcy proceeding; (2) address the few cases which discuss prospective orders for relief from the automatic stay; (3) analyze whether orders for prospective relief are an appropriate means of combating the serial filer problem; and (4) discuss the res judicata and collateral estoppel issues which subsequent courts confront when these orders are granted.

Part II of this Note discusses the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, and orders which limit the applicability of its protection in a subsequent filing, and several cases which have denied or upheld orders for prospective relief. Part III discusses Bankruptcy Code sections 105 and 349(a) and whether these sections provide a bankruptcy judge with the power to grant orders for prospective relief from the automatic stay. Part IV analyzes why, as a matter of policy, orders for prospective relief should be enforceable. Part V discusses the res judicata and collateral estoppel issues which courts confront when addressing orders for prospective relief.

II. THE AUTOMATIC STAY AND CASES ADDRESSING ORDERS FOR PROSPECTIVE RELIEF

A. 11 U.S.C. § 362(a)—The Automatic Stay

Upon the filing of a bankruptcy petition, a debtor is protected by an automatic stay, 8 arguably one of the most significant protections provided by the Bankruptcy Code. The automatic stay serves several

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6. For a discussion of the relevance of orders that do not contain language for prospective relief from the automatic stay, see infra Part III.


different purposes. First, it provides a "breathing spell" for the debtor by placing a freeze, for a limited time, on any action taken against the debtor by his or her creditors. Second, the automatic stay protects creditors. The stay ensures an orderly administration of the debtor's assets and prevents the "feeding frenzy" that would occur without a stay, whereupon default, creditors would "race to the courthouse" to secure a lien and execute on the debtor's property. Another discernible purpose of the automatic stay is to simply permit the debtor to "hold on," hoping for better times. Despite the existence of a policy which might justify allowing a debtor to forestall his creditors, courts cannot ignore what has become a major problem in today's bankruptcy courts: the repeated filings by Chapter 13 debtors designed to fend off the same action by the same creditor, commonly known as serial filing.

Section 362(a) of the Bankruptcy Code provides the means for a serial filer to misuse the bankruptcy laws. By filing a petition immediately after an earlier petition is dismissed, another stay is "automatically" imposed pursuant to section 362(a), and Chapter 13 debtors are able to fend off foreclosing mortgagees, prolong the occupation of their residences, and frustrate other creditors' rights.

Given the effort and expense invested in foreclosure proceedings, the hardships caused by serial filers are particularly burdensome on foreclosing mortgagees. These efforts include issuing a complaint or petition to foreclose; notifying all interested parties; coordinating the time, place, and terms of the sale; hiring an officer to conduct the sale; and advertising the sale. Consider In re Felberman, where in March of 1981, the debtor defaulted on a home mortgage loan from First National Bank. Seeking to recoup its losses, First National obtained a judgment of foreclosure in October of 1992 and scheduled a foreclosure sale for January 19, 1993. On the day of the foreclosure, the debtor filed a Chapter 13 petition, staying the sale. The debtor's case was dismissed on June 1, 1993, and First National commenced another foreclosure

10. See Fidelity Mortgage Investors v. Camelia Builders, Inc. (In re Fidelity Mortgage Investors), 550 F.2d 47, 55 (2d Cir. 1976) (noting that the automatic stay was "designed to prevent a chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts").
11. See Cashman Inv. Corp. v. Robinson (In re Bradley), 38 B.R. 425, 428 (Bankr. C.D. Cal. 1984) ("However primitive as this [objective] may appear on the surface, it is quite clearly an established policy of bankruptcy law.").
proceeding and scheduled another foreclosure sale for August 13, 1993. Once again, this time the day before the sale, the debtor filed a Chapter 13 petition, staying the sale. On January 13, 1994, the debtor’s second Chapter 13 petition was dismissed, and First National’s third foreclosure sale was scheduled for May 25, 1994. Clearly undeterred by the prior dismissals, the debtor filed a third Chapter 13 case the day before the sale, preventing foreclosure once again. One can imagine the frustration of a mortgagee like First National Bank when a serial filer repeatedly undercuts their efforts by filing petitions, halting foreclosures, and forcing the mortgagee to start again from square one.

Dealing with the hardships caused by serial filers has not been easy for courts. The filing of a bankruptcy petition merely to prevent a foreclosure proceeding without the ability or intention to reorganize is an abuse of the Bankruptcy Code and is considered a bad faith filing. However, the challenge that courts have faced is how to stop the abusive serial filings. While some courts impose sanctions and costs to try to stop these abusive serial filings, others resort to dismissal of the case on bad faith grounds. The problem with these measures is that they do not prevent a serial filer from refiling to trigger the automatic stay and obstruct another foreclosure. Only a few reported opinions have attempted to use a prospective order for relief to prevent abusive refilings, and of those few that are reported, courts have only upheld such orders in two cases: Abdul-Hasan v. Firemen’s Fund Mortgage, Inc. (In re Abdul-Hasan) and In re Felberman.

B. The Cases

Very few cases have attempted to use prospective orders for relief to combat the problem of Chapter 13 serial filing. This section discusses six of these cases, two of which use a measure akin to an order with


14. See In re Bono, 70 B.R. 339, 345 (Bankr. E.D.N.Y. 1987) (ordering sanctions and awarding costs to prevent attorneys “from becoming partners to such abusive filing”).


17. See also Keller, 1996 WL 590877, at *1.


prospective relief called a “drop dead” order. Part III returns to the cases containing “drop dead” orders to illustrate why, as a matter of policy, orders for prospective relief should be granted.

In what appears to be the first reported case addressing the issuance of an order for prospective relief, the bankruptcy judge in *In re Norris* granted relief from the automatic stay, permitting a mortgagee to foreclose. The order for relief stated that “the filing of any future petitions in bankruptcy [by the debtor] shall not affect the instant Order granting relief from the [automatic] stay.” The debtor’s appeal did not challenge the order for relief except to the extent that it contained prospective relief which would affect the debtor’s rights in future proceedings. The district court refused to uphold the prospective relief, noting that “[i]n my view, a bankruptcy judge in a pending proceeding simply does not have the power to determine that the automatic stay shall not be available in subsequent bankruptcy proceedings.” *Norris*, however, was not a serial filing situation, but rather, the order for prospective relief was granted after the debtor twice failed to show up to the hearing on the lift stay motion.

