NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NV-03-1632-MaRP
JEFFREY ALAN ARNESON,	Bk. No. 03-53451
Debtor.	
JEFFREY ALAN ARNESON,	
Appellant,	**M E M O R A N D U M**[1]
v.	
FARMERS INSURANCE EXCHANGE; WILLIAM A. VAN METER, Chapter 13 Trustee,	
Appellees.	

Argued by Telephone Conference
and Submitted on January 21, 2005

Filed - April 21, 2005

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Gregg W. Zive, Chief Bankruptcy Judge, Presiding.

Before: MARLAR, RUSSELL[2] and PERRIS, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Hon. Barry Russell, Chief Bankruptcy Judge for the Central District of California, sitting by designation.

INTRODUCTION

In this appeal, the bankruptcy court ordered permanent stay relief in favor of a garnishing judgment creditor as a sanction for the debtor's bad faith serial filing.[3] We conclude that such a remedy was neither necessary nor appropriate to carry out the automatic stay relief provisions of § 362[4], and was an abuse of the court's discretion. Therefore, we REVERSE.

FACTS

Jeffrey Alan Arneson ("Debtor") filed the instant chapter 13 petition on October 10, 2003 in order to stop Farmers Insurance Exchange ("Farmers") from garnishing his income. In 1996, Farmers had obtained a $30,883.31 state court judgment against Debtor based on its subrogation claim for injuries sustained by its insured as a result of Debtor's operation of a motor vehicle while

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[3] Although Debtor has challenged the court's finding of bad faith, as the grounds for stay relief, his bankruptcy case was dismissed while this appeal was pending, thus rendering moot the merits of the order terminating the automatic stay. See Aheong v. Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 247 (9th Cir. BAP 2002) (citing Davis v. Courington (In re Davis), 177 B.R. 907, 912-13 (9th Cir. BAP 1995) ("dismissal of the underlying case renders moot a motion for prospective relief regarding the stay"); 11 U.S.C. § 362(c) (automatic stay terminates upon dismissal of the case).

However, the appeal as to the order for *permanent* stay relief is *not* moot since such prospective order could be applied in a future bankruptcy case. As a result, the only appealable live controversy is the propriety of the order granting permanent stay relief.

[4] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code ("Code"), 11 U.S.C. §§ 101-1330, and rule references are to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules 1001-9036.

intoxicated. The unsecured judgment debt in the amount of $25,000 was determined to be nondischargeable in an adversary proceeding in Debtor's original chapter 13 case, which was filed in 1999. The debt was excepted from discharge under § 523(a)(9),[5] which applies in chapters 7, 11, 12, and 13. The order of nondischargeability was affirmed on appeal.

This is Debtor's third chapter 13 bankruptcy case in four years, as follows:

Petition Date	Chapter	Disposition
2/10/99	13	Dismissed with prejudice for failure to make plan payments on 11/20/00
7/26/01	7	Converted to chapter 13 on 12/06/01
12/06/01 (conversion date)	13	Dismissed with prejudice for bad faith on 7/24/02
10/10/03	13	Dismissed pursuant to § 1307(c) on 7/9/04[6]

Plan confirmation was not achieved in the first chapter 13 case, which was dismissed due to Debtor's failure to make the plan payments of $100 per month.

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[5] Section 523 provides that

> (a) a discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—
>
> . . . .
>
> (9) for death or personal injury caused by the debtor's operation of a motor vehicle if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance; . . .

11 U.S.C. § 523(a)(9).

[6] Following dismissal of this case, Debtor filed a "Motion for Vacatur" arguing that the this appeal was moot, due to the dismissal, and that the stay relief/sanction order should therefore be vacated. We denied the motion because this appeal affects future bankruptcy filings and therefore is not moot in its entirety. Debtor has not challenged our ruling.

In Debtor's next case, a chapter 7, Farmers filed a motion to lift the automatic stay in order to enforce its judgment against Debtor's postpetition wages. The motion was granted, and Debtor appealed the order. In a published opinion, we reaffirmed the viability of the nondischargeable judgment.[7] We also held that Farmers was required to file a separate motion for relief from the automatic stay in the new case in order to enforce its judgment from the prior case. See Arneson, 282 B.R. at 893-94.

While the BAP's decision was pending, Debtor moved to convert his chapter 7 case to chapter 13. He proposed a new five-year plan with payments of $100/month prorated to Farmers and one other creditor. The amount that Farmers would have received under the plan was significantly less than the 25 percent of Debtor's income that Farmers could have obtained through garnishment.[8]

On April 9, 2002, the chapter 13 trustee ("Trustee") filed a motion to dismiss the case for failure to make payments. Farmers also filed a new motion for stay relief, arguing that Debtor's use of the automatic stay to avoid full payment of a nondischargeable

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[7] Debtor had argued that the Ninth Circuit Court of Appeals should have vacated the judgment when it dismissed the appeal of the judgment as moot due to dismissal of the first chapter 13 case. See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994); United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950). The BAP ruled that Debtor's collateral attack on the preclusive effect of the adversary judgment was procedurally improper and that such motion for vacatur should have been made in the original appeal of the order to the district court or to the bankruptcy court as a Rule 60(b) motion. Arneson v. Farmers Ins. Exchange (In re Arneson), 282 B.R. 883, 890 (9th Cir. BAP 2002).

