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Lawrence Ponoroff

PUTTING WITH A PITCHING WEDGE: INDISCRIMINATING TERMINATION OF THE AUTOMATIC STAY

Lawrence Ponoroff[*]

ABSTRACT

The serial filing of chapter 13 cases solely for the purpose of frustrating and delaying foreclosure or other legitimate collection efforts, and with no serious intent to reorganize, has long been perceived as an abuse of the bankruptcy system requiring a fulsome response. In 2005 Congress seized on a solution involving withdrawal or withholding of the automatic stay. Since it is the existence of the stay that most prompts abusive filings, the solution seemed appropriate. It was not for a variety of reasons examined in this article, but most notably because not all serial filings are abusive, and the stay serves to implement multiple bankruptcy policies, implicating the interests of participants in the system other than the debtor. Thus, this article contends that the new paragraphs added to section 362(c) in 2005 are overly broad, out of kilter with the structure of other stay termination provisions, and as likely as not to produce more mischief than they prevent. Moreover, the article asserts that there currently are better, more narrowly tailored, tools available to the courts to address bad faith serial filings that neither run the risk of depriving deserving debtors of bankruptcy relief and that do not prejudice the interests of other creditors in the case. Building on these tools, this article constructs an alternative approach to stay modification in the case of repeat filings that distinguishes the differing considerations at work in rehabilitation versus liquidation cases, and that contemplates a more meaningful role for bankruptcy courts to exercise experienced judgment in balancing the equities in individual cases in a fashion that a mechanical, self-executing statutory approach can never replicate.

[*] Professor of Law and former Dean, Michigan State University College of Law.

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INTRODUCTION

To a man with a hammer, everything looks like a nail.[1]

The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") of 2005[2] was the most comprehensive set of amendments to the Bankruptcy Reform Act of 1978.[3] With more than just cause, BAPCPA has received its share of criticism, and not simply because of its openly pro-creditor

[1] ABRAHAM H. MASLOW. THE PSYCHOLOGY OF SCIENCE, 15 (1966) (ISBN 9780976040231).

[2] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 119 Stat. 23 (2005) (codified as amended throughout 11 U.S.C. and scattered sections of 18 U.S.C. and 28 U.S.C.) [hereinafter BAPCPA].

[3] References in this Article to the "Code" or the "Bankruptcy Code" are to the current law of bankruptcy, which is found in Title 11 of the United States Code. 11 U.S.C. § 101 (originally enacted as Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 92 Stat. 2549). It was enacted on November 6, 1978, as the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 92 Stat. 2549, (referred to in text as the "1978 Act") and governs all cases filed on or after October 1, 1979.

bias,[4] but more pointedly due to what an astonishingly poor example of legislative draftsmanship it represents.[5]

One of many instances of this wretched butchering of English language and syntax can be found in the two new provisions that BAPCPA added to Section 362(c) regarding the circumstances under which the automatic stay will be be deemed to terminate other than on request of a party in interest.[6] Both provisions

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4 *See, e.g.*, David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. Rev. 223, 225, 318–19 (2007) (arguing that the credit card industry's real objective was to reduce consumer bankruptcy filings); Karen M. Gebbia, *The Keepers of the Code: Evolution of the Bankruptcy Community*, 91 AM. BANKR. L.J. 183, 282 (2017) (pointing out that, "in the lead up to BAPCPA, the consumer credit industry was in a position to shape bankruptcy legislation in ways it never had before"); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (chronicling successive legislative proposals to toughen bankruptcy laws against debtors); Juliet M. Moringiello, *(Mis)Use of State Law in Bankruptcy: The Hanging Paragraph Story*, 2012 WISC. L. REV. 963, 965 (2012) (describing the story of BAPCPA as a story of creditor influence); Gary Neustadter, *2005: A Consumer Bankruptcy Odyssey,* 39 CREIGHTON L. REV. 225, 233–34 (2006) (noting that the designers of BAPCPA clearly intended to constrict the "availability, feasibility, and desirability" of relief under chapter 7); Katherine Porter, *Bankrupt Profits: The Credit Industry's Business Model for Postbankruptcy Lending*, 93 IOWA L. REV. 1369, 1371 (2008) ("The credit industry convinced Congress that curtailing bankruptcy relief was sound social policy; such reforms were needed to dampen prodigality and encourage consumers to make prudent financial decisions."); Charles J. Tabb & Jillian McClelland, *Living With the Means Test*, 31 S. ILL. U. L.J. 463, 465–67 (2007) (noting consumer credit industry influence in introducing substantial abuse test, followed by mechanical means testing calculation); Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy,* 2007 U. ILL. L. REV. 9, 29 (2007) ("Never before in our history has such a well-organized, well-orchestrated, and well-financed campaign been run to change the balance of power between creditors and debtors, and on April 20, 2005, those efforts paid off with the enactment of BAPCPA.").

5 Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97 (2007) ("The problems with the 2005 Act are breathtaking. There are typos, sloppy choices of words, hanging paragraphs and inconsistencies."); Ralph Brubaker, *Supreme Court Adopts the Forward-Looking Approach to Projected Disposable Income in Chapter 13*, 30 No. 8 BANKR. L. LETTER 2, Aug. 2010, at 2 ("Congress knew that it was a poorly drafted statute and was warned repeatedly about all of the difficulties that it would pose for the courts . . . Congress just did not care, though, and enacted BAPCPA without attempting to fix even the most glaring drafting gaffes."); John Rao, *Testing the Limits of Statutory Construction Doctrines: Deconstructing the 2005 Bankruptcy Act*, 55 AM. U. L. REV. 1427, 1427 (2006) ("Most bankruptcy practitioners, scholars, and courts readily agree on one thing: the 2005 Bankruptcy Act . . . is poorly drafted."); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 191–92 (2005) (noting that bankruptcy experts drafted previous amendments to title 11 and that BAPCPA drafters refused to make technical corrections to the statute); *In re* Grydzuk*,* 353 B.R. 564, 567 (Bankr. N.D. Ind. 2006) (expressing no surprise that the drafters of BAPCPA have chosen to remain unidentified); *In re* Donald, 343 B.R. 524, 529 (Bankr. E.D.N.C. 2006) (stating the 2005 law's changes are "confusing, overlapping, and sometimes self-contradictory" and "introduce new and undefined terms that resemble, but are different from, established terms that are well understood").

6 "Nearly all courts agree that [Section] 362(c)(3) is not a model of skillful draftsmanship." *In re* Roach, 555 B.R. 840, 845 (Bankr. M.D. Ala. 2016); *see also In re* Baldassaro, 338 B.R. 178, 182 (Bankr. D. N.H. 2006) ("[Section] 362(c)(3)(A) is very poorly written"); *In re* Paschal, 337 B.R. 274, 277 (Bankr. E.D.N.C. 2006) ("[I]n an Act in which head-scratching opportunities abound for both attorneys and judges alike, [Section] 362(c)(3)(A) stands out."); *In re* Charles, 332 B.R. 538, 541 (Bankr. S.D. Tex. 2005) (describing the statutory

are directed at the perceived abuse of serial filings interposed merely for purposes of delay and vexation.[7] First, Section 362(c)(3)(A) provides for automatic termination of the stay with respect to the debtor on the thirtieth day after filing "if a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding [one]-year period but was dismissed."[8] Second, Section 362(c)(4)(A) addresses the even higher tier of frequent filers: a debtor who had two or more single or joint cases pending within the previous year and that were dismissed.[9] In that circumstance, subsection (c)(4)(A) provides that "the stay under subsection (a) shall not go into effect upon the filing of the later case."[10]

A bevy of case law and legal commentary, and now a split in the circuits,[11] has developed over whether there is a distinction between Sections 362(c)(3) and (c)(4) based not only the number of cases pending against the debtor in the preceding one-year period, but also on the scope of the resulting consequence in relation to the stay upon satisfaction of the conditions triggering the respective provisions.[12] Specifically, a majority of courts hold that the language in

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language is "at best, particularly difficult to parse and, at worst, virtually incoherent"). Section 362(c)(4) has come in for less extensive but no less brutal criticism. *See, e.g.*, Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A)*, 86 AM. BANKR. L.J. 407, 437–40 (2012) (referring to the "utterly poor draftsmanship" of subsection (c)(4) and identifying the differences in language between subsection (c)(3) and (c)(4)).

[7] The legislative history leaves no room for doubt that Congress intended to deter successive bankruptcy filings by imposing stricter limitations on the power of the automatic stay as subsequent bankruptcy cases are filed. *In re* Curry*,* 362 B.R. 394, 402 (Bankr. N.D. Ill. 2007). In *Curry,* the court noted that "[Section] 302 of BAPCPA added [Sections] 362(c)(3) and 362(c)(4) to the Bankruptcy Code," and that this section [§ 302] of BAPCPA legislation was specifically titled "Discouraging Bad Faith Repeat Filings." *Id*. "Section 302 of the Act amends [S]ection 362(c) of the Bankruptcy Code to terminate the automatic stay . . . ." *Id*. (citing H.R. Rep. No. 109–31(I),) at 69–70 (2005), reprinted in 2005 U.S.C.C.A.N., at p. 88). *Cf.* Kimberly L. Nelson, Comment, *Abusive Filings: Can Courts Stop the Abuse Within the Confines of the Bankruptcy Code?* 17 BANKR. DEVS. J. 331, 332 (2001) (addressing the problem of abusive filings pre-BAPCPA "as they relate to real estate foreclosure actions with primary emphasis on [c]hapter 7 and [c]hapter 13 petitions").

[8] 11 U.S.C. § 362(c)(3) (2018).

[9] *Id*.

[10] *Id*. at 362(c)(4)(A)(i).

[11] *Compare* Rose v. Select Portfolio Servicing, Inc., 945 F.3d 226, 231 (5th Cir. 2019) (concluding that Section 362(c)(3)(A) "does not terminate the automatic stay with respect to property of the estate"), *with* Smith v. Maine Bureau of Rev. Servs. (*In re* Smith), 910 F.3d 576, 591 (1st Cir. 2018) ("Based on the provision's text, the statutory context, and Congress's intent in enacting BAPCPA, we hold that [Section] 362(c)(3)(A) terminates the entire automatic stay – as to actions against the debtor, the debtor's property, and property of the bankruptcy estate – after thirty days for second-time filers.").

[12] Linda E. Coco, "*Using a Cannon to Go After a Fly": "Re-entering the Briar Patch" of Stay Termination for Repeat Filers Under Section 362(c)(3)(A)*, 30 No. 1 J. BANKR. L. & PRAC. NL Art. 5 (Feb. 2021) (summarizing the disagreement in the case law between the "narrow" view (section 362(c)(3) limited to property of the debtor) and the "broad" view (no distinction between subsections (c)(3) and (c)(4) with respect to property

subsection (c)(3)(A) "with respect to the debtor," which does not appear in subsection (c)(4), means that the automatic stay terminates after thirty days *only* with respect to property of the debtor, not property of the estate.[13] By contrast, a not trifling minority of cases consider the language of subsection (c)(3) to be ambiguous and, based on a variety policy and practical considerations,[14] conclude that the stay is lifted as to the property of the estate *as well as* the property of the debtor.[15]

The question is an interesting one that has considerable implications for bankruptcy practice and outcomes.[16] In all likelihood, the matter will eventually

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affected by termination of the stay)).

[13] First Fin. Bank. v. Clark (*In re* Clark), 627 B.R. 663, 667–68 (N.D. Ind. 2021); Holcomb v. Hardeman (*In re* Holcomb), 380 B.R. 813, 816 (10th Cir. B.A.P. 2008); Moore v. Reis (*In re* Moore), 631 B.R. 764, 781 (Bankr. D. Wash. 2021) (suggesting that the "trend" is toward this reading of the statute); *In re* McGrath, 621 B.R. 260, 266–67 (Bankr. D. N.M. 2020); Ortega v. Cannaday (*In re* Cannaday), 621 B.R. 16, 33 (Bankr. D. Colo. 2020); *In re* Markoch, 583 B.R. 911, 914 (Bankr. W.D. Mich. 2018); *In re* Pope, 351 B.R. 14, 15 (Bankr. D. R.I. 2006); *In re* Brandon, 349 B.R. 130, 132 (Bankr. M.D.N.C. 2006); Bankers Trust Co. of Ca., N.A. v. Gillcrese (*In re* Gillcrese), 346 B.R. 373, 377 (Bankr. W.D. Pa. 2006); *In re* Daniel, 404 B.R. 318, 322–23 (Bankr. N.D. Ill. 2009).

[14] The leading case espousing the minority view is *In re Reswick*. The panel in that decision determined that Section 362(c)(3)(A) is ambiguous because, in addition to the majority view's interpretation, the phrase "with respect to the debtor" can be interpreted as delineating between a repeat-filing debtor and a non-repeat-filing joint-debtor spouse, with the automatic stay terminating only as to the repeat-filing debtor. Reswick v. Reswick (*In re Reswick*), 446 B.R. 362, 366–67 (9th Cir. B.A.P. 2011). The court further pointed out that the majority view's interpretation renders Section 362(c)(3)(A) internally inconsistent because the opening phrase of the statute becomes surplusage if controlling weight is placed on the phrase "with respect to the debtor." *Id*. at 368. Finally, the *Reswick* opinion also explained that under the majority view, § 362(c)(3)(A) is "devoid of any practical effect" as most property that the debtor owned at the time the case was commenced is now property of the estate. *Id*. By contrast, the court found that interpreting the phrase "with respect to the debtor" as a distinction between persons instead of property is a better reading because it is consistent with the distinction between "single or joint case" made in the introductory clause of Section 362(c)(3). *Id*. at 369–70.

[15] *Id*. at 373; *In re* Brice, No. 19-15207, 2019 WL 5783269, at *2, (Bankr. D. Nev. Sept. 12, 2019); *In re* Dev, 593 B.R. 435, 443–44 (Bankr. E.D.N.C. 2018); *In re* Goodrich, 587 B.R. 829, 849 (Bankr. D. Vt. 2018); *In re* Furlong, 426 B.R. 303, 307 (Bankr. C.D. Ill. 2010); *In re* Daniel, 404 B.R. 318, 329 (Bankr. N.D. Ill. 2009); *In re* Curry, 362 B.R. 394, 401–02 (Bankr. N.D. Ill. 2007) (reasoning that "[t]he legislative history does not support the notion that termination of the automatic stay [in Section 362(c)(3)(A)] was only a partial and extremely limited termination . . . ."); *In re* Jupiter, 344 B.R. 754, 762 (Bankr. D.S.C. 2006); *cf. In re* Bender, 562 B.R. 578, 580 (Bankr. E.D.N.Y. 2016) (adopting an alternative view that when the stay terminates 30 days after order for relief, it does not do so in its entirety, but does so with respect to the debtor and property of the debtor, as well as with respect to any judicial, administrative or other formal proceeding commenced prepetition which related to a debt, to property securing such debt, or to lease, *regardless* of whether property or lease was property of the estate or property of debtor). The *Bender* view is not dissimilar from certain aspects of the proposal made in this treatment. *See infra* Section IV.A.2.

[16] For instance, if the minority view were ultimately to hold sway, it would represent a serious incursion on the availability of bankruptcy relief given the extreme difficulty, albeit not impossibility, of successfully concluding a case without the benefit of the stay. Accordingly, the alternative view has developed that the stay terminates only "with respect to the debtor," and presumably the property of the debtor. *In re* Daniel, 404 B.R. 318, 321 (Bankr. N.D. Ill. 2009). However, this approach seems unsustainable under the statutory language and particularly with regard to legislative intent. *See, e.g.*, *Id*. at 321–22 ("Reading the phrase 'with respect to the

need to be resolved by the Supreme Court, particularly if the circuit split deepens.[17] My personal view is that the minority probably has the better argument that the stay simply cannot be definitively resolved under the convoluted language of the statue itself.[18] However, my attention in this article in relation to the automatic termination of the stay is directed to what is a different and, I believe, more fundamental issue than the proper interpretation of the language "with respect to the debtor." Specifically, I would contend Congress not only failed to express its intention with anything approaching what might be termed clarity, but that in choosing to use the automatic stay and its nondiscriminating discontinuation (or nonimposition) as a vehicle to police abusive serial filings, Congress also commandeered the wrong concept altogether and created unnecessary conceptual confusion between termination of the stay under Section 362(c) and relief from stay under Section 362(d).

debtor' as an all-property exclusion would make [Section] 362(c)(3)(A) oxymoronic, terminating the stay as to 'any action taken with respect to … property securing [a] debt,' but at the same time, as limited by the phrase, not terminating the stay as to any property.")(second alteration in original); *infra* note 18. This is part of the reason why reform is so desperately needed.

