

APR 21 2005

NOT FOR PUBLICATION

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No. NV-03-1632-MaRP
)	
JEFFREY ALAN ARNESON,)	Bk. No. 03-53451
)	
Debtor.)	
_____)	
)	
JEFFREY ALAN ARNESON,)	
)	
Appellant,)	
)	<u>MEMORANDUM</u> 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, RUSSELL² and PERRIS, Bankruptcy Judges.

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.

1 **INTRODUCTION**

2
3 In this appeal, the bankruptcy court ordered permanent stay
4 relief in favor of a garnishing judgment creditor as a sanction
5 for the debtor's bad faith serial filing.³ We conclude that such
6 a remedy was neither necessary nor appropriate to carry out the
7 automatic stay relief provisions of § 362⁴, and was an abuse of
8 the court's discretion. Therefore, we REVERSE.

9
10 **FACTS**

11
12 Jeffrey Alan Arneson ("Debtor") filed the instant chapter 13
13 petition on October 10, 2003 in order to stop Farmers Insurance
14 Exchange ("Farmers") from garnishing his income. In 1996, Farmers
15 had obtained a \$30,883.31 state court judgment against Debtor
16 based on its subrogation claim for injuries sustained by its
17 insured as a result of Debtor's operation of a motor vehicle while
18

19 ³ Although Debtor has challenged the court's finding of bad
20 faith, as the grounds for stay relief, his bankruptcy case was
21 dismissed while this appeal was pending, thus rendering moot the
22 merits of the order terminating the automatic stay. See Aheong v.
23 Mellon Mortgage Co. (In re Aheong), 276 B.R. 233, 247 (9th Cir.
24 BAP 2002) (citing Davis v. Courington (In re Davis), 177 B.R. 907,
25 912-13 (9th Cir. BAP 1995) ("dismissal of the underlying case
26 renders moot a motion for prospective relief regarding the stay");
27 11 U.S.C. § 362(c) (automatic stay terminates upon dismissal of
28 the case).

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

27 ⁴ Unless otherwise indicated, all chapter and section
28 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.

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

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

<u>Petition Date</u>	<u>Chapter</u>	<u>Disposition</u>
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

15 Plan confirmation was not achieved in the first chapter 13
 16 case, which was dismissed due to Debtor's failure to make the plan
 17 payments of \$100 per month.
 18

19
 20 ⁵ Section 523 provides that
 21 (a) a discharge under section 727, 1141, 1228(a),
 22 1228(b), or 1328(b) of this title does not discharge an
 23 individual debtor from any debt—
 24
 25 (9) for death or personal injury caused by the
 26 debtor's operation of a motor vehicle if such operation
 27 was unlawful because the debtor was intoxicated from
 28 using alcohol, a drug, or another substance; . . .
 11 U.S.C. § 523(a)(9).

26 ⁶ Following dismissal of this case, Debtor filed a "Motion
 27 for Vacatur" arguing that the this appeal was moot, due to the
 28 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.

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

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

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

19
20 ⁷ Debtor had argued that the Ninth Circuit Court of Appeals
21 should have vacated the judgment when it dismissed the appeal of
22 the judgment as moot due to dismissal of the first chapter 13
23 case. See U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513
24 U.S. 18, 26 (1994); United States v. Munsingwear, Inc., 340 U.S.
25 36, 39-40 (1950). The BAP ruled that Debtor's collateral attack
26 on the preclusive effect of the adversary judgment was
27 procedurally improper and that such motion for vacatur should have
28 been made in the original appeal of the order to the district
29 court or to the bankruptcy court as a Rule 60(b) motion. Arneson
30 v. Farmers Ins. Exchange (In re Arneson), 282 B.R. 883, 890 (9th
31 Cir. BAP 2002).

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

1 debt was cause for stay relief.⁹

2 Both motions were heard with plan confirmation on July 3,
3 2002. Trustee questioned whether Debtor was contributing all of
4 his current disposable income, considering that his live-in
5 girlfriend's income was not included on Debtor's schedules.
6 According to Debtor's schedules, his net monthly take-home pay was
7 \$2,509 and his monthly expenses were \$2,412.¹⁰ Furthermore, he
8 owed \$41,483.67 in unsecured debt and \$300 in secured debt, and
9 Farmers' judgment constituted the bulk of his debt.

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

19 In October, 2003, Debtor filed the instant chapter 13
20 petition. He listed a net monthly income of \$2,906.80 and
21 expenses of \$2,715. His schedules showed that he had no secured
22

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

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

¹¹ Id.