Similarly, in *Little v. Taylor (In re Taylor)*, the Ninth Circuit Bankruptcy Appellate Panel confronted the appeal of a bankruptcy court default judgment that provided prospective relief from the automatic stay. Unlike *Norris*, however, *Taylor* presented a serial filer situation. After the debtor’s first Chapter 13 petition was dismissed, the debtor filed another petition, but failed to show up at the lift stay hearing. As a result, the bankruptcy judge entered an order which lifted the stay and mandated that the judgment be res judicata in any future bankruptcy proceeding. On appeal, the Bankruptcy Appellate Panel cited to *Norris* and vacated.

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22. Id. at 86.

23. See id. at 87.

24. Id.

25. See id. at 86.

26. 77 B.R. 237 (B.A.P. 9th Cir. 1987), aff’d in part & rev’d on other grounds, 884 F.2d 478 (9th Cir. 1989).

27. The judge’s order for default judgment noted “[t]hat for a period of six months from the date of entry of the Judgment herein, this relief from automatic stay shall also apply, as res judicata, to any subsequent Chapter 13 cases and proceedings” and that “this Judgment shall act as a bar against the automatic stay arising from any further Chapter 13 bankruptcy proceedings.” *Id.* at 239.
the order, holding that "it is doubtful that a bankruptcy court can enter such an order." Interestingly, the Bankruptcy Appellate Panel acknowledged that a prior bad faith filing may prevent a debtor from filing multiple petitions. However, the court declined to consider whether the case under appeal was filed in good faith since the issue was not addressed in the trial court.

In contrast, the court in Abdul-Hasan v. Firemen's Fund Mortgage, Inc. (In re Abdul-Hasan) enforced an order for prospective relief entered in an earlier Chapter 13 case. Again, in Abdul-Hasan, the bankruptcy judge granted a creditor's motion for relief from the automatic stay, and the order provided prospective relief. Unlike Norris and Taylor, however, the original order entered by the bankruptcy court in the debtor's first Chapter 13 case was never appealed and therefore became final. Several months after the order was entered, and immediately prior to the foreclosure of the debtor's property, the debtor filed a second Chapter 13 petition without ever trying to modify the prior order or seek an injunction to prevent the sale of his property. The creditors relied on the prior order and sold the debtor's property to a bona fide purchaser at foreclosure.

On appeal, the debtor claimed that the creditors knew of the second filing and therefore violated the automatic stay by holding the foreclosure sale. The court addressed whether the order for prospective relief of the stay in the prior Chapter 13 case relieved the creditor of the requirement that it again seek relief from the stay when the subsequent bankruptcy petition was filed. The district court resolved this issue by refusing to follow Taylor and Norris, holding that when an order in a prior Chapter 13 case provides prospective relief from the automatic stay, a creditor need not seek relief from the stay when a subsequent bankruptcy case is filed. The court reasoned that the debtor was barred from challenging the prior order granting prospective relief, and that the order was res

28. Id. at 240.
29. See id.
30. See id.
32. The order stated that the "[d]ebtor[1] shall be bound by this Order in any conversion of this Bankruptcy proceeding or in any subsequently filed bankruptcy proceedings of any nature whatsoever, and as to any Automatic Stays issued . . . and any such future Automatic Stay shall be null and void . . . ." Id. at 264.
33. See id.
34. See id. at 265.
35. See id. at 266.
judicata, holding “[t]here is nothing so sacrosanct about the automatic stay that it should not be subject to the res judicata effect given to other types of litigation.” Moreover, in response to the debtor’s argument that Taylor barred the court from ordering prospective relief from the stay, the court noted that while the Ninth Circuit Bankruptcy Appellate Panel in Taylor did question whether a bankruptcy court could enter an order for prospective relief, the issue was never raised in the Taylor trial court, nor was it argued or briefed before the Bankruptcy Appellate Panel. Therefore, the court reasoned, “[t]he comment in Taylor [was] dictum and not a determination of this important question.”

Importantly, the Abdul-Hasan court acknowledged that orders for prospective relief could affect debtors who undergo a positive change in circumstances after the initial filing because such orders would destroy the chance for a successful reorganization. However, the court noted that overcoming an order for prospective relief would only be “a relatively minor inconvenience” to a debtor who undergoes a positive change in circumstances because such a debtor could seek a temporary restraining order followed by an injunction under 11 U.S.C. § 105. The court reasoned that Congress intended that all presumptions be on the debtor’s side only at the time of the first filing. Once a court determines that a creditor is entitled to relief from the stay, the burden should shift to the debtor to show that they are in need of protection. To allow otherwise would permit the debtor to start afresh as though there had never been a prior determination, and “[t]he debtor] only gets one presumption, not a series of new ones at the cost of $90.00 each.”