[8] Nevada law provides that the maximum amount of disposable earnings subject to garnishment may not exceed the lesser of 25% of the disposable earnings for the relevant pay period or the amount by which the disposable earnings for each week of that period exceed 30 times the federal minimum hourly wage. See Nev. Rev. Stat. 31.295 (West, WESTLAW through 2004 legislation).

debt was cause for stay relief.[9]

Both motions were heard with plan confirmation on July 3, 2002. Trustee questioned whether Debtor was contributing all of his current disposable income, considering that his live-in girlfriend's income was not included on Debtor's schedules. According to Debtor's schedules, his net monthly take-home pay was $2,509 and his monthly expenses were $2,412.[10] Furthermore, he owed $41,483.67 in unsecured debt and $300 in secured debt, and Farmers' judgment constituted the bulk of his debt.

The court found that Debtor would save only eight percent of his income by paying Farmers' debt through the plan (17 percent) versus by garnishment (25 percent). It therefore determined that this plan was filed in bad faith and denied confirmation. Upon hearing the oral ruling, Debtor's counsel attempted to negotiate with the court to increase the payments, a move which the court found to be more evidence of bad faith. The court then dismissed the case. Debtor appealed the bankruptcy court's decision, and it was affirmed by the BAP in a Memorandum decision.[11]

In October, 2003, Debtor filed the instant chapter 13 petition. He listed a net monthly income of $2,906.80 and expenses of $2,715. His schedules showed that he had no secured

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[9] However, as we noted in Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177, 186-91 (9th Cir. BAP 2003), a chapter 11 case, a nondischargeable judgment may be paid in full during the life of a plan and unless the debtor defaults, the creditor may be enjoined from pursuing outside collection activities.

[10] We take judicial notice of these facts in our Memorandum decision, Arneson v. Van Meter, BAP No. NV-02-1534 (August 12, 2003), at 4.

[11] Id.

or priority creditors. His new three-year plan proposed to pay, on a pro rata basis, eight unsecured creditors with claims totaling approximately $40,000, including Farmers' unsecured debt of $31,000. Debtor also proposed to increase the plan payments to $150 per month.

Farmers immediately filed a "Motion to Lift Automatic Stay and for Sanctions" ("Farmer's Motion"). Farmers argued that "[s]ince all of the issues have been previously resolved by this Court and the appellate courts, it is apparent the Debtor will continue to file bankruptcies through his attorney until a message is sent." Farmer's Motion (October 27, 2003), at 3. Besides stay relief, Farmers requested that the court impose monetary sanctions against Debtor under its inherent power to prevent bad-faith conduct. See 11 U.S.C. § 105(a).

Debtor opposed the motion and maintained that Farmers was attempting to sanction him for using his due process and bankruptcy rights to "rebuild his life." Debtor's Opposition (November 10, 2003), at 1.

On November 3, 2003, Farmers filed an "Errata" pleading, which stated in full:

> COMES NOW Creditor above named by and through undersigned counsel and files the following errata to its motion for stay relief so it may continue to garnish the Debtor's wages. Attached hereto is the affidavit of Jonathan King.[12] Prior to the Debtor's third bankruptcy filing, Mr. King was collecting the approximate sum of $1,000.00 per month. This has stopped due to the automatic stay. If the court will recall, the last time the Debtor filed a chapter thirteen, Judge Goldwater dismissed the case as having been filed in bad faith due to the fact it hampered Farmer's ability to collect a non-dischargeable debt. Now we are back again with no changed

[12] Debtor has not included Mr. King's affidavit in the excerpts of record. Appellee Farmers has not appeared.

circumstances.

> It is clear this Court needs to send Debtor's counsel a message. He needs to pay the lost garnishment money to Farmers plus the attorney fees incurred in bringing this motion.

Debtor filed an immediate written objection to the Errata, asserting that it untimely raised a new issue and mischaracterized the record in regards to the prior chapter 13 case dismissal.

At a hearing on November 25, 2003, the bankruptcy court overruled Debtor's objection to the Errata. It also took judicial notice of several hearing transcripts submitted by Debtor including the July 3, 2002 hearing, which was presided over by another judge. In reviewing the July 3, 2002 proceedings, the bankruptcy court found that Debtor's prior chapter 13 case had been dismissed for bad faith.

Debtor's counsel argued that Debtor was proposing a new plan that would pay $150 per month, instead of $100, and over three years instead of five. However, in comparing Debtor's situation in 2001 with the current schedules, the court found that there was no significant change regarding his financial condition. While, in 2001, Debtor had earned a net income of $2,509 and had expenses of $2,412, in 2003, Debtor earned a net income of $2,906.80 and had expenses of $2,715, and Farmers' debt was still predominant.

Moreover, Debtor's attorney admitted that Debtor was still living with his girlfriend and her two children, that his girlfriend contributed about $2,000 a month to the household income, but her income was not included on Debtor's schedules. In addition, the court found that the evidence that Farmers was receiving $1,000 per month from garnishment proved that Debtor's

current net pay was at least $4,000 (25 percent of $4,000 is $1,000), and not the reported $2,906.80.