[17] This issue would present the Supreme Court with the opportunity to further develop the plain meaning jurisprudence that it has adopted in bankruptcy cases over the past several decades. The Court has repeatedly instructed that pre-enactment practice is relevant only "to the interpretation of an ambiguous text," and holds no sway when the statutory language is clear. RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 648–49 (2012). Thus, one might expect the Court to put considerable emphasis on the "with respect to the debtor" language, though it would render Section 362(c)(3)(A) of negligible actual effect. *See In re* Bender, 562 B.R. 578, 584 (Bankr. E.D.N.Y. 2016) ("[A] finding that under [Section] 362(c)(3)(A) the stay terminates only as to actions 'with respect to the debtor' or the debtor's property would be a hollow victory for any secured creditor.").

[18] Certainly, the strong "pro creditor, anti-debtor abuse" legislative history of BAPCPA points to an interpretation of "with respect to the debtor" that does not somehow suggest that Section 362(c)(3)(A) only affects property of the debtor. *See* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 64 (2011) (observing that BAPCPA was enacted "to correct perceived abuses of the bankruptcy system") (citing Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 231–32 (2010)); Elizabeth Warren, *The Changing Politics of American Bankruptcy Reform*, 37 OSGOODE HALL L.J. 189, 193 n.6, 195–202 (1999) (suggesting that the legislation that ultimately was enacted as BAPCPA was reputed to originally have been written by one law firm retained by the credit industry, Morrison & Foerster, and noting that experts' efforts to fix its many flaws were thereafter largely resisted by credit industry for fear it might invite closer scrutiny and a reworking of the amendments most dear to the industry); *see also* Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 493–94 (2005) (observing that, although bipartisan in origin, the legislative history leading up to passage of BAPCPA included some form of means testing to root out abuse of chapter 7). Of course, as a general proposition, legislative history is ignored if the language of the statute is clear and unambiguous. *E.g.*, United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989). However, Peter Meltzer has made a compelling case that the majority interpretation is "illogical and lacks common sense." Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A)*, 86 AM. BANKR. L.J. 407, 443–44 (2012). Among several other reasons, as the *Reswick* court observed, the majority interpretation of Section 362(c)(3)(A) would provide essentially no relief to creditors in chapter 13 cases, where repeat filings are most prevalent. Reswick, 446 B.R. at 369. This is because all property that the debtor owned at the time the case was commenced becomes property of the estate under Section 541(a)(1), and property that the debtor acquired post-petition is also property of the estate under 1306(a). *See also In re* Jupiter, 344 B.R. 754, 760 (Bankr. D.S.C. 2006).

Logically, the outcome that should have followed whatever it is that Congress wished to discourage was selective relief from stay or dismissal of the bad faith case, depending on the egregiousness of the conduct.[19] All-encompassing lifting or non-implementation of the stay does not terminate the case; rather, like a chicken without a head, the case proceeds without benefit of the most important structural element in any bankruptcy proceeding. Indeed, because of the criticality of the stay, dismissal may well follow, but it is not ordained. This raises the prospect, particularly in chapter 7, that discharge may yet be entered, and the discharge injunction would go into effect.[20] That scenario in turn creates the incongruous, and somewhat batty, possibility that any unsecured creditor might initially pursue collection activity quite lawfully in the absence of the stay by virtue of Sections 362(c)(3)(A) or (c)(4)(A), only to later find itself suddenly in violation of Section 524(a)(2) for engaging in the very same conduct.[21]

In nearly every other instance where the Code contemplates the lifting of the stay, the action relates to a particular creditor and/or claim—not a blanket elimination of the shield of the stay altogether.[22] When Congress believes that certain actions or omissions warrant such all-encompassing relief, the technique used, including in other parts of BAPCPA,[23] is dismissal.[24] Failing that approach in this context, to avoid nonsensical results, I propose that subsections (c)(3) and (c)(4) of Section 362 either be rewritten *in toto* or abrogated entirely and that other provisions of the Code addressed at policing bad faith filings be tweaked modestly to assure the legitimate concerns underlying the adoption of Sections

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[19] As discussed *infra* Section IV.A.2 dismissals might be with prejudice and relief from stay orders might be entered *in rem* in the case of any subsequent filing, whether or not by the same debtor, involving particular property.

[20] In chapter 13 and individual chapter 11 cases, the discharge does not enter (save for a chapter 13 hardship discharge) until completion of the plan. *See* 11 U.S.C. §§ 1328(a), 1141(d)(5)(A) (2018). Thus, it is unlikely that relief might be granted under Section 362(c)(3) or (4) and discharge later entered, albeit it is certainly not impossible. *See infra* text accompanying notes 167–71. By contrast, in chapter 7, the discharge is granted "forthwith" after expiration of the time for filing a complaint objection to discharge. *See* Fed. R. Bankr. P. 4004(c)(1).

[21] 11 U.S.C. § 524(a)(1). In effect, in the ordinary case, the discharge injunction picks up where the stay leaves off. *See id*. § 362(c)(2)(C). While the discharge is entered at (or near) the completion of a chapter 13 plan, the binding effect of plan conformation under Section 1327(a) may have a comparable effect in terms of prohibiting pursuit of payment other than in accordance with the terms of the plan. *Id*. §§ 1327(a), 1328(a)–(b); *see infra* note 174 and accompanying text.

[22] The one exception, which is rather limited in scope, is Section 362(n). *See infra* text accompanying notes 55–62.

[23] *See, e.g.*, *id*. § 521(i)(1), discussed *infra* notes 138–41.

[24] *See id*. § 109(g), discussed *infra* notes 68–69 and accompanying text; *see also In re* Simpson, No. 20-11577, 2021 WL 2523982, at *7–8 (Bankr. D. Kan. Apr. 13, 2021) (repeat filer's case, undertaken to avoid garnishment, dismissed with conditions on refiling); *see also infra* note 117.

362(c)(3) and (c)(4) are adequately addressed. Either way, any solution entailing stay modification or annulment should be limited to particular claims and/or *in rem* actions against property of the debtor and the estate in non-liquidation cases, and even then, only after an expedited opportunity for judicial assessment of the debtor's good faith in light of all of the facts and circumstances surrounding the case.

In support of this contention, Part I of this Article examines in broad sweeping terms the scope of the stay and the various provisions relating to termination or relief from the stay both before and after enactment of BAPCPA. Next, Part II focuses on the ineffectiveness of a global lifting of the stay as a satisfactory response to the problems associated with serial filing. In this part, I also examine other approaches to the problem and their efficacy in relation to elimination of the stay, including discharge, dismissal, and a more limited or focused approach to stay termination. Part III, then, highlights the conceptual inefficiencies associated with ending (or never implementing) the stay in comparison with other forms of responses and explains why these inefficiencies have eroded the development of a coherent scheme for policing bad faith repeat filings. Finally, Part IV proposes an alternative approach for responding to the concerns underlying Sections 362(c)(3) and (c)(4) that not only corrects this disordering of relevant concepts, but that also offers a solution that is more narrowly tailored to the behavior sought to be constrained. By so doing, I would submit that this approach minimizes the erosive impact on bankruptcy's core equality and fresh start policies that has been occasioned by Sections 362(c)(3) and (c)(4).

I. THE AUTOMATIC STAY

A. In General

It is, of course, textbook law that the automatic stay in Section 362(a) is essential to the effective realization of the foundational aspirations of a bankruptcy case: equitable treatment of multiple creditor claims and maximization of value for all concerned. The stay is an expansive injunction protecting the debtor, property of the debtor, and property of the bankruptcy estate.[25] It is intended to prevent a chaotic, disorganized, and wasteful scramble for assets by individual creditors.[26] The automatic stay effectively halts the state

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[25] *Id.* § 362(a).

[26] Deutsche Bank Trust Co. v. Large Priv. Beneficial Owners (*In re* Tribune Co. Fraudulent Conv. Litig.) 946 F.3d 66, 76 (2d Cir. 2019) ("The purpose of the stay is 'to protect creditors as well as the debtor,' by avoiding

law race of the diligent creditor to promote the debtor's fresh start and/or rehabilitation and to facilitate an orderly liquidation in chapter 7. As the legislative history explains:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors . . . . The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors.[27]

The stay is self-executing. Once notice is received, formally or informally, of the bankruptcy filing, creditors must halt collection activity immediately or risk imposition of sanctions for contempt or for actual and possibly punitive damages under Section 362(k)(1) in the case of a willful violation.[28] Moreover, any action taken prior to the creditor acquiring knowledge of the stay is considered by most courts as void and must be undone.[29]

The stay, however, does not alter the substantive rights of creditors established before filing. It simply freezes all collection efforts pending further proceedings in the administration of the bankruptcy estate. The stay is also temporary, once its purposes are satisfied, it terminates.[30] Further, even prior to termination by operation of law, the stay may be lifted, conditioned, or modified

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wasteful, duplicative, individual actions by creditors seeking individual recoveries from the debtor's estate, and by ensuring an equitable distribution of the debtor's estate.") (quoting Commerzanstalt v. Telewide Sys., Inc., 790 F.2d 206, 207 (2d Cir. 1986) (per curiam)).

27 *See* H.R. REP. No. 95-595, at 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6313.

28 Confusingly, Section 362(k)(1) applies only to *individuals* injured by willful violations of the stay. Non-natural debtors must seek recourse by means of the bankruptcy court's contempt powers. However, some disagreement has emerged over whether the Supreme Court's decision in Taggart v. Lorenzen, 139 S.Ct. 1795, 1799 (2019) (holding that a creditor who violated the discharge injunction could only be held in contempt when there is not a "fair ground of doubt" as to whether the creditor's conduct might be lawful), means that a showing that the act was willfully committed may not alone be enough to trigger the contempt sanction. *Compare In re* Caldwell, No. 18-32346, 2019 WL 5616908, at *3, (Bankr. E.D. Mich. Oct. 30, 2019) (expressing the view that the *Taggart* standard should apply equally in stay violation cases), *with In re* Spiech Farms, LLC, 603 B.R. 395, 408 n.22 (Bankr. W.D. Mich. 2019) ("This court does not read *Taggart* to change the Sixth Circuit's standard for determining whether a creditor can be held in contempt for violating the automatic stay.").

29 *See* Picard v. Fairfield Greenwich Ltd., 762 F.3d 199, 207 (2d Cir. 2014); Jubber v. Bank of Utah (*In re* C.W. Mining Co.), 749 F.3d 895, 899 (10th Cir. 2014); Griffin v. Wardrobe (*In re* Wardrobe), 559 F.3d 932, 934 (9th Cir. 2009); ACandS, Inc. v. Travelers Cas. & Sur. Co., 435 F.3d 252, 260 (3d Cir. 2006); Mann v. Chase Manhattan Mort'g Corp., 316 F.3d 1, 3 (1st Cir. 2003); Schwartz v. United States (*In re* Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). Some courts hold that actions in violation of the stay are voidable rather than void. *E.g.*, Chapman v. Bituminous Ins. Co. (*In re* Coho Res., Inc.), 345 F.3d 338, 344 (5th Cir. 2003).

30 *See infra* Section 1.B.

as to a particular creditor's claims.[31] Finally, of course, not every action against the debtor or the debtor's property is stayed in the first instance. In various instances,[32] Congress has decided that other policies, such as the state's interest in enforcing its criminal,[33] environmental,[34] or domestic relations laws,[35] are more important than those underlying the bankruptcy stay. Thus, Section 362(b) excludes such actions by from the automatic stay, despite the fact that these actions would otherwise have fallen within the purview of the broad interdictions specified in Section 362(a).

B. Termination of the Stay Before 2005

Prior to BAPCPA, the rules regarding termination of the stay were straightforward and coherent. Under Code Section 362(c), the stay terminated when its protections were no longer required to effectuate the purposes of a consolidated debt collection procedure. Specifically, as to property of the estate, the stay terminated once such property was no longer property of the estate.[36] Correspondingly, as to the debtor and property of the debtor, the stay terminated at the earliest of: "(A) the time the case [was] closed; (B) the time the case [was] dismissed; or, (C) [in an individual chapter 7 case, or] a case under chapter 9, 11, 12, or 13 the time the discharge [was] granted or denied."[37]

In each of the instances above, which persist even after BAPCPA, the stay continued until the functions it was intended to serve—promoting value maximization, equal treatment of creditors, rehabilitation, and fresh start—were no longer in play. Thus, axiomatically, there is no need to protect property of the estate once it is no longer property of the estate. In a comparable manner, there is no need to protect the debtor and her property once the case is over or the determination of entitlement to discharge has been resolved.[38] Again, there was (and is) a conceptual likeness and constancy to each of these circumstances and events.[39]

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[31] *See* 11 U.S.C. § 362(d) (2018); *see also infra* text accompanying notes 40–47.

[32] BAPCPA added eight new exceptions to Section 362(b), bringing the total now to 28.

[33] *Id.* § 362(b)(1).

[34] *Id.* § 362(b)(4).

[35] *Id.* § 362(b)(2).

[36] *Id.* § 362(c)(1).

[37] *Id.* § 362(c)(2).

[38] If granted, the discharge injunction of Section 524(a)(2) comes into play and eliminates the need for continuance of the stay. If denied, there is similarly no reason to bar collection activity.

[39] That is to say, until amended by BAPCPA, the stay, which was never intended to be permanent, only continued so long as it was necessary to effectuate specific bankruptcy purposes. It should, therefore, be noted that the two subsections are mutually exclusive, i.e., Section 362(c)(2) only applies to property *other than* the property of the estate and Section 362(c)(1) only applies to estate property. *See id.* §§ 362(c)(1), (2); *e.g.*, *In re*

Additionally, even during the pendency of the stay, it has always been the case that the stay might be lifted, modified, or annulled as to a particular claim if: (a) there is no bankruptcy purpose to warrant its continuance,[40] or (b) the reason justifying its continuation is outweighed by countervailing equities favoring the creditor seeking relief.[41] Section 362(d)(3), added to the Code by the Bankruptcy Reform Act of 1994,[42] is a special stay relief ground applying in single asset real estate cases.[43] Unlike the other grounds for relief in Section 362(d), it was intended to address use of the bankruptcy system to resolve filings by passive, nonoperating entities undertaken solely to buy time in what was essentially a two-party dispute and without any serious intent to reorganize.[44]

C. Termination of the Stay After 2005

In addition to adding Sections 362(c)(3) and (c)(4) to the Code, BAPCPA adopted several other provisions designed to limit the protection of the automatic stay for reasons involving perceived debtor misconduct rather than the presence of factors indicating that the bankruptcy purposes for the stay were no longer implicated or outweighed by counterveiling considerations.[45] For example, a fourth ground for relief from stay was added to Section 362(d) that lifts the stay with respect to real property in the case of a creditor with an interest in such property if the court finds the filing was either (a) part of a scheme to delay, hinder, or defraud creditors by virtue of either transfer of the such property without the consent of the secured party; or (b) one of multiple filings affecting the real property.[46] In a new twist, an order under Section 362(d)(4), if recorded in compliance with applicable state law, is also made binding in any subsequent

Storozhenko, 459 B.R. 693 (Bankr. E.D. Mich. 2011).

[40] 11 U.S.C. § 362(d)(2) (applying in situations where there is no equity in the property and its retention is not essential to a successful reorganization).

[41] *Id*. § 362(d)(1) (applying where cause, including lack of adequate protection, has been demonstrated by the moving party).

[42] Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 108 Stat. 218 at 4128–29 (1994) *reprinted in* 1994 U.S.C.C.A.N. 4106, 4128–29 (eliminating the stay as against the creditor with an interest in such real estate unless the debtor has taken certain actions within 90 days after entry of the order for relief).

[43] *See* 11 U.S.C. § 101(51B).

[44] *See generally* Don Willenburg & Baxter Dunaway, *Single Asset Real Estate Cases After the Bankruptcy Reform Act of 1994*, 5 J. BANKR. L. & PRAC. 107, 117–24 (1996) (explaining the operation of Section 362(c)(3) and when it applies).

[45] *See generally* Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed by or Against an Individual Debtor*, 79 AM. BANKR. L.J. 749, 764–73 (2005) (detailing the scope and operation of Sections 362(c)(3) and (c)(4)).