1 or priority creditors. His new three-year plan proposed to pay,
2 on a pro rata basis, eight unsecured creditors with claims
3 totaling approximately \$40,000, including Farmers' unsecured debt
4 of \$31,000. Debtor also proposed to increase the plan payments to
5 \$150 per month.

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

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

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

21 COMES NOW Creditor above named by and through
22 undersigned counsel and files the following errata to its
23 motion for stay relief so it may continue to garnish the
24 Debtor's wages. Attached hereto is the affidavit of
25 Jonathan King.^[12] Prior to the Debtor's third bankruptcy
26 filing, Mr. King was collecting the approximate sum of
27 \$1,000.00 per month. This has stopped due to the
28 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

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

1 circumstances.

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

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

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

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

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

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

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

10 THE COURT: Now, I don't have a motion to dismiss in
11 front of me. All I have is a motion
12 seeking relief from the stay and I am
13 going to make that relief of the stay
14 applicable in this proceeding or any other
15 proceeding that the debtor ever files at
16 any time in any jurisdiction. It's
17 nondischargeable in 7 and 13;

18 That has been found and reaffirmed;

19 The stay is lifted permanently;

20 That is the sanction.

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

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

25 that the automatic stay is lifted for all time between
26 these parties. In the event that this Debtor converts
27 this case or refiles a subsequent case under any chapter
28 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).

1 **ISSUES**

- 2
- 3 1. Whether the bankruptcy court abused its discretion in
- 4 granting Farmers permanent stay relief in regards to its
- 5 judgment based on Debtor's bad-faith serial filing.
- 6
- 7 2. Whether Debtor was deprived of due process by the
- 8 court's consideration of the late-filed Errata, thereby
- 9 rendering the permanent stay relief order void.

10

11 **STANDARD OF REVIEW**

12

13 "The bankruptcy court's decision to grant a motion for relief

14 from the automatic stay is within its sound discretion and is

15 reviewed for an abuse of discretion." Arkison v. Frontier Asset

16 Mgmt., LLC (In re Skagit Pac. Corp.), 316 B.R. 330, 335 (9th Cir.

17 BAP 2004). We also review the bankruptcy court's use of its

18 inherent authority to impose sanctions--in this case permanent

19 prospective stay relief--for an abuse of discretion. See Miller

20 v. Cardinale (In re DeVille), 361 F.3d 539, 547 (9th Cir. 2004).

21 "Under the abuse of discretion standard, we will not reverse

22 unless we are 'definitely and firmly convinced that the bankruptcy

23 court committed a clear error of judgment.'" Law Offices of David

24 A. Boone v. Derham-Burk (In re Eliapo), 298 B.R. 392, 397-98 (9th

25 Cir. BAP 2003) (citation omitted).

26 Whether due process was given in any particular instance is a

27 mixed question of law and fact that we review de novo. In re

28 Bankr. Petition Preparers Who Are Not Certified Pursuant to

1 Requirements of Ariz. Supreme Ct., 307 B.R. 134, 140 (9th Cir. BAP
2 2004).

3
4 **DISCUSSION**

5
6 **A. Permanent Stay Relief**

7
8 In this case, the bankruptcy court found that Debtor's
9 current petition was a bad-faith serial filing made for the
10 purpose of avoiding payment of Farmers' nondischargeable debt. On
11 Farmers' motion for relief from the stay, the bankruptcy court not
12 only granted Farmers' motion, but also exercised its inherent
13 authority, under § 105(a), to sanction Debtor by making the stay
14 relief permanent in regards to Farmers' debt.

15 Section 105(a) provides:

16 The court may issue any order, process, or judgment
17 that is necessary or appropriate to carry out the
18 provisions of this title. No provision of this title
19 providing for the raising of an issue by a party in
20 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.

21 11 U.S.C. § 105(a).

22 A federal court has inherent power to sanction a litigant for
23 bad-faith conduct. See Chambers v. NASCO, Inc., 501 U.S. 32, 46
24 (1991)"); Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1196
25 (9th Cir. 2003). The bankruptcy court's inherent power to prevent
26 abuse of the bankruptcy laws is well established. The discrete
27 issue in this appeal is whether the facts of this case warranted
28 the use of that power.