As described above in Part II.A, the court in In re Felberman decided a classic case of abusive serial filing. In Felberman, after the husband of the debtor filed his third successive Chapter 13 petition on the eve of foreclosure, the court dismissed his petition with an order for prospective relief. The debtor failed to appeal the order, and it became final and binding. Immediately prior to the fourth foreclosure sale, the debtor’s wife filed another Chapter 13 petition. The court held that even though the debtor’s wife was not a party to the earlier bankruptcy filings,

36. Id. at 267. See infra Part V for a discussion of the res judicata and collateral estoppel issues relating to orders for prospective relief.
37. Abdul-Hasan, 104 B.R. at 266.
38. Id. at 267.
39. See infra Part III for a discussion of the powers of the court under section 105.
42. See id. at 681.
because of the serial filing situation and the clear unity of interest, the prior order containing prospective relief was enforceable against her.\textsuperscript{43}

An important distinction between \textit{Norris} and \textit{Taylor} on the one hand and \textit{Abdul-Hasan} and \textit{Felberman} on the other is that the orders for prospective relief in \textit{Norris} and \textit{Taylor} were appealed immediately, and the appellate courts in each of those cases vacated them, reasoning that a bankruptcy judge lacks the power to enter such an order. In \textit{Abdul-Hasan} and \textit{Felberman}, however, the initial orders for prospective relief were never appealed, and the issue of their enforceability only arose after the debtors moved to set aside the creditor’s foreclosure sale as violating the automatic stay arising from the subsequent filing. The distinction between the two, which will be discussed in Part V, affects the preclusive effect that should be given to the orders. While the \textit{Abdul-Hasan} court upheld the order for prospective relief on the basis of res judicata, \textit{Norris} and \textit{Taylor} were direct appeals that did not raise res judicata or collateral estoppel issues. The conclusions reached in \textit{Norris} and \textit{Taylor} are questioned in Part III.

Courts have also attempted to address the serial filer problem with “drop dead” orders. “Drop dead” orders are entered during a Chapter 13 case, rather than upon dismissal as with orders for prospective relief, which declare that this is the last opportunity for the debtor to restructure a particular debt or cure defaults.

Such orders typically provide that if the debtor does not succeed in the Chapter 13 case before the court, either the automatic stay will be lifted or the case will be dismissed and that such action will be with prejudice as to the mortgagee or other secured creditor, giving such creditor potential prospective relief [from the automatic stay] to proceed with foreclosure, possession or other remedies.\textsuperscript{44}

Thus, “drop dead” orders give a mortgagee prospective relief from the automatic stay by providing that if the debtor’s case is dismissed, the dismissal will be “with prejudice” as to the mortgagee, who will therefore not be subject to the automatic stay upon any subsequent filing. Two examples of cases discussing the enforceability of “drop dead” orders entered in earlier Chapter 13 cases are \textit{Brengettcy v. National Mortgage Co. (In re Brengettcy)}\textsuperscript{45} and \textit{Friend v. Chemical Residential Mortgage Corp. (In re Friend), 191 B.R. 391, 394 (Bankr. W.D. Tenn. 1996).}

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\textsuperscript{43} See id. at 684.


\textsuperscript{45} 177 B.R. 271 (Bankr. W.D. Tenn. 1995).
The court in each of these cases refused to enforce the “drop dead” order until the bankruptcy court in the subsequently filed case could hold a hearing to determine if the debtor had undergone a change in circumstances since the earlier case to justify the subsequent filing.

In Brengettcy, during a debtor’s first Chapter 13 case, the court denied the holder of a first mortgage relief from the automatic stay but included a “drop dead” clause. After the debtor’s case was dismissed, the debtor filed another Chapter 13 petition, but the mortgagee nevertheless proceeded with a foreclosure sale. The mortgagee then brought an action to evict the debtor, and the debtor moved to set aside the sale, claiming it violated the automatic stay imposed by the subsequent filing. The mortgagee asserted that the “drop dead” order prospectively relieved any automatic stay restraints which would prohibit the sale. The court, however, held that the “drop dead” order, by its own terms, contemplated that the debtor would be afforded an opportunity to present evidence of a change in circumstances if she subsequently filed for bankruptcy. The “drop dead” order granted relief to the mortgagee on the explicit condition that the debtor could not show a change in circumstances, and the only way for the debtor to make such a showing was by attending a hearing. Accordingly, the court reserved decision on the mortgagee’s action to evict the debtor pending a hearing on the change in circumstances issue.

Moreover, even where a “drop dead” order was issued without provisions for a showing of a change in circumstances, the court in Friend v. Chemical Residential Mortgage Corp. (In re Friend) refused to enforce an order for prospective relief without a hearing. In Friend, during the debtor’s third Chapter 13 case, the court issued a “drop dead”

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47. The “drop dead” clause provided that “in the event this [petition] is dismissed, then debtor is prohibited from refiling as to [the mortgagee] unless she is able to show a change in circumstances.” Brengettcy, 177 B.R. at 272. It is important to point out that the language of the order is poorly constructed. Debtors do not file bankruptcy petitions “as to” or “against” particular creditors. Debtors file petitions in the bankruptcy court to gain an order for relief. See 11 U.S.C. § 301 (1994). Despite the poor choice of language, the clause has largely the same effect as an order granting prospective relief since it relieves the mortgagee from the restraints of the automatic stay in any future case.
48. See Brengettcy, 177 B.R. at 273.
49. See id.
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order. Following dismissal of the case and despite the language of the order, the court concluded that the automatic stay attached upon the filing of the debtor's fourth petition. Citing Brengettcy, the court reasoned that regardless of the language of such an order, section 362(a) of the Bankruptcy Code makes the automatic stay applicable to all entities upon the filing of a petition. Despite the fact that the "drop dead" order did not contain any language requiring a change in circumstances, the court held that "the debtor is entitled to a judicial determination of whether the debtor had a sufficient change in circumstances to justify a refiling notwithstanding such [a drop dead] order's entry in a prior case." The court further reasoned that to hold otherwise would contradict the policy of providing a good faith analysis of the totality of the circumstances in each case. In fairness to the creditor, who may have relied on the order, the court held that the "drop dead" order would not be disregarded, but rather, it would be given appropriate evidentiary weight in the hearing as the court balanced all of the facts and circumstances. Part IV discusses why Brengettcy and Friend perpetuate the serial filer problem and argues why, as a matter of policy, orders for prospective relief provide a more equitable and efficient solution.