The bankruptcy court found that the former bad-faith finding combined with the current circumstances, such as a serial filing, incomplete schedules, and minimal payment on a nondischargeable debt, indicated that the present chapter 13 petition was also filed in bad faith. It denied Farmers' motion for monetary sanctions and attorneys fees, but concluded that permanent stay relief was a proper sanction, stating:

> THE COURT: Now, I don't have a motion to dismiss in front of me. All I have is a motion seeking relief from the stay and I am going to make that relief of the stay applicable in this proceeding or any other proceeding that the debtor ever files at any time in any jurisdiction. It's nondischargeable in 7 and 13;
>
> That has been found and reaffirmed;
>
> The stay is lifted permanently;
>
> That is the sanction.

Tr. of Proceedings (November 25, 2003), pp. 22-25.

An order was entered, on December 19, 2003, which granted Farmers' motion for stay relief and, in a separate paragraph, further ordered

> that the automatic stay is lifted for all time between these parties. In the event that this Debtor converts this case or refiles a subsequent case under any chapter of Title Eleven, United States Code, the stay in that case will be null and void as it concerns this creditor so it will not have to file another motion for stay relief.

Debtor filed a timely notice of appeal. Following the filing of the notice of appeal, the chapter 13 case was dismissed on July 9, 2004, for "cause," pursuant to § 1307(c).

ISSUES

1. Whether the bankruptcy court abused its discretion in granting Farmers permanent stay relief in regards to its judgment based on Debtor's bad-faith serial filing.

2. Whether Debtor was deprived of due process by the court's consideration of the late-filed Errata, thereby rendering the permanent stay relief order void.

STANDARD OF REVIEW

"The bankruptcy court's decision to grant a motion for relief from the automatic stay is within its sound discretion and is reviewed for an abuse of discretion." Arkison v. Frontier Asset Mgmt., LLC (In re Skagit Pac. Corp.), 316 B.R. 330, 335 (9th Cir. BAP 2004). We also review the bankruptcy court's use of its inherent authority to impose sanctions--in this case permanent prospective stay relief--for an abuse of discretion. See Miller v. Cardinale (In re DeVille), 361 F.3d 539, 547 (9th Cir. 2004). "Under the abuse of discretion standard, we will not reverse unless we are 'definitely and firmly convinced that the bankruptcy court committed a clear error of judgment.'" Law Offices of David A. Boone v. Derham-Burk (In re Eliapo), 298 B.R. 392, 397-98 (9th Cir. BAP 2003) (citation omitted).

Whether due process was given in any particular instance is a mixed question of law and fact that we review de novo. In re Bankr. Petition Preparers Who Are Not Certified Pursuant to

Requirements of Ariz. Supreme Ct., 307 B.R. 134, 140 (9th Cir. BAP 2004).

DISCUSSION

A. Permanent Stay Relief

In this case, the bankruptcy court found that Debtor's current petition was a bad-faith serial filing made for the purpose of avoiding payment of Farmers' nondischargeable debt. On Farmers' motion for relief from the stay, the bankruptcy court not only granted Farmers' motion, but also exercised its inherent authority, under § 105(a), to sanction Debtor by making the stay relief permanent in regards to Farmers' debt.

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.

11 U.S.C. § 105(a).

A federal court has inherent power to sanction a litigant for bad-faith conduct. See Chambers v. NASCO, Inc., 501 U.S. 32, 46 (1991)"); Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196 (9th Cir. 2003). The bankruptcy court's inherent power to prevent abuse of the bankruptcy laws is well established. The discrete issue in this appeal is whether the facts of this case warranted the use of that power.

A bankruptcy court has broad discretion to shape equitable remedies in the exercise of its § 105(a) authority *which further Congressional intent*. See Lemon v. Kurtzman, 411 U.S. 192, 200 (1973) (a court's "equitable remedies are a special blend of what is necessary, what is fair, and what is workable"); Pacific Shores Dev., LLC v. At Home Corp. (In re At Home Corp.), 392 F.3d 1064, 1070 (9th Cir. 2004) ("[A] bankruptcy court must locate its equitable authority in the Bankruptcy Code."). "[S]tatutory silence alone does not invest a bankruptcy court with equitable powers. Those powers are limited and do not amount to a 'roving commission to do equity.'" Id. (citation omitted).

Thus, a bankruptcy court may not use its equitable powers "'to defeat clear statutory language, nor to reach results inconsistent with the statutory scheme established by the Code.'" Missoula F.C.U. v. Reinertson (In re Reinertson), 241 B.R. 451, 455 (9th Cir. BAP 1999) (quoting Committee of Creditors Holding Unsecured Claims v. Koch Oil Co. (In re Powerine Oil Co.), 59 F.3d 969, 973 (9th Cir. 1995)). See also Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988); 2 Collier on Bankruptcy ¶ 105.01[2], p. 105-8 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) ("The equitable origins of the bankruptcy power suggest substantial leeway to tailor solutions to meet the diverse problems facing bankruptcy courts. Section 105 gives the bankruptcy court the power to fill in gaps and further the statutory mandates of Congress in an efficient manner.").