[46] 11 U.S.C. § 362(d)(4). Of note, the relief provided under Section 362(d)(4) is *in rem* relief against the real property at issue. *Id*.

case affecting the property filed within two years of entry of the stay relief order.[47]

BAPCPA turned to the stay as well in order to eliminate (or at least curtail) the ability of an individual debtor who is current in their payments and not otherwise in default on a secured obligation to avoid having to choose between surrender, redemption, or reaffirmation of the property under Section 521(a)(2).[48] Specifically, BAPCPA added Sections 362(h)(1) and 521(a)(6) to the Code.[49] These provisions provide for lifting of the stay in the case where, respectively, an individual debtor fails to timely both announce and perform the debtor's stated intention under Section 521(a)(2),[50] or the debtor fails timely to take the action called for under Section 521(a)(6).[51] Of note, all of these provisions relate only to secured claims and only to circumstances where the collateral is personal property of the debtor or the estate.[52] The effect, as implemented through Section 521(d), is to allow the secured party to exercise its *in rem* rights against the collateral without further ado.[53] While no motion is required, as would be the case in other circumstances involving relief from stay under Section 362(d), the remedy is limited to the aggrieved creditor and specific

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47 United States v. Olayer (*In re* Olayer), 577 B.R. 464, 470 (Bankr. W.D. Penn 2017) ("Because *in rem* relief is extraordinary and imposes consequences beyond the contours of the present bankruptcy case, it is not to be taken lightly."); *see* 11 U.S.C. § 362(b)(21), discussed *infra* text accompanying notes 68, 69; *see also In re* Greenstein, 589 B.R. 854, 863 (C.D. Cal. 2018); *e.g.*, Alakozai v. Citizens Equity First Credit Union (*In re* Alakozai), 499 B.R. 698, 703 (B.A.P. 9th Cir. 2013) (noting the "serious implications" of an order entered under Section 362(d)(4) as is effective as to anyone holding any interest in the subject property, whether or not they are in privity with the debtor). *Cf.* Barner v. Saxon Mort'g Servs., Inc. (*In re* Barner), 597 F.3d 651, 653–54 (5th Cir. 2010) (rejecting application of a continuing suspension of the stay where the earlier order for relief was not entered under Section 362(d)(4)).

48 11 U.S.C. § 521(a). The practice is what was known as "ride-through." *But see* Lawrence Ponoroff, *A Contemporary Approach to Ride-Through,* Ipso Facto *Clauses, and the Nondefaulting Debtor*, 21 NEV. L.J. 209, 233–54 (2020) (reviewing various circumstances and contexts where ride-through has or may have survived BAPCPA). *See generally* Home Owners Funding Corp. of Am. v. Belanger (*In re* Belanger), 962 F.2d 345, 347 (4th Cir. 1992) (deciding Section 521(a)(2) does not limit debtor's options).

49 BAPCPA, §§ 441(2), 305, 119 Stat. 78–80 (2005).

50 *See* Ostrander v. Source One Fin. Corp. (*In re* Mollison), 463 B.R. 169, 180–81 (Bankr. D. Mass. 2012) (holding, based on the legislative history of Section 362(h)(1), it applies if a debtor fails to comply with either (rather than both) of the requirements of Section 521(a)(2) (i.e., timely filing of statement of intent or performance in accordance with stated intention)).

51 *See In re* Donald, 343 B.R. 524, 535–36 (Bankr. E.D.N.C. 2006 (explaining the operation of Section 521(a)(6) and its relationship to Sections 521(a)(20 and 362(h)(1)).

52 *See* Ponoroff, *supra* note 47, at 249 (arguing that, collectively, Sections 521(a)(6), 362(h), and by extension, 521(d), are most plausibly read to suggest that ride-through with respect to real property collateral survived enactment of BAPCPA).

53 *See* 11 U.S.C. § 521(d) (2018) (reversing the Code's typical bias against the enforceability of an *ipso facto* clause by providing that, if a debtor fails to comply with Section 521(a)(6) or the stay is lifted pursuant to Section 362(h), then nothing in subsection (d) or elsewhere in the Code shall be prevent or limit the operation of such a provision); *see also* Ponoroff, *supra* note 47, at 229–30.

collateral. Put another way, the protection of the stay is not abrogated in its entirety, but only as to the property securing the claim involved with the debtor's failure to declare or perform in accordance with Sections 521(a)(2) or (a)(6).[54]

Another subsection added to Section 362 by BAPCPA functions as a kind of "stealth" exception to the imposition of the stay under subsection (a).[55] It applies in cases where there have been multiple filings of small business cases.[56] When applicable,[57] like Sections 362(h)(1) and 521(a)(6), Section 362(n) removes the stay as a penalty for what is presumed to be discreditable debtor behavior, although here the behavior at issue is bad faith serial filings rather than failing to perform statutory duties.[58] Consonant with Sections 362(h)(1) and 521(a)(6), Section 362(n) removes the barrier of the stay unrelated to whether the underlying purposive objectives served by the stay are in play.[59] Although Section 362(n) is self-executing, it does provide the debtor, unlike Sections 362(h)(1) and 521(a)(6),[60] with an opportunity to obtain continuation of the stay if the debtor is able to sustain the burden of proving by a preponderance of the evidence circumstances justifying the filing of the later petition and the likelihood of confirming a feasible plan.[61] Another difference from Sections

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54 *See generally Id*. at 229–31 (noting that the relief provided in Section 521(d) relates to the secured lender (or lessor) affected by the debtor's failure to comple with Sections 521(a)(2) and/or (a)(6)).

55 BAPCPA, § 441(2) 119 Stat. 23, 114 (2005) (codified at 11 U.S.C. § 362(n)).

56 Under Section 101(51C) a "small business case" is one filed under chapter 11 in which the debtor is a "small business debtor" as defined in Section 101(51D). 11 U.S.C. §§ 101(51C), (51D) (2018); *see infra* notes 64–65 for further discussion of these provisions.

57 Under 11 U.S.C. § 362(n), there are four situations where the serial filing stay bar shall apply in context of a small business filing, which include: (1) the debtor is a debtor in another pending small business case; (2) the debtor was a debtor in a small business case that was dismissed in the preceding two years; (3) the debtor was a debtor in a small business case in which a plan was confirmed in the preceding two years; and (4) the debtor acquired substantially all of the assets of a small business debtor otherwise covered in the three first three categories, unless the debtor can prove it acted in good faith and not for the purpose of evading the serial filing bar. *Id*. § 362(n)(1)(A)–(D).

58 This purpose is made evident by the language of Section 362(n)(2) that provides a defense to lifting of the stay under Section 362(d)(1) where the debtor can meet the burden of establishing that the second filing was due to unforeseeable circumstances beyond the control of the debtor. *See, e.g.*, Palmer v. Bank of the West, 438 B.R. 167, 168–69 (E.D. Wisc. 2010) (explaining the application of Section 362(n)(2).

59 11 U.S.C. § 362(n). Prior to BAPCPA, termination of the stay occurred only when its role in protecting debtors and creditors had been served. *See infra* text accompanying notes 36–37.

60 *See supra* note 58. *Cf. Id*. § 362(h)(2) (suspending operation of Section 362(h)(1) where the trustee is able to show that the personal property in question is of consequential value or benefit to the estate).

61 *Id*. § 362(n)(2)(B). Curiously, the standard of proof under this provision is a preponderance of the evidence standard, as opposed to the more challenging "clear and convincing" evidence standard applied under Sections 362(c)(3)(C) and 362(c)(4)(D). In *Shafer v. Army & Air Force Exch'g Serv*., the Fifth Circuit described what is necessary to meet the clear and convincing standard as follows:

> weight of proof which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and

362(h)(1) and 521(a)(6), and one that is of some importance for purposes of this treatment, is that Section 362(n), when applicable, strips away the stay in its *entirety*, leaving the debtor and the estate at the mercy of collection efforts by any and all claimholders.[62]

It bears mention in this connection that a "small business debtor," within the meaning of the Small Business Reorganization Act of 2019,[63] is not necessarily a debtor in a "small business case." Rather, a "small business case" is a case under chapter 11 in which a small business debtor has *not* elected application of Subchapter V.[64] Thus, a small business debtor that has elected to proceed under Subchapter V is *not* in a small business case, and Section 362(n) will not apply in a later case of the Subchapter V debtor even though it would have applied had the debtor not made the Subchapter V election.[65]

Lastly, and mercifully so, BAPCPA added two additional exceptions to the stay in what became codified as Sections 362(b)(20) and (b)(21).[66] Both provisions were intended, once more, to address serial filings. Section 362(b)(20) makes the stay inapplicable in the case of an act to enforce a lien against real property for two years following entry of an order under Section 362(d)(4) as to such real property in an earlier case.[67] Section 362(b)(21) creates

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> convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts" of the case.

Shafer v. Army & Air Force Exch'g Serv. (*In re* Shafer), 376 F.3d 386, 396 (5th Cir. 2004) (quoting *In re* Medrano, 956 F.2d 101, 102 (5th Cir. 1992)). Obviously, this "clear and convincing" evidence standard is considerably more challenging to establish than the "more likely than not" standard that must be satisfied for a preponderance of the evidence showing.

[62] *See In re* PM Cross, LLC, 494 B.R. 607, 616 (Bankr. D.N.H. 2013) (noting that, when applicable, Section 362(n) prevents the stay from arising at all). The fact that the stay may be extended or imposed as to any or all creditors under Sections 362(c)(3) and (c)(4) is of small consolation given the challenging showing that must be made to overcome the presumption of bad faith. *See infra* text accompanying notes 76–83.

[63] Small Business Reorganization Act of 2019, Pub. L. No. 116-54, 133 Stat. 1079 (2019). The Small Business Reorganization Act ("SBRA") added Subchapter V to chapter 11 for electing "small business debtors." SBRA § 2, 113 Stat. 1180-1184. Section 4(a)(1) of SBRA amended the Section 101(51D) definition of a "small business debtor," and the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1113, 134 Stat. 281, 310–12 (2020) [hereinafter "CARES Act"], made a further amendment that temporarily increased the debt limit for a Subchapter V debtor from $2,725,625 to $ 7.5 million for cases filed on or after March 27, 2020. This increase was originally intended to sunset after one year but, with expiration looming, was continued for an additional year, through March 27, 2022, by the COVID-19 Bankruptcy Relief Extension Act of 2021. *See* COVID–19 Bankruptcy Relief Extension Act of 2021, Pub. L. No. 117-5, § 135 Stat. 249 (2021).

[64] 11 U.S.C. § 101(51C).

[65] In other words, a case involving a Subchapter V debtor is *not* a "small business case," even though a Subchapter V debtor is a "small business debtor." *Id*. §§ 101(51D), 1182(1)(A).

[66] BAPCPA, § 303(4)(b), 119 Stat. 23, 78 (2005) (codified as 11 U.S.C. §§ 362(b)(20)–(21)).

[67] This provision implements the provision in Section 362(d)(4), discussed *supra* note 47 and accompanying text regarding continuation of an *in rem* stay relief order against real property.

an exception to the automatic stay in circumstances where the debtor is ineligible to file the case under Section 109(g),[68] or the filing was in violation of an order of a bankruptcy court in a prior case prohibiting the debtor from filing the petition in the current case only.[69] Subsections (b)(20) and (b)(21) are both limited in scope as to any act to enforce a "lien against or a security intertest in real property."[70] Both provisions also represent a bit of overkill. Section 362(d)(4) already largely accomplishes what Section 362(b)(20) sets out to achieve.[71] As to Section 362(b)(21), if the debtor is barred by the Code or court

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68 11 U.S.C. § 362(b)(21)(A). This provision was intended effectively to preclude the stay from going into effect during the short gap period between the time an ineligible debtor filed a petition, thus triggering the automatic stay, and the time dismissal could be obtained under Section 109(g). However, a creditor that acts without the court's imprimatur does so at the risk of incurring liability if it turns out that the assumption that the debtor was ineligible to file turns out to be wrong. *See generally* Robert Lefkowitz, *The Filing of a Bankruptcy Petition in Violation of 11 U.S.C. § 109(g): Does it Invoke the Automatic Stay?,* 26 CARDOZO L. REV. 297, 297–98 (2005) (addressing general abuse of the automatic stay by serial filers). BAPCPA also enacted an exception in Section 362(b)(19) for the withholding of the debtor's wages under a pension, with the debtor's authorization, if used for that purpose. BAPCPA, § 224(b)(3), 119 Stat. 23, 64 (2005) (codified as 11 U.S.C. § 362(b)(19)).

69 *Id*. § 362(b)(21)(B). This provision assumes, seemingly correctly, that courts have the inherent power, in connection with dismissal of a case under Section 349(a), to impose a ban on the refiling of petition by the debtor for specified period of time. *See* Duran v. Rojas (*In re* Duran), 630 B.R. 797, 804 (B.A.P. 9th Cir. 2021) ("[E]very dismissal, including a [Section] 1307(b) motion to dismiss, triggers the [Section] 349(a) issue whether '"cause"' exists to order that dismissal be with prejudice."); *In re* Via, No. 19-33999, 2020 WL 1015264, at *4 (Bankr. E.D. Tenn. Feb. 27, 2020) ("[I]f there is sufficient cause, courts have the authority under [Sections] 105(a) and 349(a) to sanction abusive debtors with a prohibition against filing for more than the 180 days set forth in [Section] 109(g)(1)."); *In re* Jordan, 598 B.R. 396, 410 (Bankr. E.D. La. 2019) ("This Court agrees with the majority of courts to address the issue, holding that either or both Sections 105(a) and 349(a) provide bankruptcy courts with the power to sanction bad faith serial filers by forbidding further bankruptcy filings for longer than 180-day periods."); *see also In re* Errico, 618 B.R. 41, 49 (Bankr. M.D. Fla. 2021) (imposing on the dismissal of a bad faith chapter 13, filed on the heels of several prior petitions, a one-year ban on refiling without referencing Section 349(a)). *But see In re* Frieouf, 938 F.2d 1099, 1103 n.4 (10th Cir. 1991), *cert. denied,* 502 U.S. 1091 (1992) (holding because Section 109(g) is the only Code section that bars a debtor from filing a new case, it also sets the outer limit on the length of time a new case may be barred (i.e. 180 days), and that any additional prohibition imposed under Section 105(a) would be in contravention of the terms of the statute); *In re Simpson*, No. 20-11577, 2021 Bankr. LEXIS 986, at *21 (Bankr. D. Kan. Apr. 13, 2021) ("U.S. Trustee's request for dismissal with prejudice under Section 349(a) denied."). The rationale in *Frieouf* finds support in the Supreme Court's later decision in *Law v. Siegal* with its conclusion that the bankruptcy courts equitable powers may not be invoked to circumvent express provisions of the Code. Law v. Siegal, 571 U.S. 415, 425 (2014). *Law* is widely regarded as severely limiting the precedential value of the holding in the Court's earlier decision, Marrama v. Citizens Bank of Mass., 549 U.S. 365 (2007), which had espoused a very expansive view of the breadth of the bankruptcy courts' inherent equitable authority to police for debtor abuse and keep bad faith debtors out of the bankruptcy system. *See generally* Bruce Markell, *Courting Equity in Bankruptcy,* 94 AM. BANKR. L.J. 227, 237–38 (2020). Nevertheless, in his highly-regarded treatise, Professor Tabb muses that, in spite of *Law,* the rationale of *Marrama* should support the view that dismissal with prejudice to a subsequent filing is possible apart from Section 109(g). *See* CHARLES JORDAN TABB, LAW OF BANKRUPTCY § 2.18, 212–15 (5th ed. 2020).

70 *Id*. §§ 362(b)(20)–(21).

71 *See supra* notes 46–47 and accompanying text. Unquestionably, the concern is creditor protection from the stay during the relatively short period of time between the filing of the improper petition and the time it takes to have the case dismissed.

order from filing the case in the first place, there would not ordinarily seem to be an urgent need to restrict operation of the stay.[72] Still, this redundancy aside, the point remains neither provision entails a blanket lifting of the stay or prohibition against its going into effect in the first place.