Although both the district court in In re Norris and the Bankruptcy Appellate Panel in Little v. Taylor (In re Taylor) questioned a

51. The order provided that "in the event of the dismissal of [the] case or in the event of relief from the automatic stay, the dismissal . . . would be with prejudice to the debtors' refiling for 180 days as to [the mortgagee]." Id. at 393. This order was essentially the same as the order in Brengettcy, except that it did not contain an exception for a change in circumstances. See Brengettcy, 177 B.R. at 272.
52. See Friend, 191 B.R. at 394 (citing 11 U.S.C. § 362(a)).
53. Id. (quoting Norwest Fin. Tenn., Inc. v. Coggins (In re Coggins), 185 B.R. 762, 765 (Bankr. W.D. Tenn. 1995)).
54. See id.; see also Society Nat'l Bank v. Barrett (In re Barrett), 964 F.2d 588, 591 (6th Cir. 1992) (holding that the Circuit's good faith test required an examination of the totality of the circumstances).
55. The court suggested that the evidentiary value of a prior order "may place upon the debtor an increased burden of showing a sufficient change of circumstances to justify a refiling in the face of such an order." Friend, 191 B.R. at 396.
57. 77 B.R. 237 (B.A.P. 9th Cir. 1987), aff'd in part & rev'd on other grounds, 884 F.2d 478 (9th Cir. 1989).
bankruptcy judge's power to render the automatic stay unavailable to a debtor in a future bankruptcy proceeding, neither court considered the remedies that could be fashioned to prevent abuse under the powers given to the bankruptcy court pursuant to section 105 of the Bankruptcy Code.

Section 105 of the Bankruptcy Code provides the court with the authority to exercise a broad range of powers within the administration of a bankruptcy case that are "necessary or appropriate to carry out the provisions of this title." However, case law has not been uniform in interpreting the breadth of section 105. Courts have taken either an expansive view of section 105, arguing that the legislature provided a broad grant of power so that the bankruptcy court could carry out the many goals that are implied in the Code's language, or a more restrictive approach, limiting the court's authority to the clear language and intent of the Bankruptcy Code. Regardless of which approach is adopted, the power of the bankruptcy court under section 105 is not limitless; section 105 does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code. Under either approach, however, a bankruptcy court can use section 105 to order prospective relief from the automatic stay.

Under an expansive reading of section 105, the statute authorizes the bankruptcy court to issue any order that is "appropriate to carry out the provisions of [the Code]." The word "appropriate" could justify a bankruptcy court's use of section 105 to further the important, although

58. Section 105(a) provides: 
   The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process. 

59. Id.; see also 2 COLLIER ON BANKRUPTCY ¶ 105.01 (Lawrence P. King ed., 15th ed. rev. 1996).

60. See id. ¶ 105.01[2].

61. For a more expansive argument claiming that the Bankruptcy Code and recent trends in case law addressing injunctions, contempt proceedings, and the power over non-debtors favor the curtailment of section 105 power, see Manuel D. Leal, The Power of the Bankruptcy Court: Section 105, 29 S. TEX. L. REV. 487 (1988).

62. See In re Security & Energy Sys., Inc., 62 B.R. 676, 678 (Bankr. W.D.N.Y. 1986) (holding that even though the court was granted broad exercise of power under section 105, "those powers do not allow it to override the explicit mandates of other sections of the Bankruptcy Code [governing confirmation of a plan under § 1129]"); 2 COLLIER ON BANKRUPTCY, supra note 59, ¶ 105.01[2].

63. 11 U.S.C. § 105(a) (emphasis added).
implied, goal of preventing debtor abuse of the bankruptcy system. At least one court has acknowledged that section 105 authorizes an order for prospective relief to prevent an abuse of process.\(^6\) In *In re Keller*, the district court cited to section 105 in affirming an order entered by the bankruptcy court containing prospective relief from the automatic stay. The *Keller* court held that “[r]epeated filings aimed solely at frustrating foreclosure through invocation of the automatic stay constitutes bad faith and an abuse of the bankruptcy process.”\(^6\) Thus, under an expansive reading, section 105 empowers a bankruptcy court to issue an order for prospective relief from the automatic stay, particularly when the court is confronted by a debtor who has abused the bankruptcy process by filing multiple petitions.

As the court in *In re Earl*\(^6\) stated when it dismissed a debtor’s fourth Chapter 13 case:

> The Court must preserve the integrity of the Bankruptcy system and prevent the abusive use of the Bankruptcy system invoked only to thwart the legitimate rights of creditors, and preclude an unwarranted congestion of its docket . . . . [T]he Court will rely on its equitable powers under 11 U.S.C. § 105 in fashioning an *appropriate* remedy to . . . enjoin . . . filing another Chapter 13 case for the next six months.\(^6\)

Therefore, if orders for prospective relief are considered an effective and “appropriate” means of preventing abuse of the Bankruptcy Code, an expansive reading of section 105 would allow their use.\(^6\)

While an expansive reading of section 105 interprets the word “appropriate” to mean that courts can grant orders to carry out the many implied goals not stated in the Code’s language, the restrictive approach focuses on the precise language of section 105. The statute states that a bankruptcy court may exercise its power in order to “carry out the provisions of this title.”\(^6\) Thus, under a restrictive reading of section 105, an exercise of the bankruptcy court’s power must be tied to a

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\(^6\) *Id.* at *2.


\(^6\) *Id.* at 741 (emphasis added).

\(^6\) See *infra* Part IV for the argument regarding why prospective orders for relief are a reasonable means of preventing abuse.