1 A bankruptcy court has broad discretion to shape equitable
2 remedies in the exercise of its § 105(a) authority *which further*
3 *Congressional intent.* See Lemon v. Kurtzman, 411 U.S. 192, 200
4 (1973) (a court's "equitable remedies are a special blend of what
5 is necessary, what is fair, and what is workable"); Pacific
6 Shores Dev., LLC v. At Home Corp. (In re At Home Corp.), 392 F.3d
7 1064, 1070 (9th Cir. 2004) ("[A] bankruptcy court must locate its
8 equitable authority in the Bankruptcy Code."). "[S]tatutory
9 silence alone does not invest a bankruptcy court with equitable
10 powers. Those powers are limited and do not amount to a 'roving
11 commission to do equity.'" Id. (citation omitted).

12 Thus, a bankruptcy court may not use its equitable powers
13 "'to defeat clear statutory language, nor to reach results
14 inconsistent with the statutory scheme established by the Code.'" Missoula F.C.U. v. Reinertson (In re Reinertson), 241 B.R. 451,
15 455 (9th Cir. BAP 1999) (quoting Committee of Creditors Holding
16 Unsecured Claims v. Koch Oil Co. (In re Powerine Oil Co.), 59 F.3d
17 969, 973 (9th Cir. 1995)). See also Norwest Bank Worthington v.
18 Ahlers, 485 U.S. 197, 206 (1988); 2 Collier on Bankruptcy
19 ¶ 105.01[2], p. 105-8 (Alan N. Resnick & Henry J. Sommer eds.,
20 15th ed. rev. 2004) ("The equitable origins of the bankruptcy
21 power suggest substantial leeway to tailor solutions to meet the
22 diverse problems facing bankruptcy courts. Section 105 gives the
23 bankruptcy court the power to fill in gaps and further the
24 statutory mandates of Congress in an efficient manner.").

26 Whether it was appropriate for the bankruptcy court to use
27 § 105 to grant permanent stay relief entails a comparison with
28 § 362. See Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, 852

1 (9th Cir. BAP 2002) (holding that denial of discharge under § 105
2 should not trump denial-of-discharge scheme of § 727); At Home
3 Corp., 392 F.3d at 1070 (concluding that allowing retroactive
4 lease rejection, pursuant to § 105 authority, was necessary and
5 appropriate to carry out the intended provisions of § 365(d)).

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

17 The automatic stay is one of the fundamental debtor
18 protections provided by the bankruptcy laws. It gives the
19 debtor a breathing spell from his [or her] creditors. It
20 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.

21 H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1978), reprinted in
22 1978 U.S.C.C.A.N. 5787, 5963, 6296-97 (emphasis added).

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

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

1 (5) any act to create, perfect, or enforce against
2 property of the debtor any lien to the extent that such
3 lien secures a claim that arose before the commencement of
4 the case under this title;

5 (6) any act to collect, assess, or recover a claim
6 against the debtor that arose before the commencement of
7 the case under this title; . . .

8 11 U.S.C. § 362(a).

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

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

19 (d) On request of a party in interest and after notice
20 and a hearing, the court shall grant relief from the stay
21 provided under subsection (a) of this section, such as by
22 terminating, annulling, modifying, or conditioning such
23 stay -

24 (1) for cause, including the lack of adequate
25 protection of an interest in property of such
26 party in interest; . . .

27 11 U.S.C. § 362(d).

28 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

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

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

18 Such in rem orders have been upheld under res judicata
19
20

21 ¹³ Some of the cases in our circuit include Co. of Fresno v.
22 Golden State Capital Corp. (In re Golden State Capital Corp.), 317
23 B.R. 144, 149-50 (Bankr. E.D. Cal. 2004) (in rem relief for tax
24 sale of real property); In re Fernandez, 212 B.R. 361, 371-72
25 (Bankr. C.D. Cal. 1997) (enforcing in rem order issued in prior
26 bankruptcy case where debtor's fifth petition was a blatant abuse
27 of the bankruptcy process), aff'd on other grounds, 227 B.R. 174
28 (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).

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

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

19 Here, the bankruptcy court lacked in rem jurisdiction over
20 Debtor's future wages. An order that is invalid for lack of
21 subject matter jurisdiction cannot be afforded claim preclusive or
22 issue preclusive effect. See Restatement (Second) of Judgments
23

24 ¹⁴ "Res judicata, or claim preclusion, provides that a final
25 judgment on the merits of an action precludes the parties from
26 relitigating all issues connected with the action that were or
27 could have been raised in that action. . . . Claim preclusion is
28 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).