By contrast with the approach taken in connection with most of the other stay relief or modification provisions,[73] Sections 362(c)(3) and (c)(4) function somewhat differently and more akin to Section 362(n). When triggered, they operate to extinguish the stay in its entirety or prevent it from ever initiating. Putting aside the disputed question of whether property of the estate is covered by subsection (c)(3)(A),[74] neither provision is limited necessarily to a particular creditor or even more broadly to creditors that hold an interest in property of the debtor. Rather, the stay is simply made gone as to all creditors and all claims.[75] When that occurs, although the bankruptcy case continues, the feeding frenzy to consume the debtor's assets that the bankruptcy stay is intended to curtail can commence unabated.

To be sure, the debtor (or any party in interest, including potentially a chapter 7 trustee) may seek to have the automatic termination of the stay forestalled, as to any or all creditors, in a case to which Section 362(c)(3)(A) applies, or to have the stay imposed in a Section 362(a)(4)(A) scenario. In a situation in which there was only one case filed and dismissed in the prior year, on motion of a party in interest, the court must hold a hearing within the thirty-day grace period under Section 362(c)(3)(A) to determine if the current case was filed in good faith.[76]

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72 *But see supra* note 68.

73 *See supra* text accompanying notes 48–53.

74 *See supra* notes 12–15 and accompanying text.

75 Subject to restoration or application as to "any or all creditors" as detailed in material which follows. *See infra* notes 76–83.

76 11 U.S.C. § 362(c)(3)(B) (2018); Whitaker v. Barnee (*In re* Whitaker), 341 B.R. 336, 345 (Bankr. S.D. Ga. 2006) (holding that, even in a case where the debtor managed to meet the considerable burden of overcoming the presumption of bad faith, it had no authority to reinstate the stay under either subsection (c)(3) or (c)(4) where the hearing could not be held within the required thirty-day period because of counsel's delay in filing a motion under Section 362(c)(3)(B)). However, the court concluded that re-imposition of the stay could nonetheless be ordered under Section 105(a). *Id.* at 347; *see also* Curtis v. Curtis (*In re* Curtis), No. 20-01414, 2021 WL 3878092, at *13 (Bankr. S.D. Iowa Aug. 30, 2021) (stay reinstated under authority of Section 105(a)). *But see In re* Flynn 582 B.R. 25, 30 (B.A.P. 1st Cir. 2018) (ruling that the bankruptcy court had no authority to extend the thirty-day period under subsection (c)(3)(A), absent a motion for extension filed prior to the time the stay lapsed); *In re* Franklin, 627 B.R. 661, 663 (Bankr. E.D. Mich. 2021) (denying a motion to continue the stay because it was filed too late to allow the court to comply with the thirty-day deadline of Section 362(c)(3)(B)). It's also doubtful that the holding in *Whitaker* has survived more recent Supreme Court precedent limiting the scope of the bankruptcy courts' equitable powers under Section 105(a) after thirty-day period in Section 362(c)(3)(B) expired. *See generally* Michelle M. Harner & Emily A. Bryant-Alvarez, *The Equitable Powers of the Bankruptcy Court*, 94 AM. BANKR. L.J. 189 (2020) (offering an introduction to a symposium examining the issue broadly). *See also* Novack v. Wurst (*In re* Novack), No. 06-40615, 2007 WL 2060515, at *2 (D. Minn.

At this hearing, it does not seem unreasonable, due to the earlier filing,[77] to put the burden of rebutting the presumption of bad faith on the debtor by demonstrating the absence of an abusive motive in the current case. However, typical of BAPCPA,[78] by loading the deck so heavily against the moving party,[79] the statute constrains the exercise of the bankruptcy court's discretion in making the determination of whether, under all the circumstances of the case, the presumption of bad faith has been satisfactorily negated.[80]

In addition, while putting the burden on the debtor may seem unobjectionable, the moving party does not always have to be the debtor.[81] However, because the grounds for continuing the stay are limited to the debtor's actions, inaction, or personal circumstances, it is hard to see how anyone other than the debtor could make the necessary showing.[82] Similarly, under Section 362(c)(4), the debtor with two or more prior cases (or any other party in interest) may request that the stay take effect as to any creditor or all creditors "within 30 days after the filing of the later case."[83] Once more, however, the Code sets a

July 16, 2007) (holding that Section 362(c)(4) may not be used to impose the stay when the debtor had only one case pending during the prior year); Capital One Auto Fin. v. Cowley, 374 B.R. 601, 609 (W.D. Tex. 2006) (holding that the court lacked the authority under Section 105(a) to extend the stay after the thirty-day deadline expired).

77 An open question is how far the "look-period" should extend in terms of defining what constitutes a "repeat filing." *See infra* Section IV.A.2.

78 *See supra* note 4.

79 A debtor may only overcome the bad faith presumption in Section 362(c)(3)(C) by demonstrating, by clear and convincing evidence, that they did not: (i) fail to file or amend the petition or other documents; (ii) fail to provide adequate protection for a secured creditor; or (iii) fail to perform the terms of a plan confirmed. *Id.* §§ 362(c)(3)(C)(i)(I)–(II). More significantly, a debtor can also overcome the bad faith presumption by showing that there has been a substantial change in his or her "financial or personal affairs," and that the later-filed case will conclude with a discharge, if a chapter 7 case, or a confirmed plan, if a chapter 13. *Id.* § 362(c)(3)(C)(i)(III). This burden is a high one, and most efforts to rebut the presumption of bad faith come up wanting. *See infra* note 85. However, the awkward phrasing of the necessary statutory conditions makes the challenge even steeper. *See* Laura B. Bartell, *Staying the Serial Filer – Interpreting the New Exploding Stay Provisions Of § 362(c)(3) of the Bankruptcy Code*, 82 AM. BANKR. L.J. 201, 204–05 (2018) (identifying seven categories of interpretative questions arising under Section 362(c)(3)(B)); *supra* text accompanying notes 76–83.

80 *See generally* Laura J. Margulies, *Understanding the New Semi-Automatic Stay*, 25-Mar. AM. BANKR. INST. J. 26, 26–27 (2006) (discussing factors); Napoli, *supra* note 45, at 768 (noting BAPCPA's attempt to define the term good faith rather than leave it to the court's judgment based on the totality of the circumstances surrounding the filing).

81 Any "party in interest" may seek to overcome the presumption of bad faith in either Section 362(c)(3) or (c)(4). *See id.* §§ 362(c)(3),(4). In a chapter 7 case, this "party in interest" may be the trustee. *E.g.*, *In re* Thu Thi Dao, 616 B.R. 103, 105 (Bankr. E.D. Cal. 2020), discussed *infra* text accompanying notes 176–82.

82 This fact implicitly assumes that the stay operates for the benefit of the debtor alone, which is hardly the case. *See infra* note 196 and accompanying text. Also, it operates very differently from Section 362(h)(2) where termination of the stay can be negated if the trustee is able to demonstrate value or benefit of the affected property to the estate. *Supra* note 60.

83 *Id.* § 362(c)(4)(B). The conditions for imposition of the stay are as turgid and confusing as those governing the continuation of the stay under Sections 362(c)(3)(B) and (C), but they are by no means identical.

high bar, and relief may be granted "only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed."[84] In effect, the statute imposes a hard presumption that the case was not filed in good faith, which may only be rebutted by clear and convincing evidence to the contrary, as is also true of a case under Section 362(c)(3).[85] Furthermore, the determination is made without regard to whether it might be in the interests of general creditors for the case to proceed with the benefit of the stay.[86] Finally, in a Section 362(c)(4) case where the stay does not go into effect at all upon filing, even if the moving party is successful in the arduous challenge of convincing the court that the filing of the case was in good faith as to any or all creditors sought to be stayed, any action taken before the stay is imposed is

See Margulies, *supra* note 80, at 769–71. However, the miasma created by the distinction between imposing the stay as to all or less than all the debtor's creditors is carried forward in subsection (c)(4)(B)–(D). *Id.* § 362(c)(4)(A)(i)–(B). Although worded in the negative, in a nutshell, as to all creditors, the debtor must establish, through clear and convincing evidence, a substantial change in financial affairs or personal circumstances, or such other reason from which it may be concluded that the later case will be concluded with discharge, if a chapter 7 case, or, if a chapter 11 or 13 case, with a confirmed plan. *See* In re Washington, 443 B.R. 389, 394 (Bankr. D. So. Car. 2011) (discussing the standard of proof) (citations omitted). With respect to a creditor that had a motion for relief from stay pending at the time of dismissal of an earlier case, or that had been resolved by lifting the stay, there is a presumption of bad faith that can be rebutted, but there is no indication on what will be sufficient to rebut the presumption. *Id.* § 362(c)(4)(D). As with efforts to continue the stay under Section 362(c)(3), most efforts impose a stay under Section 362(c)(4)(B) fail. *E.g.*, *In re* Moss, 663 B.R. 711, 713–14 (Bankr. D.S.C. July 7, 2021).

[84] *Id.* § 362(c)(3)(B); *e.g.*, *In re* Charles*,* 334 B.R. 207, 221–23 (Bankr. S.D. Tex. 2005) (setting forth a list of factors to be used in determining whether a debtor can, or alternatively has, established that the pending case has been filed in good faith by clear and convincing evidence).

[85] *In re* Montoya, 333 B.R. 449, 461 (Bankr. D. Utah 2005) (characterizing the bad faith presumption as a "heavy burden with a harsh result"). Not surprisingly, in most of the reported cases involving attempts to rebut the presumption of bad faith the debtor comes up short. Laura B. Bartell, *supra* note 78, at 212; *see* Palladino v. HSBC Bank USA, N.A., 502 F. Supp.3d 1336, 1340 (N.D. Ill. 2020) (affirming bankruptcy court determination that debtor failed to overcome statutory presumption of bad faith); *In re* Garcia, No. 22-B-130, 2022 WL 665825, at *2 (Bankr. E.D. Ill. Mar. 7, 2022) (debtors' motion to extend the stay under Section 362(c)(3)(B) denied); *In re* Wooten, 633 B.R. 475, 485 (Bankr. N.D. Miss. 2021); Morillo v. Wells Fargo Bank, N.A., No. 19-08183, 2020 WL 2539068, at *3–4 (S.D.N.Y. May 19, 2020); *In re* Rallo, No. 21-20135, 2021 WL 2787602, at *2–3 (Bankr. D. Me. July 2, 2021); *In re* Ramsey, No. 21-10230, 2021 WL 1499319, at *8 (Bankr. D. Nev. Feb. 17, 2021); *In re* Muhammad, 536 B.R. 469, 477–78 (Bankr. M.D. Ala. 2018); *In re* Ochoa, 540 B.R. 322, 330–31 (Bankr. S.D. Tex. 2015); *In re* Wright, 533 B.R. 222, 241 (Bankr. S.D. Tex. 2015); *In re* Chaney, 362 B.R. 690, 694–95 (Bankr. E.D. Va. 2007); *In re* Garrett, 357 B.R. 128, 133 (Bankr. C.D. Ill. 2006); *In re* Harris, 342 B.R. 274, 278 (Bankr. N.D. Ohio 2006). *Cf.* Sara S. Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 252–53 (2015) (presenting empirical findings to support the proposition that chapter 13 motions to extend the stay under Section 362(c)(3)(B) are routinely granted); *In re* Baldassaro, 338 B.R. 178, 191–9 (Bankr. D.N.H. 2006) (questioning the finding that debtor was able to present clear and convincing evidence to rebut the bad faith presumption); *see also id*. § 362(c)(3)(B). The key may be whether or not there is creditor opposition to the motion. *See* Sara S. Greene, *The Failed Reform: Congressional Crackdown on Repeat Chapter 13 Bankruptcy Filers*, 89 AM. BANKR. L.J. 241, 253 (2015) (finding opposition to such motions in only 7 percent of the cases).

[86] *See supra* note 27.

shielded not only from liability (understandable) but also from cancellation and rescindment, meaning the damage cannot be undone.[87] This means that a fatal blow to the case's success may be struck before the debtor's innocence can be established.

II. ASSESSING THE ADVISABILITY OF WITHHOLDING THE STAY AS A SOLUTION TO ABUSIVE FILINGS

A. Overbreadth

There can be little doubt that exploitative filings do occur and that serial filings are commonly indicators of such opprobrious behavior.[88] However,

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87 *Id*. § 362(c)(4)(C); *see In re* Robie, No. 21-31772, 2021 WL 5183528, at *1 (Bankr. N.D. Ohio Oct. 20, 2021) (holding that "[t]his court cannot use its equitable powers to impose the stay retroactively," as to do so would contravene the explicit language of Section 362(c)(4)(B), which provides that any stay imposed "'shall' be effective on the date of the entry of the order") (citing *In re* Cook, 614 B.R. 635, 643 (Bankr. N.D. Ga. 2020)).

88 The actual scope of the problem remains shrouded in mystery, with much of the evidence coming in the form of anecdotal accounts from parties adversely affected by serial filings, such as secured lenders, courts, chapter 13 Trustees, and court clerks' offices. The National Bankruptcy Review Commission (the "NBRC") acknowledged the existence of the problem in its 1997 Final Report but called the supporting data sparse. *See* NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 235–36 (Oct. 20, 1997) (available at https://govinfo.library.unt.edu/nbrc/reportcont.html) (hereinafter "Final Report"). Reflecting the uncertainty over how widespread the phenomenon may be, the NBRC observed that, according to both formal and informal surveys, chapter 13 trustees from various regions suggested widely divergent numbers of repeat filers, with the responders identifying anywhere from 1% to 40% their cases being filed by individuals who have been debtors previously—a range so large as to be of almost no use at all. *See* Final Report at 276–77. In 1996, Geraldine Mund, Chief Judge of the United States Bankruptcy Court for the Central District of California, established an Ad Hoc Task Force to investigate abusive bankruptcy filings and to recommend possible solutions. Lisa Hill Fenning et al., *Final Report of the Bankruptcy Foreclosure Scam Task Force*, 32 LOY. L.A. L. REV. 1063, 1077–78 (1999). The Task Force studied:

> [a] total of 3947 new cases of all types . . . in Los Angeles County during April 1996, of which 3119 (79%) were chapter 7 cases, 50 chapter 11s (1%), and 778 Chapter 13s (20%). By November [of that year], 1066 relief from stay motions had been filed in these cases at a ratio of approximately one motion for every 3.7 April cases. This ratio is roughly equivalent to a comparison of total annual relief from stay motions versus total annual case filings (3.2 motions per filing in 1996 Los Angeles cases).

Id. at 1077–78. Ultimately, the Task Force could not, as it set out to do, definitively identify the percent of abusive filings except by means of the most indirect and inexact proxies. Another study, conducted by the United States Foreclosure Network (a national organization of lender lawyers) (the "Network"), gathered data from four lending institutions in 1993. Assuming that approximately 10% of all bankruptcy filings involve multiple filings, the Network estimated a loss of over $1 billion to the national mortgage lending industry in 1992 alone. *Id*. at 1075. Of course, the partiality of the Network calls its methods and conclusions open to some doubt. While the problem persists, there are no contemporary empirical data identifying its scope, although some studies suggest that Sections 362(c)(3) and (c)(4) have had little if any success in cur curtailing abuse repeat filings. *See* Bartell, *supra* note 78, at 207 (concluding that Section 362(c)(4) was not necessary and has not been effective in achieving the aims of those who sought its enactment); *see* Greene, *supra* note 84, at 244–45 (contending, based on an empirical study, that BAPCPA's efforts to crack-down on bad-faith repeat filings has had little practical multiple filings within a specified period of time are at best a rough proxy for abuse,[89] and Sections 362(c)(3) and (c)(4) are dragnet provisions that pull in all cases where an earlier filing was dismissed within the prior one-year period. Additionally, while the earlier filed case might warrant placing more onus on the debtor to justify the stay in the later case rather than requiring creditors to establish grounds for relief from stay,[90] the bar for overcoming the presumption of bad faith in both provisions is made unnecessarily (and arguably unfairly) high.[91] The effect is inevitably to bar some good faith filers from meaningful or complete bankruptcy relief.

For instance, in *In re Crilly,* a few hours after agreeing to the dismissal for cause of their chapter 11 case, the individual debtors filed a new case under Subchapter V of chapter 11,[92] an option that was not available when their first bankruptcy case was filed in 2018.[93] The debtors then filed a motion to extend the automatic stay that, under Section 362(c)(3)(A), would otherwise expire *nolens volens* 30 days after filing the second case.[94] The debtors argued that the enactment of the SBRA changed their legal rights under chapter 11 and, thus, constituted the necessary "substantial change" in their financial or personal affairs that justified perpetuation of the stay.[95]

The court rejected the argument based on the clear language in Section 362(c)(3)(C)(i)(III), which states that a filing is presumptively in bad faith if there has not been a substantial change in the financial or personal affairs of the debtor *since* the dismissal of the previous case.[96] Because the SBRA was enacted and became effective *during* the earlier case, the court found that the change in the debtors' legal rights as a result of the SBRA did not take place *between* the dismissal of the first case and filing of the second case;

effect).