"provision" of the Bankruptcy Code rather than to a general bankruptcy policy or objective.\textsuperscript{70}

For courts adopting the restrictive approach, the arguments used in \textit{Norris} may appear to prevent a bankruptcy court from using section 105 to grant relief from the automatic stay in future proceedings involving the same debtor. As the court in \textit{Norris} pointed out, "there is nothing in the statutory language [of section 362] which purports to enable the Bankruptcy Court to provide relief from the automatic stay in advance of the filing of a bankruptcy petition. That is, on its face, the statute makes the stay \textit{automatic} in all bankruptcy proceedings."\textsuperscript{71} In addition, if the reasoning of \textit{Norris} is applied to the assumption that the automatic stay is imposed "automatically" by section 362 upon the filing of every petition, and that there is no other direct authority to support such an order in the Bankruptcy Code, then it might be argued that a bankruptcy court should not be able to use section 105 as its source of power to force a debtor to relinquish the protections afforded by the automatic stay in the future. However, under a restrictive reading of section 105, a "provision" of the Bankruptcy Code does exist, which lends the support necessary to allow a bankruptcy court to order prospective relief from the

\textsuperscript{70} 2 COLLIER ON BANKRUPTCY, supra note 59, ¶ 105.01[2]. The court in \textit{Official Committee of Equity Security Holders v. Mabey}, 832 F.2d 299 (4th Cir. 1987), used the restrictive approach to curtail section 105 power. \textit{Mabey} involved the A.H. Robbins Chapter 11 bankruptcy case. At issue was the bankruptcy court's use of section 105(a) to create an emergency fund for tort claimants suffering damages from the Dalkon Shield. The bankruptcy court's concern about tort claimants requiring medical attention led to the creation of a fund for those claimants who were in need of such funds immediately, yet unable to obtain any disbursements prior to the confirmation of a plan.

The Fourth Circuit refused to enforce the creation of the emergency fund, ruling that section 105(a) does not allow the bankruptcy court to grant relief not existing under the Code. The court stated:

While the equitable powers emanating from § 105(a) are quite important in the general bankruptcy scheme, and while such powers may encourage courts to be innovative, and even original, these equitable powers are not a license for a court to disregard the clear language and meaning of the bankruptcy statute and rules. \textit{Id.} at 302. In addition, the court added that "[t]he creation of [a fund] has no authority to support it in the Bankruptcy Code and violates the clear policy of Chapter 11 reorganizations by allowing piecemeal, preconfirmation payments to certain unsecured creditors." \textit{Id.}

However, the ability of a court to use section 105 to order prospective relief from the automatic stay is different than the attempted use of section 105 by the court in \textit{Mabey}. In \textit{Mabey}, the court refused to allow the use of section 105 to create an emergency fund because it contradicted the clear language and intent of the Bankruptcy Code, which only permits a distribution to unsecured creditors pursuant to an approved plan of reorganization under sections 1122-1129. However, the Code is silent with respect to orders for prospective relief. In fact, as will be discussed, \textit{infra}, a specific statutory "provision" exists, section 349(a), which supports restricting the filing of subsequent petitions.

automatic stay. Such support is found under section 349(a) of the Bankruptcy Code. 72

Section 349(a) provides that a case may be dismissed with prejudice where cause exists, enabling the bankruptcy court to restrict the filings of subsequent petitions. Many courts have used section 349(a) to dismiss a debtor's case with prejudice and at the same time enjoin the debtor from refiling for a limited period of time. 73 For example, in Stathatos v. United States Trustee (In re Stathatos), 74 the bankruptcy judge dismissed the debtor's third Chapter 13 petition with prejudice so that the debtor would not be allowed to file another Chapter 13 petition for twenty-four months. The district court affirmed, holding that under section 349(a) "the bankruptcy court has discretion to dismiss with prejudice to the refiling of a subsequent Chapter 13 case." 75

The validity of such orders, however, is not undisputed. In Frieouf v. United States (In re Frieouf), 76 the Tenth Circuit held that a bankruptcy court cannot dismiss a case and limit future access to the bankruptcy court except under the circumstances provided under 11 U.S.C. § 109(g). 77 The Frieouf opinion has received much criticism because of

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72. The statute states in pertinent part:

Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.


73. See, e.g., In re Madison, 184 B.R. 686, 694 (Bankr. E.D. Pa. 1995) (180 days); Stathatos v. United States Trustee (In re Stathatos), 163 B.R. 83, 88 (Bankr. N. D. Tex. 1993) (twenty-four months); In re Dyke, 58 B.R. 714, 718 (Bankr. N.D. Ill. 1986) (180 days); Cashman Inv. Corp. v. Robinson (In re Bradley), 38 B.R. 425, 432 (Bankr. C.D. Cal. 1984) (six months). Dismissal orders entered "with prejudice" under 349(a) are different from "drop dead" orders. See supra Part II. A section 349(a) order contains an outright bar to the debtor's access to the bankruptcy court. "Drop dead" orders are entered "with prejudice" only to the mortgagee. Thus, "drop dead" orders have largely the same effect as an order granting prospective relief as they relieve the mortgagee from the restraints of the automatic stay in any future case, but do not bar the debtor's access from the bankruptcy court.


75. Id. at 87. However, most courts which bar a refiling for a period of time include in the order an "except with leave of the court" provision. See Dyke, 58 B.R. at 718. With the leave of the court provision, the debtor is afforded the opportunity to show any change in circumstances which would justify another filing prior to the expiration of the stated period. See id.

76. 938 F.2d 1099 (10th Cir. 1991).

77. See id. at 1102. Section 109(g) states in pertinent part:

No individual ... may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if—

(1) the case was dismissed by the court for willful failure of the debtor to abide
its interpretation of the second part of section 349(a) which states that a "dismissal of a case [does not] prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g)." Frieouf interpreted this to mean that courts cannot limit a debtor's right to refile for a period greater than 180 days because of section 109(g). The court, however, did not consider the first sentence of section 349(a) which states, "[u]nless the court, for cause, orders otherwise." In other words, the Frieouf court did not permit the statutory language, "[u]nless the court, for cause, orders otherwise," at the beginning of section 349(a) to apply to the statute's second clause and control the limitations on filing contained in section 109(g). Notwithstanding the Frieouf decision, courts have held that a bar to refiling for a specific period of time, for cause, may be ordered without violating section 349(a) or section 109(g).