Whether it was appropriate for the bankruptcy court to use § 105 to grant permanent stay relief entails a comparison with § 362. See Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, 852

(9th Cir. BAP 2002) (holding that denial of discharge under § 105 should not trump denial-of-discharge scheme of § 727); At Home Corp., 392 F.3d at 1070 (concluding that allowing retroactive lease rejection, pursuant to § 105 authority, was necessary and appropriate to carry out the intended provisions of § 365(d)).

Bankruptcy relief is limited to the "honest but unfortunate debtor." Grogan v. Garner, 498 U.S. 279, 287 (1991). It is intended to give a "fresh start" in life to "certain insolvent debtors," so they can "reorder their affairs, make peace with their creditors and enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.'" Id. at 286 (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934)). A major protection of a debtor's fresh start as well as of the equitable distribution of assets among all of the debtor's creditors is the automatic stay of § 362(a). As Congress stated:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his [or her] creditors. It stops all collection efforts, all harassment, and all foreclosure actions. *It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.*

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5963, 6296-97 (emphasis added).

The stay is "automatic" because, ordinarily, the act of filing a new bankruptcy petition imposes a new stay of all acts to collect prebankruptcy debts against the debtor or property of the debtor. See 11 U.S.C. §§ 301, 362(a).

In this case, the garnishment of Debtor's postpetition wages was stayed by § 362(a)(5) and (a)(6), which prohibit:

> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a clam that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; . . .

11 U.S.C. § 362(a).

The automatic stay of § 362(a) is not permanent. Compare 11 U.S.C. § 524(a) (permanent injunction against action against debtor personally to collect a discharged debt). The stay continues until the property acted against is no longer property of the estate or, as to any other act under subsection (a), until the earliest of the time the case is closed, dismissed, or when a discharge is granted or denied. 11 U.S.C. § 362(c).

Section 362(d) also gives the bankruptcy court the power to grant creditors relief from the automatic stay, and provides, in pertinent part:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; . . .

11 U.S.C. § 362(d).

The same scheme gives the bankruptcy court "wide latitude" to annul the stay retroactively according to the equities of the case. Schwartz v. United States (In re Schwartz), 954 F.2d 569, 572 (9th Cir. 1992).

Courts deal strictly with debtors who abuse the Bankruptcy Code. A finding that the bankruptcy case was commenced in bad

faith can be "cause" for granting a creditor relief from the automatic stay pursuant to § 362(d). See Duvart Apt., Inc. v. F.D.I.C. (In re Duvart Apt., Inc.), 205 B.R. 196, 200 (9th Cir. BAP 1996); see also 3 Collier on Bankruptcy, supra, ¶ 362.07[6][a] at 362-104.

Within these confines, bankruptcy courts have developed a remedy for abusive filings by debtors or related third parties solely to prevent a creditor's foreclosure of a specific asset, typically real estate. See Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958) ("A judgment in rem affects the interests of all persons in designated property.") Thus, courts may issue "in rem" prospective stay relief orders which provide that no stay will arise as a result of a future petition filed by the debtor (or a third party) to prevent a foreclosure sale from proceeding against certain real property over which the bankruptcy court exercises in rem jurisdiction, thereby relieving the mortgagee of any responsibility to move for relief in the new case.[13]

Such in rem orders have been upheld under res judicata

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[13] Some of the cases in our circuit include Co. of Fresno v. Golden State Capital Corp. (In re Golden State Capital Corp.), 317 B.R. 144, 149-50 (Bankr. E.D. Cal. 2004) (in rem relief for tax sale of real property); In re Fernandez, 212 B.R. 361, 371-72 (Bankr. C.D. Cal. 1997) (enforcing in rem order issued in prior bankruptcy case where debtor's fifth petition was a blatant abuse of the bankruptcy process), aff'd on other grounds, 227 B.R. 174 (9th Cir. BAP 1998) and aff'd mem., 208 F.3d 220 (9th Cir. 2000); Abdul-Hasan v. Firemen's Fund Mortgage, Inc. (In re Abdul-Hasan), 104 B.R. 263, 266 (Bankr. C.D. Cal. 1989) (upholding prospective effect of prior in rem order); Great Western Bank v. Snow (In re Snow), 201 B.R. 968, 971 (Bankr. C.D. Cal. 1996) (finding support for in rem relief as an equitable servitude under California real property law). See generally L. Chaves, "In Rem Bankruptcy Refiling Bars: Will They Stop Abuse of the Automatic Stay Against Mortgages?" 24 Cal. Bankr. J. 3 (1998).

principles;[14] but whether an order granting relief from the stay in one bankruptcy is res judicata in a subsequent bankruptcy is still an open question in the Ninth Circuit. See Tsafaroff v. Taylor (In re Taylor), 884 F.2d 478, 481 & n.3 (9th Cir. 1989) (disapproving, in dictum, any suggestion that a bankruptcy court could not enter a stay lift order that would apply, under res judicata principles, in all bankruptcy cases brought by the same debtor). See also In re Taylor, 116 B.R. 728, 730 (Bankr. E.D. Cal. 1990) (holding that a stay relief order in a prior bankruptcy case was res judicata); Abdul-Hasan, 104 B.R. at 266; Cashman Inv. Corp. v. Robinson (In re Bradley), 38 B.R. 425, 429-31 (Bankr. C.D. Cal. 1984); Hon. B. Russell, Bankruptcy Evidence Manual § 19, p. 170 (2004) (citing Taylor, 116 B.R. at 730).