89 *See infra* note 155.

90 *See supra* note 77.

91 *See supra* notes 79–83 and accompanying text. There is no explanation why the provision that is most similar in structure and operation, Section 362(n), allows for proof of good faith to be established by a mere preponderance. *See supra* text accompanying note 61.

92 In re Crilly, No. 20-11637, 2020 WL 3549848, at *1–2, *4 (Bankr. W.D. Okla. June 30, 2020). Subchapter V of chapter 11 was created by the SBRA, in order to streamline and expedite small business debtor cases. *See supra* note 63.

93 Crilly, 2020 WL 3549848, at *1–2, *4. Subchapter V of chapter 11 was created by the SBRA, to streamline and expedite small business debtor cases. The SBRA became effective for cases filed on or after February 19, 2020. *See supra* note 63.

94 Crilly, 2020 WL 3549848, at *4.

95 *Id*. at *6.

96 *Id*.

consequently, it did not satisfy the applicable conditions of the statute.[97] For this, and a variety of other reasons,[98] the court refused to extend the automatic stay beyond 30 days.[99] Undoubtedly a proper application of the plain language of the statutory text, but a largely meaningless distinction.

A similar unintended effect of Section 362(c)(3)(A) can be observed in *In re Peak Serum*,[100] a case in which the debtors, a privately-owned corporation and its individual owner (Mr. Kutrubes),[101] sought dismissal of their chapter 11 case in order to refile under the SBRA,[102] for which they were now qualified to proceed due to the temporary increase in the permissible debt limitation.[103] There was just one glitch. While the debtors' aggregate debts were below the new limit of $7,500,000,[104] the CARES Act provided that the increased debt ceiling "shall apply only with respect to cases commenced . . . on or after the [Act's] date of enactment."[105] Accordingly, the debtors could not amend their petition, filed in 2018, to elect to proceed under Subchapter V.[106] So the debtors hit upon the dismiss and refile strategy, which would have been flawless but for the triggering provision of the automatic termination of the stay under Section 362(c)(3)(A) as to Mr. Kutrubes. Aware of this, the debtors, reasonably sought a ruling that the dismissal be accompanied by a preemptive finding that Mr. Kutrubes's refiled case would be deemed to be in good faith.[107] Although the court agreed that dismissal to allow the debtors to refile was in their best interests

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97 *Id*. The language in Section 362(c)(3)(D)(III) refers to "a substantial change in the financial and personal affairs of the debtor *since* the dismissal of the net most previous case." 11 U.S.C. § 362(c)(4)(D)(III) (2018) (emphasis added).

98 *See* Crilly, 2020 WL 3549848, at *8 (emphasizing that cause, independent of the SBRA, existed for the dismissal of the debtor's earlier case, which had been pending for over 20 months). The point remains, however, that even in the absence of those other factors the purely fortuitous timing of the enactment of the SBRA would have been enough to preclude extension of the stay.

99 *Id*. at *11.

100 *See In re* Peak Serum, Inc., 623 B.R. 609, 618 (Bankr. D. Colo. 2020).

101 After the respective petitions were filed the court entered an order providing for the joint administration of the cases. *See* Peak Serum, 623 B.R. at 613.

102 *Id*. at 614.

103 *See generally supra* note 63 and accompanying text.

104 *See* Peak Serum, 623 B.R. at 615 (the debtors conceded that their "aggregate, noncontingent, liquidated debts exceeded the [then] $2,725,625 debt limit" applicable to pre-CARES Act cases).

105 *Id.* (quoting CARES Act, § 1113(a)(3), 134 Stat. 281, 310–12 (2020)).

106 *Id.* at 617. Another option for the debtors, although not pursued in this case, could have been conversion. *Id.* at 616 (discussing how conversion may have been applicable if the debtors sought to "convert the Cases to cases under another chapter of the Bankruptcy Code" but was inapplicable because the debtors sought "authority to remain in [c]hapter 11 and amend their petitions to elect to proceed under Subchapter V."). However, conversion "does not effect a change in the date of the filing of the petition . . . or the order for relief" in the initial case. 11 U.S.C. § 348(a) (2018).

107 *See* Peak Serum, 623 B.R. at 618.

given the "streamlined provisions of Subchapter V,"[108] the court nonetheless concluded that granting the debtors' request for a preemptory ruling on good faith would be tantamount to entering an advisory opinion on hypothetical facts, which is beyond the purview of the federal courts.[109]

In *In re Sosa*, Judge Monroe left no doubts as to his view of how Section 362(c)(3) might be employed to deny relief to an innocent debtor.[110] The court initially pointed to the then-new Section 109(h) briefing requirement as a condition to eligibility for individual bankruptcy relief as "[o]ne of the more absurd provisions of [BAPCPA]."[111] After explaining the potentially devastating effect of ignoring this provision on a naïve debtor in desperate need of bankruptcy relief,[112] the court continued:

> But let's not stop there. If the Debtors' case is dismissed [so as to comply with § 109(h)] and they re-file a new case within the next year, it may be that some creditor will take the position that the new case should be presumed to be filed not in good faith.[113]

Even without Sections 362(c)(3) and (c)(4), multiple tools are available to the court and aggrieved creditors to prevent a debtor from using sequential chapter 13 filings solely to delay creditor foreclosure efforts and without real intent to confirm a plan.[114] BAPCPA itself adopted a new good faith filing requirement in chapter 13 as a requirement for confirmation,[115] although it is not clear how much that really added since courts routinely considered bad faith as

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108 *See id.* at 634.

109 *Id.* at 618 ("[T]he Court declines to issue an advisory opinion regarding a hypothetical case refiled by Kutrubes in the future. Any determination that a future case is refiled in good faith must be made in the refiled case.").

110 *See In re* Sosa, 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005).

111 *Id.* at 114; *see also* 11 U.S.C. § 109(h)(1) (2005) (requiring, as a condition to an individual debtor's eligibility to file under any debtor relief chapter, that the debtor have received in the 180-days prior to filing a briefing from an approved agency explaining opportunities for credit counseling and providing assistance in budget analysis).

112 In his opinion, Judge Monroe states as follows:

> One Debtor has now substantially complied with the intent of the Act by undergoing the required credit counseling. One has not but still could within the time limit if a waiver could be granted. However, because the Debtors did not request such counseling before they filed their case, Congress says they are ineligible for relief under the Act. Can any rational human being make a cogent argument that this makes any sense at all?

Id. at 115.

113 *Id.* Of course, a creditor need not "take the position" to trigger the presumption that the new case is not filed in good faith, as this presumption automatically arises under Section 362(c)(3)(C). *Id.*; 11 U.S.C. § 362(c)(3)(C) (2018).

114 *See supra* Sections I.C. & II.B.

115 BAPCPA, § 102(g)(7), 119 Stat. 23 (2005) (codified as 11 U.S.C. § 256).

cause to dismiss under Section 1307(c).[116] Of course, dismissal alone would not be enough to effectively police bad faith serial filings. In fact, dismissal is part of the game. Therefore, in addition, the bankruptcy court must have the ability to restrict refiling. While it is generally agreed that the bankruptcy courts already possess the authority to bar refiling for a specified period of time after the dismissal,[117] making that power explicit would provide greater certainty and stability. Further, even in the absence of dismissal, successive filings could satisfy the cause requirement for relief from stay under Section 362(d)(1) or permit relief from stay as to real property collateral under Section 362(d)(4). Of course, all of these mechanisms depend on the judgment and discretion of the bankruptcy judge to one degree or another, and there can be little question that the proponents of BAPCPA felt that bankruptcy judges were too wary of exercising that discretion in abusive cases.[118] While that may or may not be true, the response of changing the presumption on filing from good faith to bad, coupled with a rigid and exacting set of standards for overcoming that presumption,[119] demonstrates the axiom that when the pendulum swings, rarely does it stop dead center.

In sum, in addition to being drafted in a fashion seemingly intended to produce confusion and disagreement, Sections 362(c)(3) and (c)(4) represent an

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116 *See In re* Lilley, 91 F.3d 491, 494 (3d Cir. 1996) ("It is therefore beyond dispute that a court may consider matters other than those enumerated in [S]ection 1307(c) as grounds for dismissal of a [c]hapter 13 petition."); Pajarillo v. Yarnall, No. 19-02106, 2021 WL 1147150, at *3 (Bankr. D. Nev. Mar. 24, 2021) (upholding dismissal of chapter 13 case for cause and upholding two-year refiling ban); *In re* Kearns, 616 B.R. 458, 469–69 (Bankr. W.D.N.Y. 2020) (finding repeated filings on the eve of foreclosure without taking any further action toward plan confirmation in the cases smacked of bad faith); *In re* Spear, 203 B.R. 349, 352 (Bankr. D. Mass. 1996) ("[A]lthough filing a chapter 13 petition in bad faith is not among the grounds itemized in [Section] 1307(c), it nonetheless constitutes cause for dismissal."). *But see In re* Prud'homme, 161 B.R. 747, 751 (Bankr. E.D.N.Y. 1993) ("[C]ause under [Section] 1307(c) based on the Debtor's bad faith filing, is rejected since this court is unable to find good faith is a prerequisite to the filing of a [c]hapter 13 proceeding anywhere in the Code or Rules.").

117 *See supra* note 69. Refiling bars have been upheld under Sections 349(a), 109(g), and 1307(c). *In re* Kearns, 616 B.R. 458, 470 (Bankr. W.D.N.Y. 2020) (imposing twenty-four month refiling ban based on Section 105(a) and 349(a); *see also In re* Parson, 632 B.R. 613, 632 (Bankr. N.D. Tex. 2021) (imposing a three-year bar on refiling upon dismissal for cause under Section 1307(c) of the debtor's third bankruptcy case); *In re* Price, 304 B.R. 769, 772 (Bankr. N.D. Ohio 2004) (holding that the bankruptcy court has the inherent power to impose a filing bar of greater than that imposed by § 109(g) where the six months' bar is not adqueate to address the abuse at issue). *See generally* Kimberly L. Nelson, Comment, *Abusive Filings: Can Courts Stop the Abuse Within the Confines of the Bankruptcy Code?* 17 BANKR. DEVS. J. 331, 341, 340–43 (2001) (discussing judicial authority to impose refiling bars in case involving bad faith conduct that is prejudicial to a creditor).

118 *See infra* note 280. *See generally In re* Nance, 371 B.R. 360, 366 (Bankr. S.D. Ill. 2007) (noting that one of the major goals of BAPCPA "was to replace judicial discretion with specific statutory standards and formulas"); Kara J. Bruce, *Rehabilitating Bankruptcy Reform,* 13 NEV. L.J. 174, 191–93 (2012) (analyzing BAPCPA's shift from "standards to rules").

119 *See supra* notes 79–83.

overreaction to a problem of uncertain magnitude.[120] Moreover, to whatever extent a problem did exist, there were and are more efficacious ways to deal with it, as set forth more fully below. Instead, the effort, so characteristic of BAPCPA overall, to legislatively dictate the rules that rigidly control the outcome in every case with a one-size-fits-all approach,[121] was an exercise in futility. Any such undertaking is only effective until it inevitably encounters the unanticipated case. By definition, such an approach cannot lend itself to accommodating the equities of any particular case, which is why some measure of judicial discretion must also be part of a just system.[122]

B. Dismissal vs. Termination/Denial

Even more germane than the question of whether Sections 362(c)(3) and (c)(4) represent an overreaction to a problem thus far not demonstrated to be rampant and uncontrolled, is the question of whether the termination or denial altogether of the protections of the stay is the right instrument for regulating bad faith filings. Obviously, these provisions are not the first or the only Code responses to manipulative use of the system. Section 109(g) was introduced into the Code by the 1984 amendments.[123] It operates to bar an individual or family farmer from eligibility to be a debtor under any chapter if, in the preceding 180 days, such an individual (or family farmer) was a debtor in another case that was either dismissed by the court for willful failure to abide by a court order,[124] or

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120 *See supra* note 6.

121 The means test in Section 707(b)(2), often regarded as the centerpiece of BAPCPA, is the paradigmatic example of this tendency. G. Ray Warner, *Bankruptcy Reform and Economic Recovery,* 25 J. CIV. RTS. & ECON DEV. 181, 181 (2010) (describing BAPCPA as completing the shift from the Bankruptcy Reform Act of 1978's "fresh start" focus to a creditor-focused can pay/must pay approach); *see infra* note 254.

122 Lawrence Ponoroff, *The Dubious Role of Precedent in the Quest for First Principles in the Reform of The Bankruptcy Code: Some Lessons from the Civil Law and Realist Traditions*, 74 AM. BANKR. L.J. 173, 213–14 (2000).

> The Code cannot anticipate each and every circumstance and regulate with specificity when bankruptcy relief is appropriate and when not; the legislative body cannot foresee every commercial need and circumstance that might warrant attention. It can, however, expressly or by implication direct that a debtor, to be eligible for bankruptcy relief, must proceed in a certain manner, for example, in good faith, but leaving it to the courts to direct application of that maxim in particular cases. If this description is accurate, then one cannot help but believe that in bankruptcy, if not elsewhere, the role of the courts and legislature have become dysfunctionally reversed.

Id.

123 The Bankruptcy Code was amended July 10, 1984, by the Bankruptcy and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 98 Stat. 333 (1984).

124 11 U.S.C. § 109(g)(1) (2018).

was dismissed at the behest of the debtor following the filing of a request for relief from stay.[125]

When the conditions of either paragraph of Section 109(g) are met, the purported debtor in the new case is simply ineligible to file. As a practical matter, however, the only mechanism for enforcing that interdiction is by means of a motion to dismiss by a party in interest, and the short delay associated therewith could potentially be enough derail a pending state law foreclosure.[126] For that reason, BAPCPA added the new provision, referenced earlier,[127] stating that the filing of a bankruptcy petition does not operate as a stay "of any act to enforce any lien against or security interest in *re*al property – if the debtor is ineligible under [S]ection 109(g) to be a debtor in a case under this title."[128] While the necessity for this provision is open to some question,[129] it is at least limited to enforcement of liens against real estate collateral.

There is also disagreement in the case law over application of Section 109(g)(2). Some courts hold that, when applicable, Section 109(g)(2) automatically requires dismissal.[130] Other courts have found that the bankruptcy court retains discretion to withhold dismissal when not doing so would produce an unjust or absurd outcome.[131] In addition, some courts have interpreted the

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125 *See id.*§ 109(g)(2). In *Cody v. Micale*, the court concluded that the bankruptcy court was well within its statutory power to prevent abuse of the bankruptcy system by sanctioning the debtor who had filed successive petitions determined to be in bad faith. Cody v. Micale, No. 19-00433, 2019 WL 5967962, at *3 (W.D. Va. Nov. 13, 2019) (imposing sanction where the debtor had been provided with an opportunity to explain why her petition should not be dismissed and was unpersuded by debtor's offered excuse).

126 *See supra* note 68.

127 *See supra* notes 67–68 and accompanying text.

128 11 U.S.C. § 362(b)(21)(A).

129 *See supra* text accompanying note 72.

130 One line of cases strictly and broadly applies Section 109(g)(2) finding the language clearly and unambiguously requires dismissal whenever a debtor refiles for bankruptcy within 180 days after voluntarily dismissing a prior case where a motion for relief had been filed. *E.g.*, *In re* Harris, No. 05-12216, 2005 WL 6487200, at *3 (Bankr. N.D. Ga. July 29, 2005). *But see* Tooke v. Sunshine Mortg. Trust (*In re* Tooke), 149 B.R. 687, 694 (M.D. Fla. 1992).