1 §§ 11, 17, 27 (1982). Therefore, the permanent stay relief order
2 could not be justified as a proper exercise of the court's
3 inherent authority to control the disposition of a specific future
4 asset.¹⁵

5 A permanent stay relief order can also be distinguished from a
6 lawful permanent bar to discharge. The court's inherent authority
7 and § 349(a) allow a court to dismiss a case with prejudice to
8 refiling when bad faith amounting to "egregious behavior" is
9 present. See Leavitt v. Soto (In re Leavitt), 171 F.3d 1219,
10 1224-25 (9th Cir. 1999). Such a dismissal "bars further
11 bankruptcy proceedings between the parties and is a complete
12 adjudication of the issues." Id. at 1223-24. Permanent
13 prospective stay relief is less harsh than dismissal with
14 prejudice, as it does not deny a debtor's access to the bankruptcy
15 court, but simply provides that any future bankruptcy filings by
16 the debtor will not result in the imposition of the automatic stay
17 against a particular creditor.

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

27 Although such burden would comport with Debtor's existing
28 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).

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

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

11 U.S.C. § 349(a).

12 This statute plainly allows the court to "order otherwise,"
13 i.e., to dismiss a case with prejudice for cause, beyond the 180-
14 day limit of § 109(g). There is no comparably clear authority in
15 § 362(d) to grant prospective relief from the automatic stay. To
16 the contrary, § 362 relieves the debtor of the financial pressures
17 that drove him into the current bankruptcy and preserves the time-
18 sensitive rights of a creditor to reassert that pressure, with
19 court approval.

20 Finally, changed circumstances may defeat the res judicata
21 effect of prior orders. See In re Siciliano, 167 B.R. 999, 1016
22 (Bankr. E.D. Pa. 1994) (passage of time between case filings
23 rendered the parties' circumstances vis-a-vis one another quite
24 different); Restatement (Second) of Judgments, supra, § 24
25 (describing transactional test used to determine identity of
26 claims for preclusive effect). The bankruptcy court, here,
27 considered the totality of circumstances as they existed. See Ho
28 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

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

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

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

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

1 drastic sanction, whereas courts, generally, must first consider
2 the availability of less drastic, alternative sanctions. See
3 Ehrenberg v. Cal. State Univ. (In re Beachport Entm't), 396 F.3d
4 1083, 1087 (9th Cir. 2005) (before summarily dismissing an appeal,
5 as a sanction, an appellate court must consider alternative
6 sanctions); George v. City of Morro Bay (In re George), 322 F.3d
7 586, 591 (9th Cir. 2003) (discussing most drastic sanction of
8 dismissal under Rule 7041/Fed. R. Civ. P. 41(b)); Chase Manhattan
9 Bank v. Third Eighty-Ninth Assocs. (In re Third Eighty-Ninth
10 Assocs.), 138 B.R. 144, 146 (S.D.N.Y. 1992) (third-party
11 injunction broadened the scope of § 362 and therefore was a
12 "drastic" remedy). Such drastic action by the bankruptcy court
13 was therefore arbitrary and unnecessary.¹⁶

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

18 19 **B. Due Process re: the Errata**

20
21 Although our reversal on other grounds renders the second
22 issue superfluous, we address it for purposes of discussion only.
23

24
25 ¹⁶ Moreover, Debtor only received written notice as to the
26 requested monetary sanctions, but he has not raised an issue
27 concerning any lack of specific notice of the permanent stay
28 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).

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

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

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

15 A Constitutional purpose of notice is to permit adequate
16 preparation for an impending hearing. See Memphis Light, Gas &
17 Water Div. v. Craft, 436 U.S. 1, 14 (1978). In Center Wholesale,
18 759 F.2d at 1448-1451, the Court of Appeals vacated a cash
19 collateral order to the extent necessary to protect the interest
20 of a secured creditor who received just one day's notice of a
21 hearing which resulted in its lien being primed. See also Smith
22 v. Wheeler Tech., Inc. (In re Wheeler Tech., Inc.), 139 B.R. 235,
23 240-41 (9th Cir. BAP 1992), in which orders removing the appellant
24 from a creditors committee and requiring the turnover of property
25 were vacated as void for short and otherwise inadequate notice.

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

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

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

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

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

27

28

1 CONCLUSION

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

14
15 RUSSELL, Bankruptcy Judge, concurring:

16
17 I concur in the result. I would leave to another day whether
18 prospective lifting of the automatic stay in future cases filed by
19 the same debtor is ever permissible.