We do not need to decide whether an in rem order is an appropriate use of the bankruptcy court's inherent power. We address this case law in order to draw a distinction as to the facts of our case, which involve stay relief for a garnishment of Debtor's wages and not for the foreclosure of a specific asset.

Here, the bankruptcy court lacked in rem jurisdiction over Debtor's future wages. An order that is invalid for lack of subject matter jurisdiction cannot be afforded claim preclusive or issue preclusive effect. See Restatement (Second) of Judgments

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[14] "Res judicata, or claim preclusion, provides that a final judgment on the merits of an action precludes the parties from relitigating all issues connected with the action that were or could have been raised in that action. . . . Claim preclusion is appropriate where: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded to a final judgment on the merits; and (4) the same claim or cause of action was involved in both suits." Rein v. Providian Fin. Corp., 270 F.3d 895, 898-99 (9th Cir. 2001) (citations omitted).

§§ 11, 17, 27 (1982). Therefore, the permanent stay relief order could not be justified as a proper exercise of the court's inherent authority to control the disposition of a specific future asset.[15]

A permanent stay relief order can also be distinguished from a lawful permanent bar to discharge. The court's inherent authority and § 349(a) allow a court to dismiss a case with prejudice to refiling when bad faith amounting to "egregious behavior" is present. See Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224-25 (9th Cir. 1999). Such a dismissal "bars further bankruptcy proceedings between the parties and is a complete adjudication of the issues." Id. at 1223-24. Permanent prospective stay relief is less harsh than dismissal with prejudice, as it does not deny a debtor's access to the bankruptcy court, but simply provides that any future bankruptcy filings by the debtor will not result in the imposition of the automatic stay against a particular creditor.

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[15] Since res judicata is an affirmative defense, the practical effect of the permanent stay relief order was to switch the burden of proof to the plaintiff debtor to show changed circumstances (e.g., in a stay violation proceeding), in order to rebut such defense. See 18 C. Wright, A. Miller & E. Cooper, Fed. Prac. & Proc.: Juris. 2d § 4404 (2004). See generally Spencer Zane Baretz, "Combating the Chapter 13 Serial Filer: An Argument for Orders Containing Prospective Relief from the Automatic Stay Provision," 25 Hofstra L. Rev. 1315, 1331 (Summer 1997).

Although such burden would comport with Debtor's existing burden to prove a good-faith filing under § 362(d), the bankruptcy court would exceed its authority in judicially altering traditional burdens of proof in this way. See 11 U.S.C. § 362(g); Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 940 (9th Cir. BAP 1997) ("Debtor bears the burden of proving that the petition was filed in good faith."), aff'd, 171 F.3d 1219 (9th Cir. 1999); Mortgage Mart, Inc. v. Rechnitzer (In re Chisum), 847 F.2d 597, 600 (9th Cir. 1988) (evidence presented by a debtor of "a bona fide change in circumstances" can justify a finding that successive bankruptcy petitions were filed in good faith).

Nevertheless, there are clear differences between § 349 and § 362. Section 349(a) states:

> (a) 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 subsequent petition under this title, except as provided in section 109(g) of this title.

11 U.S.C. § 349(a).

This statute plainly allows the court to "order otherwise," i.e., to dismiss a case with prejudice for cause, beyond the 180-day limit of § 109(g). There is no comparably clear authority in § 362(d) to grant prospective relief from the automatic stay. To the contrary, § 362 relieves the debtor of the financial pressures that drove him into the current bankruptcy and preserves the time-sensitive rights of a creditor to reassert that pressure, with court approval.

Finally, changed circumstances may defeat the res judicata effect of prior orders. See In re Siciliano, 167 B.R. 999, 1016 (Bankr. E.D. Pa. 1994) (passage of time between case filings rendered the parties' circumstances vis-a-vis one another quite different); Restatement (Second) of Judgments, supra, § 24 (describing transactional test used to determine identity of claims for preclusive effect). The bankruptcy court, here, considered the totality of circumstances as they existed. See Ho v. Dowell (In re Ho), 274 B.R. 867, 876 (9th Cir. BAP 2002) (a determination of bad faith requires an analysis of the totality of the circumstances). Those circumstances are subject to change.

The record evidence revealed that Debtor's income and

expenses had changed in amount, if not in their relative effect upon his ability to repay Farmers. At the November 25, 2003 hearing, Debtor's counsel informed the court that Debtor and his girlfriend were engaged to be married and that Debtor worked as the assistant manager for a gas station owned by his mother. Debtor's circumstances could very well improve in the future, allowing him to file a bankruptcy case for the proper purpose of repaying his debts. Fluctuation in future wages would be relevant to Debtor's ability to obtain a fresh start at a later date. Therefore, Debtor's future wages should not be vulnerable to garnishment if, in good faith, he proposed to use his future income to pay his debts, including the debt to Farmers. Given these facts, therefore, permanent stay relief was contrary to the Congressional intent of § 362.

Similarly, Farmers' enforcement remedies could also change. Whereas the court granted it stay relief to garnish Debtor's wages, Farmers might seek, in the future, to execute on Debtor's real property, over which the present bankruptcy court does not have in rem jurisdiction.