131 *See e.g.*, *In re* Richardson, 217 B.R. 479, 482–85 (Bankr. M.D. La. 1998) (detailing the various tests for determining the meaning of the term "following" as used in Section 109(g)(2)). For example, some follow the strict approach, but find the court has discretion to consider other factors when the application of the strict approach results in unjust or absurd outcomes. *See also In re* Stachurski, 613 B.R. 251, 252 (Bankr. E.D. Mich. 2020) (holding that "dismissal is not discretionary" when Section 109(g)(2) applies and further stating that "it is irrelevant under [Section] 109(g)(2) whether there is some causal link or nexus between the filing of a stay relief motion on one hand, and the debtor's later voluntary dismissal of the case on the other hand"). *See generally* Home Savs. of Am. v. Luna (*In re* Luna), 122 B.R. 575, 577 (B.A.P. 9th Cir. 1991) (declining to engage in a mechanical application of Section 109(g)(2) where to do so would produce unjust or capricious results)); *In re* Lewis, No. 19-10999, 2019 WL 4691044, at *2 (Bankr. S.D. Ga. Sept. 24, 2019) ("After considering the matter and evidence in the current case, the Court is inclined to follow the line of cases applying the strict interpretation unless it leads to an unjust or absurd result."); *In re* Hutchins, 303 B.R. 503, 509 (Bankr. N.D. Ala. 2003) (noting

term "following" in Section 109(g)(2) to require that the stay relief motion be pending at the time of dismissal,[132] although that would seem to be the least plausible interpretation.[133]

It has been suggested that Sections 362(c)(3) and (c)(4) represent a more fulsome response to the serial filing issue than Section 109(g) because they do not require a motion and order of the court finding the debtor ineligible for relief.[134] And, yet, while Sections 362(c)(3) and (c)(4) appear to be self-executing, a creditor who mistakenly acts in reliance thereon could face liability for a willful violation of the stay pursuant to Section 362(k)(1).[135] Recognizing this risk, BAPCA introduced a new provision, Section 362(j), which allows a party in interest to seek a court order affirming that the stay has indeed terminated before taking action.[136] The concept of an automatic termination of

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that a repetitive filing does not automatically constitute an abuse).

[132] 11 U.S.C. § 109(g)(2). Other courts hinge the outcome upon the definition of the word "following." *See e.g.*, Richardson, 217 B.R. at 483–84. Some of these courts define "following" as used in Section 109(g)(2) to mean "after," but only dismiss the case if the preceding motion for relief was pending at the time of the dismissal. *Compare id*. at 484 (holding that the case is dismissed only if the preceding motion for relief was pending at the time of the dismissal), *with* Lewis*,* 2019 WL 4691044, at *3 ("This Court disagrees with the conclusion that [Section] 109(g)(2) only applies as long as a motion for relief is 'pending' at the time of the dismissal."). Other courts define "following" in Section 109(g)(2) to mean "because of" or having a causal connection. Richardson, 217 B.R. at 483–84; HPG Capital, LLC v. Bullock (*In re* Bullock), No. 08-43724, 2008 WL 7880894, at *3 (Bankr. N.D. Ga. Nov. 18, 2008); *In re* Sole, 233 B.R. 347, 349–50 (Bankr. E.D. Va. 1998); First Nat'l Bank of Rocky Mount v. Duncan (*In re* Duncan), 182 B.R. 156, 158–59 (Bankr. W.D. Va. 1995); *In re* Copman, 161 B.R. 821, 823 (Bankr. E.D. Mo. 1993).

[133] *See, e.g.*, Richardson, 217 B.R. at 484–85 ("The 'pending' approach, favored by the debtor in this case, is noteworthy primarily because dicta in two Fifth Circuit opinions can be read to favor it . . . . [T]he Court is compelled to concluded that this is the weakest candidate for the meaning of 'following.'"). Congress intended for Section 109(g)(2) to prevent abuse in the form of multiple filings by debtors seeking to thwart creditors from recovering their property. *E.g.*, Tooke v. Sunshine Trust Mortg. Trust (*In re* Tooke)*,* 149 B.R. 687, 694 (M.D. Fla. 1992). Thus, the notion that Congress would favor creditors with unadjudicated motions for relief over those with favorable adjudications is counterintutive. *See also In re* Binkley, No. 21-11180, 2021 WL 4395828, at *2–4 (Bankr. W.D. Wisc. Sept. 23, 2021) (summarizing the different approaches courts have taken in interpreting Section 109(g)(2)).

[134] *See* Linda E. Coco, *"Using a Cannon to Go After a Fly": "Re-entering the Briar Patch" of Stay Termination for Repeat Filers Under Section 362(c)(3)(A)*, 30 No. 1 J. BANKR. L. & PRAC. NL Art. 5 (Feb. 2021) (suggesting that the "complicated and unpredictable procedure associated" with Section 109(g) was the impetus for the enactment of Sections 362(c)(3) an (c)(4). Of course, as time proved, even the so-called "automatic" aspect of the new provisions did little to uncomplicate the procedure. Moreover, and perhaps more to the point, Sections 362(c)(3) and (c)(4) operate in a much wider range of cases than Section 109(g), and, while Section 109(g) does not necessarily promote core bankruptcy values, the automatic stay automatic termination provisions affirmatively undermine the objective of equality among similarly situated creditors and maximization of value. *See supra* note 80 and accompanying text.

[135] The risk is exacerbated by virtue of the inartful drafting, which fails to provide clear and unambiguous direction. *See supra* note 6.

[136] 11 U.S.C. § 362(j); *see id.* § 362(c)(4)(C) (providing that even if a stay is imposed under paragraph (4)(B) it shall have no retroactive effect.

the automatic stay without any judicial involvement whatsoever is an extreme response, running the almost certain risk of eroding essential bankruptcy protection for deserving debtors as the cost of ferreting out some abusive filings.[137]

Dismissal as a response to various types of debtor misbehavior can also be observed in other provisions of BAPCPA itself. Section 521(i)(1), for example, calls for automatic dismissal of an individual debtor case if the debtor fails to file various financial statements, schedules, and certificates required by Section 521(a)(1) within 45 days of the date of the filing of the petition.[138] However, the court can avert dismissal in certain circumstances, including, most salient for purposes of this treatment, where the creditors' best interest would be served by allowing the case to proceed.[139] By contrast, the provisions of Sections 362(c)(3) and (c)(4) that set forth grounds for continuation or imposition of the stay focus on production of substantial evidence tending to overcome the presumed bad faith of the debtor, and not necessarily on the best interests of unsecured creditors who, despite the debtor's perfidy, might actually be better off as a group if the case were to continue with the benefit of the stay.[140] That scenario might particularly arise if the debtor's conduct rose to the level of grounds for denial of discharge, the subject to which attention is turned below.[141]

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137 *See infra* text accompanying notes 252–53.

138 11 U.S.C. § 521(i)(1). In addition, the bankruptcy court must enter an order of dismissal not later than seven days after being requested to do so by any party in interest. *Id.* § 521(i)(2). The absence of any sort of process prior to dismissal raises questions about whether the rule violates the due process clause. *See* Gregory Germain, *Due Process in Bankruptcy: Are the New Automatic Dismissal Rules Constitutional?*, 58 U. PENN J. BUS. L. 547, 579–87 (2011) (arguing that the automatic dismissal rules for failure to comply with Section 521(i)(1) fail to provide debtors with procedural due process). However, while both Section 521(i) and the automatic dismissal rules set forth in Sections 362(c)(3)(A) and (c)(3)(4)(A) are harsh at this juncture, they are not constitutionally infirm. *Cf. In re* Tabert, 540 B.R. 790, 793 (Bankr. D. Colo. 2015) (suggesting due process concerns may be implicated where the Code does *not* provide for automatic dismissal).

139 For example, if the estate contained substantial nonexempt, non-encumbered assets, the court might determine that the case should proceed under chapter 7, either as originally filed or upon conversion from chapter 11 or 13. *See, e.g.*, Francis v. Desmond (*In re* Francis), 996 F.3d 10, 17 (1st Cir. 2021) (rejecting the so-called "mechanical application" of Section 521(i)(1) as contrary to congressional intent).

140 Some courts, moreover, hold that even if the moving party manages to overcome the presumption of bad faith by clear and convincing evidence, the moving party must still convince the court, by a preponderance of the evidence, that it should exercise its discretion to extend the stay. *E.g.*, *In re* Baldassaro, 338 B.R. 178, 186–87 (Bankr. D.N.H. 2006) ("[E]xplaining that a debtor's good faith may authorize an extension of the stay, but the statute does not mandate that the bankruptcy court extend the stay.") (citing *In re* Charles*,* 334 B.R. 207, 223 (Bankr. S.D. Tex. 2005). That is a far cry from the decisions that provide that a case under Section 109(g)(2) might continue if dismissal would produce an unjust or absurd result. *See supra* note 131.

141 *See infra* Section II.C.

Finally, the bankruptcy court may either dismiss or convert a chapter 13 case to chapter 7 for cause.[142] As noted earlier,[143] bad faith in filing, as evidenced by a successive filings undertaken solely to delay and frustrate state law collection efforts and without intent to carry out a plan, easily meets the cause requirement in Section 1307(c). Although there is no express good faith filing requirement in chapter 11, some courts have implied one in certain instances,[144] and, in any case, as with chapter 13,[145] lack of good faith may factor into the determination of cause to support dismissal under Section 1112(b).[146]

C. Denial of Discharge or (maybe even) Dischargeability

The legislative history of BAPCPA is derisory,[147] but concern over manipulative serial filings was clearly in focus.[148] Moreover, BAPCPA was the culmination of series of efforts to enact bankruptcy "reform" legislation in the

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142 *Id.* § 1307(c); *e.g.*, *In re* Legree, 285 B.R. 615, 618–19, 620 (Bankr. E.D. Pa. 2002) (dismissing chapter 13 case based on bad faith in filing and identifying factors to be considered by the courts in assessing the good faith *vel non* of a serial filer).

143 *See supra* note 116.

144 The most recent example can be observed in Judge Hale's decision (following a twelve-day trial with twenty-three witnesses) to dismiss the chapter 11 petition filed by the National Rifle Association, finding that the "petition was not filed in good faith but instead was filed as an effort to gain an unfair litigation advantage in the [action by the New York Attorney General to dissolve the NRA] and as an effort to avoid a regulatory scheme." *In re* Nat'l Rifle Ass'n of Am., 628 B.R. 262, 283 (Bankr. N.D. Tex. 2021).

145 *See infra* note 155.

146 *E.g.*, Santa Fe Minerals, Inc. v. BEPCO, L.P., (*In re* 15375 Memorial Corp.), 589 F.3d 605, 618 (3d Cir. 2009) ("Chapter 11 bankruptcy petitions are 'subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith and the burden is on the bankruptcy petitioner to establish [good faith]).'") (quoting NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (*In re* Integrated Telecom Express, Inc.), 384 F.3d 108, 118 (3d Cir. 2004)) (alteration in original).

147 *See supra* note 88; *see also In re* Davis*,* 348 B.R. 449, 457 (Bankr. E.D. Mich. 2006) (describing BAPCPA's legislative history as "scant").

148 The House Report summarized that the Act:

> includes provisions intended to provide greater protections for creditors, while ensuring that the claims of those creditors entitled to priority treatment, such as spousal and child support claimants, are not adversely impacted. These include provisions: (1) ensuring that creditors receive proper and timely notice of important events and proceedings in a bankruptcy case; (2) prohibiting abusive serial filings and extending the period between successive discharges; and (3) implementing various provisions designed to improve the accuracy of the information contained in debtors' schedules, statements of financial affairs.

H.R. REP. NO. 109-31(I), at 16 (1st Sess. 2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 101; *see* Reswick v. Reswick (*In re* Reswick), 446 B.R. 362, 373 (9th Cir. B.A.P. 2011) (observing that in attempting to curb successive bad faith filings Congress intended to make it more difficult for that debtor to take advantage of the automatic stay); *In re* Curry, 362 B.R. 394, 401 (Bankr. N.D. Ill. 2007) (noting the legislative history regarding Section 302 of BAPCPA, which added Sections 362(c)(3) and (c)(4) to the Code, is titled "Discouraging Bad Faith Repeat Filings").

wake of the NBRC's Final Report.[149] A consistent theme throughout these efforts demonstrates that Congress intended to deter successive bankruptcy filings by imposing stricter limitations on the application of the automatic stay as subsequent bankruptcy cases are initiated.[150] Doubtless automatic interposition of the stay immediately upon filing in such cases was what permitted some unscrupulous debtors to frustrate creditor efforts to pursue their state law remedies.[151] It was natural, therefore, to focus on withholding of the stay as a means to combat the practice.

However, the stay serves multiple participants in the bankruptcy case, not just the debtor, but also creditors and, particularly, unsecured creditors.[152] This point seemed to be lost in the frenzy to combat perceived debtor abuses through the drafting of Sections 362(c)(3) and (c)(4) in terms that myopically focus on a high level of proof over the debtor's good faith as the basis for continuation or imposition of the stay,[153] as the case may be, and not on the best interests of other parties with a cognizable interest in the case. This oversight suggests the merits of a more bespoke approach designed with a view to address the problem of bad faith repeat filings when it occurs: (1) recognizing that this does encompass *every* situation involving more than one filing within a specified period of time, and (2) allowing the bankruptcy judge in the case a greater measure of discretion in determining whether withholding of the stay is appropriate.

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149 *See generally* NAT'L BANKR. REV. COMM'N, Recommendations for Reform of Consumer Bankruptcy Law by Four Dissenting Commissions, 2588–710 (Oct. 20, 1997) (available at https://govinfo.library.unt.edu/nbrc/report/24commvi06.html); Richardo I. Kilpatrick, *Selected Creditor Issues Under the Bankruptcy Abuse Prevention and Consumer Protecion Act of 2005,* 79 AM. BANKR. L.J. 817, 817 (pointing up that Congress introduced the seemingly "pro debtor" legislation that ultimately culminated in BAPCPA in anticipation of the Final Report of the NBRC); Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 486 (2005) (stating that the NBRC's Final Report galvanized the consumer credit industry to pursue bankruptcy reform legislation largely in line with the recommendations of the four dissenting NBRC Commissioners).

150 *See* Laura B. Bartell, *Staying the Serial Filer – Interpreting the New Exploding Stay Provisions Of § 362(c)(3) of the Bankruptcy Code*, 82 AM. BANKR. L.J. 201, 222–25 (2018) (reviewing the legislative history of the series of bills introduced beginning in 1998 that ultimately culminating in BAPCPA); Charles J. Tabb, *The Top Twenty Issues in the History of Consumer Bankruptcy,* 2007 U. ILL. L. REV. 9, 29 (2007) ("An overwhelming majority of the U.S. Congress rejected the recommendations of the 1997 Commission and embraced instead the draconian pro-creditor changes put forward by [dissenting members and] the consumer credit industry.").

151 *See supra* note 68.

152 *See, e.g.*, Treasurer of Snohomish Cnty. v. Seattle-First Nat'l Bank (*In re* Glasply Marine Indus., Inc.), 971 F.2d 391, 394 (9th Cir. 1992) ("Congress designed the automatic stay to protect the relative position of all creditors."); *see also* City of Chicago v. Fulton, 141 S.Ct. 585, 589 (2021) (explaining the automatic stay protects "creditors as a group by preventing individual creditors from pursuing their own interests *to the detriment of the others*") (emphasis added).

153 *See supra* notes 83–85.

Denial of the discharge is a common mechanism for responding to execrable debtor behavior in liquidation cases, whether in relation to a particular claim or more broadly,[154] and one that does not adversely impact creditors in the fashion that might occur upon lifting of the stay.[155] While a chapter 13 case may be readily dismissed at will by the debtor,[156] the same is not true of chapter 7, where dismissal may only be granted for cause.[157] The prospect of having one's nonexempt assets liquidated and distributed to creditors without the

154 Several of the grounds for objection to discharge relate to "bad" debtor behavior either before or after the filing. *See* 11 U.S.C §§ 727(a)(2)–(7), (12) (2018). Similarly, many of the exceptions to discharge under Section 523(a) relate to perfidious prefiling conduct by the debtor. *See, e.g.*, 11 U.S.C. §§ 523(a)(2), (4), (6) (2018).

155 Denial of discharge preserves the benefits of a collectivized debt collection system by allowing the orderly liquidation of the property of the estate since the stay will remain in place until such property is no longer property of the estate. *See id.* § 362(c)(1). Lifting of the stay simply reinstates the feeding frenzy that characterizes state collection law and, at least temporarily, interferes with the efforts to the trustee's efforts to maximize value in chapter 7 or the debtor's ability to confirm a plan in chapter 13. *See supra* text accompanying notes 169, 181.