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

23
24 PERRIS, Bankruptcy Judge, concurring:

25
26 While I join in the outcome of the opinion, I write
27 separately to point out a more fundamental reason why, in my
28 opinion, we must reverse. Because prospectively lifting the

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

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

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

26
27 ¹⁷ While the Ninth Circuit in In re Taylor chided the BAP for
28 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...)

1 77 B.R. 237, 240 (9th Cir. BAP 1987), aff'd in part and rev'd in
2 part, 884 F.2d 478 (9th Cir. 1989).

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

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

16 It is further ordered that the automatic stay is lifted
17 for all time between these parties. In the event that this
18 Debtor converts this case or refiles a subsequent case
19 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.

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

27 ¹⁷(...continued)
28 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.

1 debtor's other creditors.¹⁸

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

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

22
23 ¹⁸ This scenario stands in contrast to those instances,
24 admittedly the majority of cases involving prospective stay relief
25 orders, where the creditor benefitting from the order is secured
26 and, as a result of the order, can foreclose on its collateral
27 without seeking relief from stay even if subsequent bankruptcy
28 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 language of § 362 renders prospective stay relief
impermissible.

1 court wide latitude in creating relief from the automatic stay,
2 including the power to grant retroactive relief," In re Schwartz,
3 954 F.2d 569, 572 (9th Cir. 1992), this power does not interfere
4 with the automatic imposition of the stay following the filing of
5 every bankruptcy petition. As a result, the powers given to the
6 bankruptcy court in § 362(d) do not contradict the fundamental
7 tenet of § 362(a) that the stay arises automatically.

8 The Ninth Circuit repeatedly has stated that the automatic
9 stay takes effect even in cases involving bad-faith filings, and
10 that the appropriate remedy for aggrieved creditors in such cases
11 is relief under § 362(d). See e.g., 40235 Washington St. Corp. v.
12 Lusardi, 329 F.3d 1076, 1080 n.2 (9th Cir. 2003) (bad-faith filing
13 triggers automatic stay; appropriate relief would be annulling
14 stay); Wekell v. United States, 14 F.3d 32, 33 (9th Cir. 1994)
15 (noting that "[a] creditor who believes that the stay should not
16 be in effect for any reason—including that the bankruptcy filing
17 is . . . a sham—can take advantage of" the relief-from-stay
18 provision of § 362(d) (internal citation omitted)); In re Arnold,
19 806 F.2d 937, 939 (9th Cir. 1986) (noting that "debtor's lack of
20 good faith in filing a bankruptcy petition has often been used as
21 cause for removing the automatic stay").

22 In short, the Code provides a solution to the problem of bad-
23 faith filings in the retroactive relief-from-stay powers of
24 § 362(d). This solution not only is statutorily explicit but also
25 is consistent with the rest of § 362. Moreover, courts have
26 numerous other tools with which to sanction the bad-faith conduct
27 of debtors and their counsel. Under Bankruptcy Rule 9011, courts
28 can "sanction attorneys, parties, and individuals that file bad-

1 faith documents before the court." In re Rainbow Magazine, Inc.,
2 77 F.3d 278, 282 (9th Cir. 1996). Bankruptcy courts also have an
3 inherent sanction authority that stems from the "very creation of
4 the court (unless Congress intentionally restricts those powers)."
5 In re Dyer, 322 F.3d 1178, 1197 (9th Cir. 2003) (citing Rainbow
6 Magazine, 77 F.3d at 283). "The inherent sanction authority
7 allows a bankruptcy court to deter and provide compensation for a
8 broad range of improper litigation tactics." Id. (citing Fink v.
9 Gomez, 239 F.3d 989, 992-93 (9th Cir. 2001)). Lastly, pursuant to
10 § 105(a), bankruptcy courts have "[c]ivil contempt authority . . .
11 to remedy a violation of a specific order." Id. Given this
12 inventory of alternatives, there is no compelling reason to allow
13 courts to order prospective stay relief under the auspices of
14 § 105(a), particularly when such relief is at odds with the Code
15 and Ninth Circuit precedent.¹⁹

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

25
26 ¹⁹ Significantly, the creditor in this case, Farmer's, did
27 not request prospective stay relief. Instead, Farmer's requested
28 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.

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

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

14 I concur.
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23 ²⁰ That these courts gave res judicata effect to stay relief
24 orders may have more to do with the fact that the orders were not
25 appealed than with the validity of the orders themselves. The
26 Supreme Court has held that "final, unappealed judgment[s] on the
27 merits" are entitled to res judicata effect even when they are
28 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.