Orders which grant a creditor prospective relief from the automatic stay do not raise a Frieouf issue because they do not deny a debtor's access to the bankruptcy court. Such orders simply provide that any future bankruptcy filing by the debtor will not result in the imposition of the automatic stay as against a particular creditor. More importantly, a bar to refiling under section 349(a) is a much harsher measure to combat the serial filer problem than an order for prospective relief from the automatic stay. A bar under section 349(a) shuts the door to the bankruptcy court entirely, whereas an order for prospective relief keeps all of the debtor's other bankruptcy rights intact. Thus, if section 349(a) can be used to prevent debtor abuse by barring subsequent petitions, a bankruptcy judge should also be able to use section 105 to prevent serial filing by ordering prospective relief from the automatic stay. Accordingly, the policies of the restrictive view of section 105, to "carry out the provisions of this title," would be served by using section 105 to

by orders of the court . . .; or

(2) the debtor requested and obtained the voluntary dismissal of the case
following the filing of a request for relief from the automatic stay . . . .

11 U.S.C § 109(g)(1)-(2) (1994).

78. 11 U.S.C. § 349(e); see Frieouf, 938 F.2d at 1103; see also In re Felberman, 196 B.R. 678, 682 (Bankr. S.D.N.Y. 1995) (explaining criticism of Frieouf).

79. 11 U.S.C. § 349(a); see Felberman, 196 B.R. at 682.


81. See Felberman, 196 B.R. at 682.


83. 11 U.S.C. § 105 (emphasis added).
further the provision of section 349(a) to prevent debtor abuse and allow orders for prospective relief.

IV. ORDERS FOR PROSPECTIVE RELIEF FROM THE AUTOMATIC STAY SHOULD BE GRANTED AS A MATTER OF PUBLIC POLICY

Orders for prospective relief from the automatic stay are a reasonable way for courts to prevent abusive multiple filings and provide assistance to creditors who have previously litigated the automatic stay issues. The practical consequence of such an order is to shift the burden of proof from the creditor to the debtor. With such orders, the debtor will not be able to rely on the automatic imposition of the stay to impose the burden on the creditor to show why the stay should be lifted. Instead, upon a filing that follows an order containing prospective relief, the burden falls on the debtor to seek a temporary injunction and a restraining order along with his new petition in order to prevent a scheduled foreclosure sale.

Part II.B discussed Brengetty v. National Mortgage Co. (In re Brengetty) and Friend v. Chemical Residential Mortgage Corp. (In re Friend), two cases where courts refused to enforce “drop dead” orders before the bankruptcy court could hold a change in circumstances hearing. These cases may appear to provide a just result for debtors, guaranteeing a judicial determination of whether the debtor had a sufficient change in circumstances to justify a refiling notwithstanding the prior order. However, mandating a “change in circumstances” hearing following each filing pursuant to Brengetty and Friend will only result in perpetuating the problem of serial filings. Such a hearing would allow a serial filer to stall another foreclosure and would largely ignore the efforts undertaken by creditors in prior proceedings. Where the debtor does have an honest change in circumstances, an order for prospective relief would not bar the debtor from protection from the bankruptcy court. Rather, the burden would be placed on the debtor to prove his

85. Bankruptcy Rule 7001(7) provides that the commencement of an adversary proceeding is necessary in order “to obtain an injunction or other equitable relief.” FED. R. BANKR. P. 7001(7). Once an adversary proceeding is commenced, Bankruptcy Rule 7065 expressly makes applicable Rule 65 of the Federal Rules of Civil Procedure (which governs the granting of preliminary injunctions and temporary restraining orders). See FED. R. BANKR. P. 7065.
86. 177 B.R. 271 (Bankr. W.D. Tenn. 1995).
88. See supra Part III.
or her new situation by requesting an injunction along with the new petition.89

With a "Friend hearing," following a subsequent filing, the debtor still would be required to come into bankruptcy court to justify the refiling in the face of the prior order for prospective relief. However, a significant burden would remain on creditors who have previously litigated the automatic stay issues. Friend assumes that all debtors have the ability to undergo a change in circumstances, yet this assumption eliminates the deterrence for abusive filers since hearings will be required in every case, and a significant burden will remain on creditors. Debtors without a change in circumstances would be able to simply invoke the protection of the automatic stay and cause more delay, expense, and docket congestion. In comparison, prior orders with prospective relief would rest the burden on the shoulders of debtors, who now believe they are in a better position to reorganize, to make a showing that the bankruptcy court should provide them with additional protection.

The Brengettcy and Friend holdings may seem fair because they want to afford the debtor the benefit of the doubt before an order for prospective relief will be enforced; courts, however, must understand the hardships imposed on creditors having to deal with serial filers, and should assume that debtors will not have a change in circumstances so as to allow for a successful reorganization. Although section 362(a) provides for the imposition of the automatic stay upon the filing of each case, the legislature did not intend to bless debtors with a "breathing spell" for multiple foreclosures, particularly when a bankruptcy court determined in an earlier proceeding that the debtor has no air left to breathe.90

In addition, orders for prospective relief are important to the overall system of bankruptcy. When a bankruptcy judge enters an order with prospective relief from the automatic stay, he or she is making a judgment about the benefits that a Chapter 13 debtor can gain from the bankruptcy process. An order preventing the automatic stay from taking effect in the future allows judges to "sort out," in advance, the bankruptcy rights which will be most costly to the system if the debtor is to file a subsequent petition and attempt to relitigate the stay. In effect, such orders maximize an efficient use of the bankruptcy system by making a

89. See supra note 85 and accompanying text.
90. See 140 CONG. REC. S4531 (daily ed. Apr. 20, 1994).
judgment as to the costs and benefits of a future filing. 91

Finally, prospective orders for relief provide a reasonable means of combating the serial filer problem because they deter unjustifiable refilings, provide protection for creditors who have invested a significant amount of time and money litigating the automatic stay issues in the prior proceeding, and minimize the overall costs to the bankruptcy system. At the same time, such orders are not absolute in that they provide a procedural opportunity for debtors to make a showing of a change in circumstances to justify the reimposition of the stay. 92

V. RES JUDICATA AND COLLATERAL ESTOPPEL—HOW SHOULD FUTURE COURTS TREAT PRIOR ORDERS CONTAINING PROSPECTIVE RELIEF FROM THE AUTOMATIC STAY?