156 *Id.* § 1307(b). There is, however, some disagreement in the case law over whether the Supreme Court's decision in *Marrama v. Citizens Bank*, has created bad faith exception to a debtor's absolute, unqualified right to dismiss a voluntary chapter 13 petition as long as the case had not yet been converted. Marrama v. Citizens Bank, 549 U.S. 365 (2007); *see also* Endurance Am. Ins. Co. v. Burbridge (*In re* Burbridge), No. 18-591, 2019 WL 1535369, at *4 (N.D.N.Y. 2019 Apr. 9, 2019) (holding that circuit precedent rejecting a bad faith exception to Section 1307(b) remained intact notwithstanding *Marrama*); *In re* Marinari, 610 B.R. 87, 93–95 (Bankr. E.D. Pa. 2019) (concluding that *Marrama* did not affect the absolute right of a debtor to dismiss under Section 1307(b) for bad-faith conduct or abuse of the bankruptcy process"). *Compare In re* Jacobsen, 609 F.3d 647, 649 (5th Cir. 2010) (holding "that the right to dismiss under 11 U.S.C. § 1307(b) is subject to a limited exception for bad-faith conduct or abuse of bankruptcy process"), *with* Smith v. U.S. Bank, N.A. (*In re* Smith), 999 F.3d 452, 455 (6th Cir. 2021) (holding that nothing in Section 1307(b) makes dismissal discretionary in cases where the petition was filed in bad faith). In Nichols v. Marana Stockyard & Livestock, Market Inc. (*In re* Nichols), 10 F.4th 956, 961 (9th Cir. 2021), the court overruled its earlier precedent in Rosson v. Fitzgerald (*In re* Rosson), 545 F.3d 764 (9th Cir. 2008), which had extended *Marrama* to a chapter 13 debtor's motion to dismiss. Rosson v. Fitzgerald (*In re* Rosson), 545 F.3d 764, 772–73 (9th Cir. 2008). The Court in *Nichols* concluded that Rosson was implicitly overruled by the Supreme Court's decision in Law v. Siegel, 571 U.S. 415 (2014), making clear that a bankruptcy court may not use its equitable powers under Section 105(a) to contravene express provisions of the Bankruptcy Code. Nichols, 10 F.4th at 962. The court hinted, however, that the court had "ample alternative tools" to address bad faith filings. *Id.* at 964. *See In re* Molitor, 76 F.3d 218, 220 (8th Cir. 1996) (holding, pre-*Marrama* as well as pre-*Law* that bankruptcy courts have the power to limit Section 1307(b) when necessary to protect against abuse). Likewise, in *In re* Minogue the court held that although a chapter 13 debtor may not "be precluded from voluntarily dismissing his or her chapter 13 case in the face of a pending motion to convert or allegations of bad faith conduct." However, the court continued that:

> does not preclude the view that other portions of the Bankruptcy Code, such as Sections 349(a) or 109(g), provide the Court with authority to issue remedial orders in addition to an order granting a debtor's motion to dismiss under Section 1307(b) to address a debtor's bad faith conduct or abuse of the bankruptcy process.

In re Minogue, 632 B.R. 287, 293–94 (Bankr. D.S.C. 2021).

157 *Id.* § 707(a) (providing that the court may dismiss a chapter 7 case "only after notice and a hearing and only for cause"); *see e.g.*, *In re* Jabarin, 395 B.R. 330, 343 (Bankr. E.D. Pa. 2008) (denying debtor's motion to dismiss due to prejudice that creditors would incur as a result thereof).

accompanying forgiveness for any remaining personal liability should present a significant deterrent in the case of a debtors considering invoking the system with improper ulterior motives.[158] Stated another way, just because the stay is the instrument that makes chapter 13 ripe for abuse by guileful debtors, does not mean that the rapid automatic expiration after 30 days, or outright elimination of the stay, are the most effective means of responding to the concern. Thus, the combination of a similar good faith limitation on the debtor's ability to dismiss a chapter 13 case,[159] coupled with a new ground for objecting to discharge under Section 727(a) based on proof of multiple prior filings (and dismissals) within a specified period of time undertaken purely for purposes of gaining a tactical advantage and without intent to confirm a plan, should produce a much more effective deterrent than the current scheme to manipulative use of the system for purposes of frustrating and delaying creditors.[160]

It is clear that most of the abusive repeat filing circumstances entail the effort to disrupt an imminent foreclosure.[161] Therefore, they are directed at vexing secured claimants. While perhaps a nuisance, multiple filings do not have the same potential to exasperate unsecured creditors. This too, then, could commend the superiority of a narrower approach focused on dischargeability of particular debts,[162] along with targeted relief from stay, as opposed to wholesale denial of discharge. It is true that any solution grounded in discharge or dischargeability would not be self-executing in the fashion of Sections 362(c)(3) and (c)(4), but

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158 At the same time, the system would work in the manner it was designed to do, promoting value and assuring equity among the debtor's creditors. *See infra* text accompanying notes 195–96.

159 In reality, if the court refuses to dismiss a chapter 13 case, then the debtor is unlikely to cooperate in confirming and performing the repayment obligations set forth in their chapter 13 plan, so the exercise would be futile. The solution, however, should be conversion to chapter 7, where the protections discussed immediately above would ensure fair treatment for unsecured creditors. *See id.* § 1307(c); *see also infra* notes 245–46 and accompanying text. While there is some authority in the case law concerning a bankruptcy court's authority to convert either *sua sponte* or on motion a case from chapter 13 to chapter 7, there remains some doubt so long as the debtor retains an absolute right to dismiss. *E.g.*, *In re* Fulayter, 618 B.R. 808, 821–22 (Bankr. E.D. Mich. 2020) (denying a motion to convert the debtor's chapter 13 case to chapter 7 based on the debtor's absolute right to dismiss); *see In re* Elliott, 506 Fed. Appx. 291, 293–94 (5th Cir. 2013).

160 This is the focus of *infra* Section IV.

161 *See* Peter E. Meltzer, *Won't You Stay a Little Longer? Rejecting the Majority Interpretation of Bankruptcy Code § 362(c)(3)(A)*, 86 AM. BANKR. L.J. 407, 411 (2012) (noting that the problem is particularly acute in chapter 13); *see also infra* note 207 and accompanying text. *But see* Lisa Hill Fenning et al., *Final Report of the Bankruptcy Foreclosure Scam Task Force,* 32 LOY. L.A. L. REV. 1063, 1067–68 (1999), (describing the work of the Ninth Circuit's 1992 Ad Hoc Committee on Unlawful Detainer and Bankruptcy Mills).

162 *See In re* Lashay, No. 20-11577, 2021 WL 2523982, at *17 (Bankr. D. Kan. Apr. 13, 2021) (holding that in the case of bad faith repeat filings the court may go beyond dismissal of the case and order as well non-discharge of certain debts in a future case under Section 349(a)). This would also benefit secured creditors as well to the extent that the value of their collateral is less than the total amount owed, since the unsecured portion of the claim could be pursued against the debtor personally. *Id.* § 506(a)(1); *see also supra* note 69.

that in fact would be a salutary improvement on the overbreadth of the approach adopted by BAPCPA.[163] Furthermore, there are existing examples in the Code of how the burden can be adjusted in situations replete with facts suggestive of exploitation of the system in pursuit of improper ends that might be emulated to make denial of discharge a more effective weapon against bad faith filings.[164]

D. In Personam vs. In Rem Claims

The most troubling aspect of Sections 362(c)(3) and (c)(4) is that they eliminate the protection of the stay across the board. Unlike, for example, Sections 362(h)(1) and 521(a)(6) that, when applicable, afford automatic relief to a creditor with an interest in the debtor's personal property so as to allow such creditor to seize and resell its collateral,[165] Sections 362(c)(3) and (c)(4) remove the protection of the stay as to all claimants.[166] In effect, they operate as a blunderbuss, exposing the debtors to personal liability for all debts, as well as foreclosure with respect to property securing specific claims.

Coupled with the fact that neither of the Section 362(c) provisions added in 2005 lead necessarily to the termination of the case, the effect of their application can have far less to do with penalizing abusive debtor behavior and much more to do with disadvantaging less vigilant creditors and, potentially, the trustee in chapter 7, all in contravention of core bankruptcy equality and value maximization goals. A bankruptcy case that proceeds without a stay in place can also produce bizarre results should the case proceed all the way through to discharge or plan confirmation.[167]

That possibility was put in sharp focus by the bankruptcy court's decision in *In re Fleming*, a chapter 13 case involving joint repeat filers who failed in their effort to have the stay extended beyond 30 days after the debtors' current chapter 13 case was filed.[168] Although the stay was thus terminated under Section 362(c)(3)(A), the debtors nonetheless sought confirmation of their plan. The trustee objected, expressing concern that lack of the stay would expose property

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163 *See supra* Section II.A.

164 *E.g.*, *id*. §§ 523(a)(2)(C)(i)(I)–(II) (creating a presumption of non-dischargeability in two circumstances suggestive of improper motive).

165 Sections 362(d)(4) and 362(b)(20) operate similarly. *See supra* notes 40–41, 67 and accompanying text.

166 Likewise, relief from stay under Section 362(d)(4) is limited to acts against specific real property. *See supra* notes 46–47 and accompanying text.

167 It is conceivable that, in a fashion, plan confirmation might be regarded as effectively reinstating the stay because the effect of the *res judicata* effect of Section 1327(a). *See infra* notes 167, 173 and accompanying text.

168 *In re* Fleming, 349 B.R. 444, 446 (Bankr. D.S.C. 2006).

of the estate to collection efforts during administration of plan, hence disrupting distributions to creditors.[169]

The court nonetheless confirmed the debtors' chapter 13 plan, observing that existence of the automatic stay was not prerequisite to plan confirmation.[170] Accordingly, the lapsing of the stay was not sufficient grounds for refusing to confirm the plan that otherwise met the confirmation requirements of Section 1325(a).[171] The case highlights the fact that termination of the stay and termination of the case are not coincident. In the court's words, even after automatic termination of the stay under Section 362(c)(3), a debtor retains "the right to continue under [c]hapter 13, obtain confirmation of a plan, and ultimately obtain a discharge" upon completion of the plan.[172]

In response to the trustee's very real concerns relating to potential disruptions in plan administration and payments in the absence of the stay, the court pointed out that, because of the *res judicata* effect of confirmation under Section 1327(a),[173] a creditor "who obtain[ed] relief from the automatic stay prior to confirmation" of plan might nonetheless become barred, upon confirmation, "from exercising [their] state law rights … to extent that provisions of a confirmed chapter 13 plan conflict[ed] with, and/or replac[ed] the creditor's pre-confirmation rights."[174] If the reasoning in *Fleming* is accurate,

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169 *Id*.

170 *Id*. at 446–47 (finding that Congress did not mandate the dismissal of a case or the denial of confirmation merely because the automatic stay terminated prior to confirmation pursuant to Sections 362(c)(3) or (4)).

171 *Id*.

172 *Id*. at 447.

173 *Id*. The Supreme Court has expressed strong support regarding the finality of a confirmed plan and its binding effect on all claims provided for therein. *See* United Student Aid Funds v. Espinosa, 559 U.S. 260, 275 (2010); *see also* Beyha v. Conestoga Title Ins. Co. (*In re* Beyha), No. 20-252, 2022 WL 728658, at *13, (Bankr. E.D. Penn. Mar. 10, 2022) (holding that a creditor is beyond by the terms of a confirmed plan notwithstanding the obtaining pre-confirmation stay relief).

174 Fleming, 349 B.R. at 447; *see also In re* Hileman, 451 B.R. 522, 524 (Bankr. C.D. Cal. 2011) (noting that "the vast number of reported decisions" interpreted "the fundamental binding effect of confirmation under [Section] 1327(a)" to mean that "if notice is adequate, the creditor that fails to object to confirmation and then to appeal an adverse decision is bound by the confirmation of the plan, even if it contains provisions that are inconsistent with the Code that could have been defeated by a timely objection"); *In re* Lemma, 394 B.R. 315, 324 (Bankr. E.D.N.Y. 2008) ("[O]nce a plan is confirmed, the plan binds the debtor and its creditors regardless of whether the stay has been vacated prior to confirmation, so long as the debtor remains current under the plan."); Kurtzahn v. Sheriff of Benton Cnty. (*In re* Kurtzahn), 342 B.R. 581, 585 (Bankr. D. Minn. 2006) (holding that where the stay terminated pursuant to Section 362(c)(3), but the debtor later obtained plan confirmation, "[c]onfirmation thus bound [creditor] to . . . the plan's terms, and . . . any previously-effective termination of the stay . . . did not affect that."). *But see* Cline v. Deutshe Bank Nat'l Trust Co. (*In re* Cline), 386 B.R. 344, 353 (Bankr. N.D. Ala. 2008) (holding that the expiration or termination of the stay pursuant to Section 362(c)(3) "transcends confirmation, and notwithstanding Section 1327(a) a creditor may continue to rely on such expiration or termination after confirmation when exercising its contractual and state court remedies").

and it is compelling on its face, it is difficult to see how Section 362(c)(3)(A) plays much of a meaningful role, unless the court's surmise regarding the preclusive effect of confirmation is successfully challenged.[175] Failing that, the analysis should apply with equal force in a situation where the debtor had two or more cases pending in the year proceeding the current case.

Turning to chapter 7, Judge Klein's thoughtful opinion in *In re Thu Thi Dao*,[176] illustrates the distortion that Sections 362(c)(3) and (c)(4) can wreak in liquidation mode. The principal issue in the case was the nagging question of whether the termination under Section 362(c)(3)(A) extends to property of the estate.[177] In joining the majority view that it does not, at least in chapter 7,[178] the court pointed out that "the serial filing problem was mainly a chapter 13 issue,"[179] and that reading its provisions to extend to property of the estate produces absurdities in chapter 7.[180] This follows from the fact that, regardless of the debtor's good or bad faith, in chapter 7 the property of the estate is controlled by a trustee charged with the duty to collect property of the estate and reduce it to distributable currency. An essential tool for chapter 7 trustees in performance of this vital duty is the automatic stay. A chapter 7 trustee, would, if property of the estate loses stay protection per Section 362(c)(3)(A), be subjected to a preposterously short deadline to prove by "clear and convincing evidence" that the chapter 7 case was filed in good faith even though chapter 7 does not have a good faith filing requirement.[181]

Thus, the court in *Thu Thi Dao* concluded that the trustee should not be thrust into the impossible position of losing a key item from her toolkit merely because

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It bears noting that *Cline* was decided before the Supreme Court's ruling in *Espinosa*.

175 Some courts have taken that very position. One bankruptcy court stated it:

> believes a stronger argument is that once a court finds there is no sufficient reason to justify an extension or imposition of the stay under Sections 362(c)(3) or (4), confirmation of a plan should neither change that finding nor interfere with the creditor's uninterrupted right to exercise its remedies post-confirmation without seeking additional relief from the court.

Cline, 386 B.R. at 352.

176 *In re* Thu Thi Dao, 616 B.R. 103 (Bankr. E.D. Cal. 2020).

177 *See supra* text accompanying notes 11–12.

178 Thu Thi Dao, 616 B.R. at 106.

179 *Id*. at 108.

180 *E.g.*, *id*. at 113–14 (Bankr. E.D. Cal. 2020) (pointing to the canon of construing a statute so as to avoid absurd results).