In addition, there are other Code provisions for dealing with Debtor's bad-faith filing, such as a § 349 dismissal with prejudice or a § 109(g) refiling bar. It was neither necessary nor appropriate to use § 105 to trump § 362(d) in view of straightforward alternatives available under the Code. See Yadidi, 274 B.R. at 847.

Finally, in this case, the bankruptcy court denied Farmers' motion for attorney's fees, and, instead, sua sponte ordered permanent stay relief. Permanent stay relief represented the most

drastic sanction, whereas courts, generally, must first consider the availability of less drastic, alternative sanctions. See Ehrenberg v. Cal. State Univ. (In re Beachport Entm't), 396 F.3d 1083, 1087 (9th Cir. 2005) (before summarily dismissing an appeal, as a sanction, an appellate court must consider alternative sanctions); George v. City of Morro Bay (In re George), 322 F.3d 586, 591 (9th Cir. 2003) (discussing most drastic sanction of dismissal under Rule 7041/Fed. R. Civ. P. 41(b)); Chase Manhattan Bank v. Third Eighty-Ninth Assocs. (In re Third Eighty-Ninth Assocs.), 138 B.R. 144, 146 (S.D.N.Y. 1992) (third-party injunction broadened the scope of § 362 and therefore was a "drastic" remedy). Such drastic action by the bankruptcy court was therefore arbitrary and unnecessary.[16]

For the foregoing reasons, we hold that the bankruptcy court abused its discretion in sanctioning Debtor by ordering permanent stay relief in favor of Farmers for the enforcement through garnishment of its judgment debt.

B. Due Process re: the Errata

Although our reversal on other grounds renders the second issue superfluous, we address it for purposes of discussion only.

[16] Moreover, Debtor only received written notice as to the requested monetary sanctions, but he has not raised an issue concerning any lack of specific notice of the permanent stay relief sanction. See Fjeldsted v. Curry (In re Fjeldsted), 293 B.R. 12, 27 (9th Cir. BAP 2003) (inherent sanctions may be imposed sua sponte only if due process is provided). Therefore, such issue has been waived. Meehan v. County of Los Angeles, 856 F.2d 102, 105 n.1 (9th Cir. 1988) (issue not briefed by a party is deemed waived).

An order issued in a manner inconsistent with due process is void. Owens-Corning Fiberglas Corp. v. Center Wholesale, Inc. (In re Center Wholesale, Inc.), 759 F.2d 1440, 1448 (9th Cir. 1985).

Debtor contends that the bankruptcy court violated his due process rights by overruling his objection to the Errata, and maintains that he was not afforded an opportunity to adequately respond to the new issues raised in the Errata.

To meet the requirements of due process, notice "must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." GMAC Mortgage Corp. v. Salisbury (In re Loloee), 241 B.R. 655, 660-61 (9th Cir. BAP 1999) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

A Constitutional purpose of notice is to permit adequate preparation for an impending hearing. See Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14 (1978). In Center Wholesale, 759 F.2d at 1448-1451, the Court of Appeals vacated a cash collateral order to the extent necessary to protect the interest of a secured creditor who received just one day's notice of a hearing which resulted in its lien being primed. See also Smith v. Wheeler Tech., Inc. (In re Wheeler Tech., Inc.), 139 B.R. 235, 240-41 (9th Cir. BAP 1992), in which orders removing the appellant from a creditors committee and requiring the turnover of property were vacated as void for short and otherwise inadequate notice.

Farmers' Errata was filed and served on November 14, 2003, which was 11 days before the November 25, 2003 hearing. Debtor contends that the Errata was untimely and that he had "less than

five (5) Court days to respond to the new issues raised therein." Opening Brief, supra, at 3. Nevertheless, Debtor did respond and filed his written objection on November 19, 2003. At the hearing, the bankruptcy court stated that it had considered both the Errata and Debtor's objection thereto, as well as all of the hearing transcripts submitted for judicial notice by Debtor.

Debtor objected on two grounds. First, he stated that the Errata raised "a new issue in an untimely manner." Debtor did not specify what the "new issue" was or why it was untimely. Next, Debtor stated that the Errata failed to cite the record for its reference to the dismissal of the prior case. Obviously, the Errata was referring to the transcript of the July 3, 2002 hearing, of which Debtor himself had requested that the bankruptcy court take judicial notice.

Debtor's counsel did not argue, at the hearing, that Debtor's due process rights had been violated, nor did counsel request more time to provide additional evidence or argument. In fact, Debtor did not complain of any prejudice due to the court's consideration of the Errata, nor was there any actual prejudice to Debtor, who filed a two-page objection. See City Equities Anaheim, Ltd. v. Lincoln Plaza Dev. Co. (In re City Equities Anaheim, Ltd.), 22 F.3d 954, 959 (9th Cir. 1994) (party claiming procedural due process violation failed to show any prejudice).

Debtor therefore had notice and opportunity to respond to the Errata. The bankruptcy court's adverse ruling was not a violation of Debtor's due process.