The terms res judicata and collateral estoppel are often confused when used to describe the effect of a valid, final judgment. 93

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. 94

Both res judicata and collateral estoppel serve the same general objective: to “relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." 95

Notwithstanding the analysis in Parts III and IV of this Note, even if orders containing prospective relief from the stay cannot be granted by judges, a separate question arises as to how these orders should be treated if the debtor refiles at some later date. This section analyzes whether orders for prospective relief from the automatic stay should be

91. See Tracht, supra note 1, at 128-37.
92. A prior order that grants prospective relief from the automatic stay may, however, adversely affect other creditors. For example, if a secured creditor obtained an order granting prospective relief, junior secured or unsecured creditors taken on by the debtor subsequent to the initial filing and order may be denied recovery. While this result may be unfair, one could argue that creditors were on notice of the order and the effects that it could have on the debtor’s estate.
considered res judicata or collateral estoppel in subsequent Chapter 13 cases.

The question posed above was never raised in Norris\textsuperscript{96} or Taylor\textsuperscript{97} because the orders for prospective relief were appealed immediately. In each of those cases, because the issue was on direct appeal, res judicata and collateral estoppel were not implicated.

If, however, the orders in Norris and Taylor were not appealed, they would be res judicata for one important reason: court orders which are not appealed are entitled to res judicata effect even if they are erroneous on either the facts or the law.\textsuperscript{98} As the Fifth Circuit enunciated in Republic Supply Co. v. Shoaf, "[r]egardless of whether [a] provision is inconsistent with the bankruptcy laws or within the authority of the bankruptcy court, [if] it is nonetheless included in the Plan, [and confirmed without objection or appeal]" the issue is foreclosed from review under the doctrine of res judicata.\textsuperscript{99} Therefore, even if the orders entered in Norris and Taylor were erroneous, and the judges were correct about their doubts concerning a bankruptcy judge's authority to order prospective relief, if the debtor did not appeal the order, it would be entitled to res judicata.

Indeed, this was the case in Abdul-Hasan\textsuperscript{100} and Felberman\textsuperscript{101} where the orders for prospective relief became final. The issue of their

\textsuperscript{97} Little v. Taylor (In re Taylor), 77 B.R. 237 (B.A.P. 9th Cir. 1987), aff'd in part & rev'd on other grounds, 884 F.2d 478 (9th Cir. 1989).
\textsuperscript{98} See Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981); Republic Supply Co. v. Shoaf, 815 F.2d 1046, 1049-51 (5th Cir. 1987); 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE \S\ 0.405[4.-1] (2d ed. 1974); see also Celotex Corp. v. Edwards, 514 U.S. 300, 306 (1995) (holding that an order of the bankruptcy court that is issued on a matter within its jurisdiction and that does not have "only a frivolous pretense to validity" may not be collaterally attacked in another court (quoting GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375, 386 (1980))). Thus, the only avenue available to challenge the propriety of a bankruptcy court order on a matter within its jurisdiction is to timely appeal it.
\textsuperscript{99} Republic Supply, 815 F.2d at 1050. In Republic Supply, the bankruptcy court confirmed a plan of reorganization which released a guaranty for a note that was held by the creditor. See id. at 1047. The creditor never objected to or appealed the entry of the provision in the plan which waived the creditor's right to collect from the guarantor. Postconfirmation, the creditor brought a separate action in district court to collect under the guaranty, claiming that the bankruptcy court had no power to release the guaranty. See id. The defendant raised the defense of res judicata claiming that the confirmation of the plan barred the creditor from enforcing the guaranty. See id. The Fifth Circuit reversed the district court's decision and held that res judicata barred the creditor from enforcing the guaranty that was released under the confirmed plan of reorganization. See id.
\textsuperscript{101} In re Felberman, 196 B.R. 678 (Bankr. S.D.N.Y. 1995).
enforceability only arose after the creditors had carried out foreclosure sales, and the debtors moved to set aside such sales as violating the automatic stay because of a subsequent filing. As the Abdul-Hasan court wrote:

Res judicata fills several public purposes, all of which apply in this situation. It preserves the judicial dispute resolution process against disrespect from multiple litigation of the same matter or multiple litigation with inconsistent results, it preserves courts against the burdens of repetitious litigation, and it provides a means of finality for ending private disputes. There is nothing so sacrosanct about the automatic stay that it should not be subject to the res judicata effect given to other types of litigation.

Therefore, the failure to appeal an order for prospective relief will be fatal to a debtor’s challenge of the order in a subsequently filed case. Courts confronting such orders should enforce them on the basis of res judicata.

The issue of whether orders for prospective relief should be considered res judicata is different from the enforceability of prior orders that simply lift the automatic stay but do not contain prospective relief—another closely related issue that courts have addressed when confronting successive Chapter 13 filings. Some of these courts hold that because the property and the issues are the same in each case, the doctrine of collateral estoppel will prevent the stay from being relitigated in the subsequent action. However, in Jim Walter Homes, Inc. v. Saylors (In re Saylors), the Eleventh Circuit indicated that neither res judicata nor collateral estoppel are applicable in automatic stay litigation. There, the holder of a first mortgage moved for relief from the automatic stay after the debtors filed under Chapter 7. The day after such relief