CONCLUSION

The bankruptcy court's order of permanent stay relief was not void for lack of due process. Nonetheless, it exceeded the court's equitable authority where: (1) § 362(d) does not expressly authorize such relief; (2) it was not an in rem order over which the bankruptcy court had subject matter jurisdiction and which, arguably, could have res judicata effect; (3) Debtor's circumstances and Farmers' remedies could possibly change; (4) there were more appropriate Code provisions for dealing with a bad-faith filing; and (5) it was not the least drastic sanction. We therefore REVERSE the sanction portion of the stay relief order which granted Farmers permanent stay relief.

RUSSELL, Bankruptcy Judge, concurring:

I concur in the result. I would leave to another day whether prospective lifting of the automatic stay in future cases filed by the same debtor is ever permissible.

Even if such relief were permissible due to the extreme bad faith of the debtor, such relief could not be justified under the facts before us.

PERRIS, Bankruptcy Judge, concurring:

While I join in the outcome of the opinion, I write separately to point out a more fundamental reason why, in my opinion, we must reverse. Because prospectively lifting the

automatic stay in future bankruptcy cases filed by the same debtor defeats the clear statutory language of the Bankruptcy Code and is inconsistent with the Code's overall statutory scheme, I conclude that courts do not have the power under § 105(a) to issue such orders.

Bankruptcy courts cannot use their broad equitable powers under § 105(a) of the Code in a way that "defeat[s] clear statutory language" or "reach[es] results inconsistent with the statutory scheme established by the Code." In re Reinertson, 241 B.R. 451, 455 (9th Cir. BAP 1999) (quoting In re Powerine Oil Co., 59 F.3d 969, 973 (9th Cir. 1995)). Both the clear statutory language of the Code and its statutory scheme support the view that the automatic stay arises, as its name indicates, automatically, as of the filing of any bankruptcy petition. See 11 U.S.C. § 362(a) ("a petition filed under . . . this title . . . operates as a stay, applicable to all entities"); see also 3 Collier on Bankruptcy ¶ 362.02 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) ("[t]he stay is effective automatically and immediately upon the filing of a bankruptcy petition").

There is nothing in § 362 that "purports to enable the [b]ankruptcy [c]ourt to provide relief from the automatic stay in advance of the filing of a bankruptcy petition." In re Norris, 39 B.R. 85, 87 (E.D. Penn. 1984). Because the Code "creates an automatic stay in all bankruptcy proceedings," it is "doubtful that a bankruptcy court can enter such an order."[17] In re Taylor,

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[17] While the Ninth Circuit in In re Taylor chided the BAP for its "sweeping statement . . . regarding the res judicata effect of stay lift orders," this admonition stemmed from what the Ninth Circuit saw as the BAP "clearly reach[ing] way beyond the facts of (continued...)

77 B.R. 237, 240 (9th Cir. BAP 1987), aff'd in part and rev'd in part, 884 F.2d 478 (9th Cir. 1989).

The automatic stay serves two primary purposes. The first is to protect the debtor by "halting all collection efforts." In re Dawson, 390 F.3d 1139, 1147 (9th Cir. 2004) (quoting United States v. Dos Cabezas Corp., 995 F.2d 1486, 1491 (9th Cir. 1993)). Second, and more important in the present context, the stay protects the interest of creditors, by "prevent[ing] creditors from racing to devour the debtor's estate at the expense of fellow creditors." Id.

In circumstances such as the stay relief order on appeal here, allowing prospective stay relief as to one creditor but not others directly contravenes the intent and function of the stay as viewed from the perspective of the entire creditor body. The Order on appeal states as follows:

> It is further ordered that the automatic stay is lifted for all time between these parties. In the event that this Debtor converts this case or refiles a subsequent case under any chapter of Title Eleven, United States Code, the stay in that case will be null and void as it concerns this creditor so it will not have to file another motion for stay relief.

If, for example, Mr. Arneson were to file for bankruptcy in the future under Chapter 7, Farmer's, an unsecured creditor, would be entitled to proceed against the property of the estate while other creditors were subject to the automatic stay. The bankruptcy estate that is supposed to exist for the benefit of all creditors would be devoured by Farmer's at the expense of the

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[17](...continued)
the instant case to announce a generally applicable rule." 884 F.2d at 481 n.3. The Ninth Circuit did not review the BAP's statement on its merits.

debtor's other creditors.[18]

The Ninth Circuit has held that the a debtor who has had a Chapter 13 case dismissed may confirm a plan in a subsequent Chapter 13 case if the debtor has had a positive bona fide change of circumstances and is otherwise proceeding in good faith. In re Metz, 820 F2d 1495, 1497 (9th Cir. 1987). The order at issue would likely defeat Mr. Arneson's ability in the future to use Chapter 13 to equitably deal with his unsecured creditors because Farmer's would be free to garnish 25% of his net wages, thus severely restricting the money he would have available to pay other creditors and reasonable living expenses.