102. See id.; Abdul-Hasan, 104 B.R. at 264.
103. Abdul-Hasan, 104 B.R. at 267 (citation omitted).
104. See infra note 107.
105. See Abdul-Hasan, 104 B.R. at 266-67; see also In re Taylor, 116 B.R. 728, 730 (Bankr. E.D. Cal. 1990) (holding that a prior order granting relief from the automatic stay was considered res judicata in a subsequently filed case). But see Metmor Fin., Inc. v. Debtors & Trustee (In re Cruz Martinez), 123 B.R. 158, 159 (Bankr. D.P.R. 1991) (holding that a prior order lifting the stay in a previous Chapter 13 case would not be given res judicata effect in the current Chapter 13 case because the motion to lift the stay in the current case was predicated on a different section of the Bankruptcy Code).
106. 869 F.2d 1434 (11th Cir. 1989).
107. See id. at 1435.
was granted, the debtors filed another petition under Chapter 13. The mortgage holder argued that the prior order lifting the stay in the Chapter 7 case was a final adjudication of his right to foreclose, and that res judicata and collateral estoppel should bar the debtor, in his current Chapter 13 case, from challenging that earlier determination. The court rejected the mortgagee's argument holding that "[t]he bankruptcy court's order . . . merely lifted the automatic stay in the [debtor's] Chapter 7 case. In no way did the order purport to be a permanent adjudication of [the mortgagee's] right to foreclose." The court noted the difference between 11 U.S.C. § 1306 ("Property of the estate" in a Chapter 13 case) and 11 U.S.C. § 541 ("Property of the bankruptcy estate") in reasoning that the stay imposed pursuant to section 362(a), by virtue of the subsequently filed Chapter 13 petition, is "distinct" from the stay in the Chapter 7 case which preceded it. Thus, according to the Saylors court, although the stay litigation involved the same property and was brought by the same debtor, the property in a subsequently filed Chapter 13 case is different from the property in an earlier Chapter 7 case, thereby precluding the application of either res judicata or collateral estoppel.

The primary difference between a prior order which merely lifts the

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108. See id.
109. See id. at 1438.
110. Id.
111. See id.

The holding of the Saylors court may be supported by distinguishing the two cases through the policy differences between the automatic stay in Chapter 7 cases and Chapter 13 cases. In Chapter 13 cases, the automatic stay relieves financial pressures while the debtor seeks to reorganize under a repayment plan. Under Chapter 7, on the other hand, the automatic stay prevents debtor harassment while an orderly liquidation of the estate can occur. However, the court’s reasoning in Saylors, which only distinguished between property of the estate defined under section 1306 as compared to section 541, may be questionable. All of the property included in a bankruptcy estate pursuant to section 541 is also property of the estate under Chapter 13. See BENJAMIN WEINTRAUB & ALAN N. RESNICK, BANKRUPTCY LAW MANUAL ¶ 9.10 (4th ed. 1996). Section 1306 simply provides that income earned from the debtor’s services after the petition is filed becomes part of the estate. See 11 U.S.C. § 1306 (1994). The reason for the additional “Property of the estate” provision under section 1306 is because the debtor in a Chapter 13 case is expected to pay creditors using income earned after the petition is filed. See WEINTRAUB & RESNICK, supra, ¶ 4.03[6]. Thus, the debtor’s property in Saylors is only “distinct” to the extent that the debtor’s postpetition income must now be included in the Chapter 13 estate. However, the debtor’s postpetition income was not even at issue in Saylors. Therefore, because there was no evidence of postpetition income from the debtor, the property was the same, and the application of either res judicata or collateral estoppel should have been used to enforce the prior order.
automatic stay and one which adds prospective relief is that with the latter, the judge has purposefully included such language with the intent of creating a "permanent adjudication" of the debtor's rights to the automatic stay as against a particular creditor. Such orders provide a means of finality for ending a private dispute and serve the same policy considerations as res judicata or collateral estoppel: enhancing judicial efficiency by preventing repetitious litigation of the same matter or multiple litigation with inconsistent results and providing a means of finality for ending private disputes. Therefore, future courts confronting orders with prospective relief should enforce them by res judicata in order to prevent the relitigation of the automatic stay against a specific creditor.

However, despite the strong policies for using res judicata to bar relitigation of the automatic stay issues, one important exception to the doctrine of res judicata exists: no judgment can affect subsequently arising rights and duties. This exception is particularly relevant when debtors have had a material change in circumstances since their initial filing and could justify the imposition of a new stay. If a debtor has a material change in circumstances, creating the possibility of a successful reorganization, such a change should be considered a new right to utilize the bankruptcy system. Even if all of the elements of res judicata or collateral estoppel were present to bar a debtor from challenging a prior order, a material change in circumstances should nevertheless allow the debtor to gain the protection of the automatic stay. However, the use of this exception does not mean that orders with prospective relief cannot still be considered res judicata in subsequently filed cases. As discussed in Part IV of this Note, the problem of debtors with a change in circumstances can be addressed by using section 105 to invoke a temporary injunction or restraining order in place of the

114. See 1B JAMES WM. MOORE ET AL., supra note 93, ¶ 0.415 n.16 (citing 2 FREEMAN ON JUDGMENTS §§ 712-716 (1925)).
115. See Cashman Inv. Corp. v. Robinson (In re Bradley), 38 B.R. 425, 432 (Bankr. C.D. Cal. 1984) (holding that the problem of multiple filings should be dealt with as a problem of res judicata, and that prior decisions granting creditor relief from the automatic stay should be considered conclusive and res judicata where the debtor has not had a change in circumstances to justify invoking a new stay).
116. Due to the extreme effect that res judicata can have on someone with a change in circumstances, some courts give no res judicata effect after there has been a material change in circumstances. See State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 161 (1945).
automatic stay. Therefore, courts should use res judicata to protect creditors from the abuses of debtors who refile without a change in circumstances, and where such a change has occurred, debtors should not be barred from receiving the protection of an injunction in the subsequent action.

VI. CONCLUSION

For several years, bankruptcy courts have been faced with the problem of fashioning a form of relief from the automatic stay that will protect creditors from abuse of the bankruptcy laws by debtors acting in bad faith. Orders granting prospective relief from the automatic stay are a balanced solution to the problem of serial filing. While the first courts to address the enforceability of these orders doubted the authority to enter such an order, there are sound statutory arguments and good policy reasons to provide the basis for bankruptcy judges to grant them. Until Congress decides to address the problem and amend the Bankruptcy Code, orders for prospective relief from the automatic stay can and should be granted to address the serial filer problem.

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