The statutory scheme of the Code allows the bankruptcy court to grant stay relief or annul the stay retroactively, according to the equities of the case. The existence of retroactive stay relief, including annulment, detracts from any argument that prospective stay relief is permissible (or necessary) under the Code. First, there is explicit statutory language authorizing retroactive relief. See 11 U.S.C. § 362(d) (giving court the power to "terminat[e], anull[], modify[], or condition[]" the automatic stay). As mentioned above, no such statutory basis exists for prospective relief. Second, though § 362(d) "gives the bankruptcy

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[18] This scenario stands in contrast to those instances, admittedly the majority of cases involving prospective stay relief orders, where the creditor benefitting from the order is secured and, as a result of the order, can foreclose on its collateral without seeking relief from stay even if subsequent bankruptcy petitions are filed by the debtor. As long as the debtor has no non-exempt equity in such property, unsecured creditors are not injured by allowing the secured creditor to foreclose without asking the court for relief. Even in the absence of a policy argument based on the interests of the creditor body as a whole, however, the conflict between prospective stay relief and the statutory langauge of § 362 renders prospective stay relief impermissible.

court wide latitude in creating relief from the automatic stay, including the power to grant retroactive relief," In re Schwartz, 954 F.2d 569, 572 (9th Cir. 1992), this power does not interfere with the automatic imposition of the stay following the filing of every bankruptcy petition. As a result, the powers given to the bankruptcy court in § 362(d) do not contradict the fundamental tenet of § 362(a) that the stay arises automatically.

The Ninth Circuit repeatedly has stated that the automatic stay takes effect even in cases involving bad-faith filings, and that the appropriate remedy for aggrieved creditors in such cases is relief under § 362(d). See e.g., 40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076, 1080 n.2 (9th Cir. 2003) (bad-faith filing triggers automatic stay; appropriate relief would be annulling stay); Wekell v. United States, 14 F.3d 32, 33 (9th Cir. 1994) (noting that "[a] creditor who believes that the stay should not be in effect for any reason—including that the bankruptcy filing is . . . a sham—can take advantage of" the relief-from-stay provision of § 362(d) (internal citation omitted)); In re Arnold, 806 F.2d 937, 939 (9th Cir. 1986) (noting that "debtor's lack of good faith in filing a bankruptcy petition has often been used as cause for removing the automatic stay").

In short, the Code provides a solution to the problem of bad-faith filings in the retroactive relief-from-stay powers of § 362(d). This solution not only is statutorily explicit but also is consistent with the rest of § 362. Moreover, courts have numerous other tools with which to sanction the bad-faith conduct of debtors and their counsel. Under Bankruptcy Rule 9011, courts can "sanction attorneys, parties, and individuals that file bad-

faith documents before the court." In re Rainbow Magazine, Inc., 77 F.3d 278, 282 (9th Cir. 1996). Bankruptcy courts also have an inherent sanction authority that stems from the "very creation of the court (unless Congress intentionally restricts those powers)." In re Dyer, 322 F.3d 1178, 1197 (9th Cir. 2003) (citing Rainbow Magazine, 77 F.3d at 283). "The inherent sanction authority allows a bankruptcy court to deter and provide compensation for a broad range of improper litigation tactics." Id. (citing Fink v. Gomez, 239 F.3d 989, 992-93 (9th Cir. 2001)). Lastly, pursuant to § 105(a), bankruptcy courts have "[c]ivil contempt authority . . . to remedy a violation of a specific order." Id. Given this inventory of alternatives, there is no compelling reason to allow courts to order prospective stay relief under the auspices of § 105(a), particularly when such relief is at odds with the Code and Ninth Circuit precedent.[19]

There are several bankruptcy court decisions in the Ninth Circuit that give effect to prospective stay relief orders on the basis of res judicata. See, e.g., In re Taylor, 116 B.R. 728 (Bankr. E.D. Cal. 1990); In re Abdul-Hasan, 104 B.R. 263 (Bankr. C.D. Cal. 1989). It is important to note, however, that the question of whether a court will give res judicata effect to a stay relief order from an earlier bankruptcy proceeding that expressly states that it will be effective in future bankruptcy cases is not the same question as whether the Code permits a court

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[19] Significantly, the creditor in this case, Farmer's, did not request prospective stay relief. Instead, Farmer's requested that the bankruptcy court vacate the stay in the instant case and impose monetary sanctions against debtor's counsel, the same remedies discussed above as the appropriate alternative to the permanent prospective stay relief imposed sua sponte by the bankruptcy court.

to grant permanent prospective stay relief in the first instance. It is the latter issue that is on appeal in the instant case, which involves a direct appeal of a prospective stay relief order, not a collateral attack on such an order commenced in a subsequent bankruptcy proceeding.[20]

In sum, § 105(a) cannot be used by courts to craft equitable relief that contravenes the clear statutory language or statutory scheme of the Bankruptcy Code. Because permanent prospective stay relief orders issued pursuant to § 105(a) contradict the language and intent of § 362(a) and (d), and because other methods exist to deter abuse of the automatic stay by serial filers and their attorneys, I conclude that permanent prospective stay relief orders are impermissible as a matter of bankruptcy law.

I concur.

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[20] That these courts gave res judicata effect to stay relief orders may have more to do with the fact that the orders were not appealed than with the validity of the orders themselves. The Supreme Court has held that "final, unappealed judgment[s] on the merits" are entitled to res judicata effect even when they are based on an erroneous view of the law. Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 399, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981). Procedural history, then, rather than the soundness of the legal reasoning underlying the previous decision on the merits, governs the application of res judicata. Accordingly, not much significance should be accorded to holdings giving res judicata effect to prospective stay relief orders when determining the propriety of the orders themselves as a matter of law.