181 *Id*. at 113 (pointing out that rigid thirty-day post-filing deadline for completing a hearing on a Section 362(c)(3)(B) request to preserve the stay simply does not fit with basic chapter 7 procedure); *see also In re* Franklin, 627 B.R. 661, 662 (Bankr. E.D. Mich. 2021) (reasoning that the filing date runs from the date on which the petition commencing the case was filed, unaffected by conversion of the case after filing).

the debtor had earlier filed a case that was not completed. In other words, according to Judge Klein:

> How is a chapter 7 trustee at the outset of a case in a position to assess the good faith of the debtor? . . .
>
> . . . .
>
> An internal contradiction emerges. Requiring the chapter 7 trustee to prove by clear and convincing evidence that the case will be concluded with a chapter 7 discharge conflicts with the trustee's statutory duty "if advisable" to "oppose the discharge" of the debtor. If the trustee's suspicions about . . . this case are borne out, there is a nontrivial chance that the trustee actually will successfully opposed the discharge of the debtor.[182]

The absurdities Judge Klein identified in *Thu Thi Dao* do not, of course, end here. First, there is no question that property of the estate is not protected by the stay in a situation where Section 362(c)(4) applies. Thus, the narrower interpretation that saves Section 362(c)(3)(A) from producing anomalous results in chapter 7 is of no help in a Section 362(c)(4)(A) scenario.[183] In either case, unless the court agrees to extend or impose the stay, which is no sure thing by a long shot,[184] the trustee is obliged to perform her duties and achieve an orderly liquidation all the while competing with the collection efforts of other creditors. No mean feat. Second, although limiting application of Section 362(c)(3)(A) to property of the debtor solves the most immediate problem, it does so at the expense of the most sensible reading of the poorly drafted statute and probably at the expense of what Congress intended in the first place.[185]

Finally, in either situation, it is possible that the case will proceed to discharge without the stay being restored. While the likelihood of discharge is relevant in the determination of good faith under both Sections 362(c)(3)(C) and (c)(4)(D),[186] there is no guarantee that the party seeking extension or imposition of the stay will be able to overcome the heavy burden required to earn the stay's protection at the early stages of the case,[187] and which implicitly assumes that the moving party will necessarily be the debtor.[188] Thus, the case might proceed without benefit of the stay until subsequent entry of the discharge order, at which

182 Thu Thi Dao, 616 B.R. at 113–14 (citations omitted).

183 *See supra* text accompanying note 10.

184 *See supra* notes 83–85 and accompanying text.

185 *See supra* note 18.

186 *See* 11 U.S.C. §§ 362(c)(3)(C)(i)(III)(aa), (4)(D)(i)(III) (2018).

187 *See supra* notes 83–85.

188 In chapter 7, it is the case trustee rather than the debtor necessarily who has the greatest incentive to seek extension or imposition of the stay. *See supra* text accompanying notes 178–82.

point the stay is effectively back in play in the form of the discharge injunction.[189] As a consequence, pending creditor collection efforts perfectly lawful at one moment would instantly comprise a Section 524(a)(2) violation in the next.[190] In the meantime, the absence of the stay until discharge is granted or denied effectively assures that the equality of creditors objective in chapter 7 would be largely forfeit.

In effect, the ones suffering the brunt of the loss or denial of the stay would not be the malfeasant debtors, but rather those creditors that were less vigilant and/or less successful in pursing collection. The harm to bankruptcy equality policy is palpable. Finally, all creditors are likely worse off from the chaotic, disorganized, and wasteful scramble for assets by individual creditors seeking immediate repayment of an obligation under state law that the stay was intended to prevent.

The point is, as Judge Klein suggested,[191] the rationale for Section 362(c)(3) and (c)(4) was to address the repeated use of eleventh-hour chapter 13 filings to thwart imminent foreclosures, then, logically, a more cut-to-fit solution would have been to allow those creditors with an unavoidable interest in the debtor's property to proceed against that property unhampered by the stay.[192] While potentially damaging to the prospect for reorganization or rehabilitation, it would not be fatally so.[193] Moreover, it would avoid the calamitous consequences that flow from indiscriminate elimination of the stay in either chapter 7 or 13 cases.

III. THE STAY AS THE WRONG TOOL FOR THE JOB

The automatic stay was Congress's "go to" solution in BAPCPA for dealing with serial filings as well as other kinds of debtor defalcations.[194] Given the centrality of the stay in securing effective bankruptcy relief, this may seem understandable or even logical at first blush. However, the intuitively reflexive

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[189] *See* 11 U.S.C. § 524(a)(2) (setting forth the injunctive effect of entry of an order of discharge on any action intended to impose personal liability on the debtor for a dischargeable prepetition obligation).

[190] This reinforces Judge Klein's point about the awkward fit between Sections 362(c)(3), (c)(4), and chapter 7 cases. *Supra* note 180.

[191] *See supra* text accompanying note 179. This was also the conclusion of the NBRC. *See infra* note 207 and accompanying text.

[192] This, as discussed below, might be coupled with *in rem* effect as to such property modeled on current Section 362(d)(4). *See infra* text accompanying notes 250–52.

[193] This is the point made by the court in *In re Fleming*, that the decision not to continue the stay under Section 362(c)(3)(B) does not prevent the case from proceeding through confirmation and discharge. *In re* Fleming, 349 B.R. 444, 445, 447 (Bankr. D.S.C. 2006); *see supra* text accompanying notes 170–72.

[194] *See supra* Section I.C.

solution is not always the best choice. Indeed, as in this context, the punishment does not always fit the crime. The basic problem stems from the fact that, unlike the discharge for example, the stay does not exist solely to advance the debtor's fresh start. Rather, the stay plays a critical role in advancing all policy interests implicated in a bankruptcy case, including the interests of creditors. In the now iconic parable provided nearly four decades ago,[195] Thomas H. Jackson demonstrated how and why the automatic stay serves as the lynchpin in achieving creditor cooperation (even if grudgingly), rather than competition, producing greater value in the aggregate for creditors.[196]

To date, the focus of attention in the caselaw and commentary has been on interpreting the stunted and inscrutable language of Sections 362(c)(3) and (c)(4), particularly in relation to the scope of subsection (c)(3)(A) compared to (c)(4)(A) in terms of just what property is freed from the stay when each provision applies.[197] However, regardless of how that question is ultimately resolved, it does not address the more basic concern over whether wholesale abrogation of the stay was best suited to address the debtor behavior sought to be interdicted. I believe it was not. The damage would be mitigated to a considerable degree if the current majority view of the property affected by Section 362(c)(3)(A) is limited to property of the debtor,[198] but it is precisely for that reason that the majority view, while a preferable outcome from a practical point of view,[199] is probably not the correct reading of the statute.[200]

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195 *See* THOMAS H. JACKSON, THE LOGIC & LIMITS OF BANKRUPTCY 10–14 (1986) (using an example of a lake and 100 fishers to highlight the need for a mandatory rule the forces multiple creditors to act as one in order to maximize value); *see also* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain,* 91 YALE L.J. 857, 857 (1982) (noting that while bankruptcy is usually thought of as a procedure for providing relief to an overburdened debtor, in fact, "most of the bankruptcy process is concerned with creditor-distribution questions.").

196 *See* JACKSON, *supra* note 194, at 16–17 (explaining the advantages of a single, coordinated system of creditor collection over individual creditor actions); *see also* Timothy P.W. Sullivan, *Swapped Disincentives: Will Clearinghouses Mitigate the Unintended Effects of The Bankruptcy Code's Swap Exemptions?* 80 FORDHAM. L. REV. 1491, 1507–08 (2011) (noting the role of the automatic stay as benefiting creditors in the aggregate by preventing the wasteful dismembering of the debtor by self-interested individual creditor action).

197 *See supra* text accompanying notes 11–14 and accompanying text.

198 *See supra* note 11.

199 *See supra* note 18.

200 Although, as Judge Klein urged (*supra* text accompanying notes 178–80) an exception might be found for chapter 7 cases on the basis of necessity in avoiding an absurd result. *In re* Thu Thi Dao, 616 B.R. 103, 114 (Bankr. E.D. Cal. 2020). *Cf. In re* Trans Alaska Pipeline Rate Cases*,* 436 U.S. 631, 643 (1978) (suggesting that courts have some freedom to stray from the plain meaning of a statute where application of that meaning would produce absurd results).

To be clear, it is not as if the relief of the automatic stay, properly calibrated, cannot play a role in an effective solution.[201] Rather, it is the complete lifting of the stay in all its permutations that produces distorted and undesired effects. These are most notable as applied to unsecured claims because of the disruptive impact they cause to bankruptcy equality objectives.[202] The sharp turn taken in 2005 was the move away from addressing stay relief on a case-by-case basis to eliminating protection of the stay both automatically and across the board.[203] The result is a remedy that is recklessly overbroad,[204] and carries the not insubstantial risk of causing considerable collateral damage in terms of systemic goals, except in the rare contested case where the debtor or another party in interest can meet the heavy burden of convincing the court that the stay should persist.[205]

The potential prejudice to core bankruptcy objectives includes not only reducing overall returns for unsecured creditors both in liquidation and rehabilitation cases due to the loss of equity in encumbered property,[206] but also depriving general creditors of the benefits of a collectivized debt adjustment process. Thus, the impact is not merely one of overkill, but one of whiffing entirely, as these costs may be suffered without any price being paid by the debtor whose conduct instigated the reaction in the first place. While dismissal likewise means that the parties are relegated to the whims of state debt collection law, at least everyone is on an even footing and the debtor will not enjoy a discharge from personal liability on his or her unsatisfied obligations.

In its Final Report, the NBRC identified repeat filings in chapter 13 as a problem, although, conceding that hard evidence to expose the extent of the problem is "sparse."[207] The NBRC identified, for example, several circumstances that could account for successive filings which are unrelated to bad faith motivation.[208] However, the Final Report acknowledged that, in some instances, these filings do involve debtors seeking to forestall the legal process,

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[201] From the inception of the Code, the inclusion of grounds under which a party in interest might receive relief from or modification of the say is more than ample testimony of that fact. *See* 11 U.S.C. § 362(d) (2018).

[202] *See supra* notes 20–21, 189–90 and accompanying text.

[203] *See supra* text accompanying notes 73–74.

[204] *See supra* Section II.A.

[205] *See supra* notes 79–83 and accompanying text.

[206] This possibility exists under the current scheme if the debtor is unable to provide an undersecured creditor with adequate protection. *See id*. § 362(d)(1).

[207] *Final Report*, *supra* note 88, at 276. And that has remained true. *See* Linda E. Coco, *"Using a Cannon to Go After a Fly": "Re-entering the Briar Patch" of Stay Termination for Repeat Filers Under Section 362(c)(3)(A)*, 30 No. 1 J. BANKR. L. & PRAC. NL Art. 5 nn. 51–54 (Feb. 2021).

[208] *Final Report*, *supra* note 88, at 276 (identifying a variety of benign reasons that might account for multiple filings other than a bad faith effort to abuse the system).

such as an imminent foreclosure or eviction, with no real intent to proceed with confirmation of an actual plan of repayment.[209] In response the NBRC initially leaned toward recommending a two-year ban on the refiling of a chapter 13 case regardless of the disposition of the earlier case.[210]

On reconsideration, however, the NBRC decided that evidence of these practices was not "sufficiently conclusive . . . to warrant" advancement of so drastic a change concerning access to bankruptcy relief "when a more modest measure would suffice."[211] Therefore, in its final recommendation aimed at deterring bad faith refilings, the NBRC proposed:

> If a debtor sought bankruptcy relief for the third time in six years, and within six months of the dismissal or conversion of the second filing, the filing would not trigger an automatic stay. The bankruptcy court clerk's office would not send notice of the bankruptcy to the debtor's creditors, and thus no creditor actions would be halted, unless the court subsequently ordered that a stay be imposed. The debtor would have the burden of persuading the court to enter that stay order.[212]

The NBRC further recommended that Section 362 be amended to permit the court to enter an *in rem* order prospectively granting relief from the automatic stay as to specific real property for up to six years.[213] The trigger for such an order would be upon a showing that an individual debtor had transferred such property, or a fractional interest therein, to another individual to avoid foreclosure or eviction.[214] Such an order would bind any party claiming an interest in that property and would further prevent the property from becoming part of a bankruptcy estate in any subsequent case.[215]

While the NBRC's recommendations on the issue of bad-faith filings designed solely to evade legitimate process had some merit and were certainly

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209 *Final Report*, *supra* note 88, at 277.

210 *Final Report*, *supra* note 88, at 280. The Report observed that the recommendation, which received the support of the home mortgage lending industry, was based on proposal that Senators Reid and Brown had put forth several years earlier that would have limited a debtor's eligibility to file a chapter 13 petition to once every three years. *Final Report*, *supra* note 88, at 280. That proposal came in for some criticism as inflexible. *Final Report*, *supra* note 88, at 280. (quoting Senator Grassley as characterizing the proposed amendment as "using a cannon to go after a fly" and expressing concern that the amendment would discourage the use of chapter 13 repayment plans).

211 *Final Report*, *supra* note 88, at 281 & n.742.

212 *Final Report*, *supra* note 88, at 281–82.

213 *See supra note* 208, detailing a variety of other non-abusive explanations for repeat filings identified in the *Final Report*. *Final Report*, *supra* note 88, at 273–74.

214 *Final Report*, *supra* note 88, at 282. Of course, in a fashion, Section 362(d)(4) adopted this approach. *See supra* note 47 and accompanying text.

215 *Final Report*, *supra* note 88, at 282.

less draconian than what Congress ultimately came up with in BAPCPA,[216] they suffered from some of the same shortcomings that plague Sections 362(c)(3) and (c)(4). Most notably in this regard was the NBRC's decision to adopt universal withdrawal of the stay as the principal mechanism for thwarting the utilization of the system to accomplish improper ends, although, to its credit, it only applied to chapter 13. In any case, in the final section of this article I offer what I believe is a more measured and customized approach to abusive serial filings.

IV. A PROPOSED SOLUTION

A. The Concept

Misuse of the bankruptcy system accomplished by multiple filings inside of some specified period of time without intent to confirm and perform a chapter 13 plan or otherwise make appropriate use of the system is a concern that merited a response, although not every such repeat filing can be assumed to abusive.[217] Congress's solution in Sections 362(c)(3) and (c)(4),[218] even looking beyond the poor draftsmanship,[219] is not limited to chapter 13 situations where the debtor's right to retain possession of his or her property, coupled with the near unfettered discretion to dismiss at will,[220] makes abusive repeat filings most prevalent.[221] It is also in sweeping nature, potentially eliminating the barrier of the stay well beyond the specific *in rem* claim or claims against property of the debtor or the estate that may have been the primary motivators of the debtor's actions. As earlier discussed, this runs the unintended risk that the harm to some creditors will greatly outweigh the punitive impact on the perfidious debtor.[222]

Therefore, I propose that any reform effort should keep front and center the following considerations:

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216 *Final Report*, *supra* note 88, at 282.

217 *Final Report*, *supra* note 88, at 277–79.

218 *See* 11 U.S.C. § 362(c)(3)–(4) (2018) (respectively, terminating the stay after 30 days or preventing its ever going into effect). And, of course, the solution was not limited to those provisions (*supra* Section I.C.), however, they loom large in the overall reaction and, as explained in this Section, are perhaps the most problematic.

219 *See supra* note 5–6.

220 *See id*. § 1307(b). While some cases have found an exception to this absolute right in the case of bad faith, the weight of authority is that the lack of textual support therefor deprives the bankruptcy court of any discretion. *See supra* notes 69, 156.

221 *See supra* text accompanying note text accompanying note 192.

222 *See supra* 140–41 and accompanying text. Confusingly, Sections 362(c)(3)(C) and (c)(4)(D) separately address the presumption of bad faith "as to all creditors" and as to individual creditors that had sought relief from stay under Section 362(d) in a previous case. *Compare id*. § 362(c)(3)(C), *with id*. § 362(c)(4)(D).

- Express the elements associated with policing abusive repeat filings in clear and unambiguous terms;
- Minimize collateral damage;
- Preserve avenues for deserving debtors to obtain bankruptcy relief; and
- Operate efficiently and effectively.

1. Chapter 7

Toward this end, I believe a revised approach to stay modification for repeat filers needs to be limited to individual non-chapter 7 cases. First, chapter 7 already provides adequate protection against the "file and dismiss" stratagem. It is easy to get into chapter 7, but not so easy to get out.[223] Second, the ability to deprive the debtor of a discharge if it is determined that a second (or third) filing was undertaken with intent to frustrate proper state law process, such as an eviction or garnishment, should operate as a sufficient deterrent.[224] Ordinarily, in a discharge objection, the moving party bears the burden of proof and objections are narrowly construed so as not to impinge unduly on the fresh start.[225] In connection with any new ground for denying discharge (or dischargeability), based on bad-faith repeat filings, however, the burden might shift to the debtor, albeit under a mere preponderance standard, rather than be placed on the objecting party.[226] Finally, excluding chapter 7 debtors from the serial filing regime would eliminate the Catch-22 for the case trustee that Judge Klein identified in *In re Thu Thi Dao*.[227]

The First Circuit's recent decision in *In re Francis* provides a fair illustration of how such an approach might effectively operate. The debtor initially filed a chapter 13 petition on April 3, 2017, that was dismissed by the bankruptcy court a month later for failure to file required documents.[228] On July 21 of the same year, the debtor filed a second chapter 13 petition, but then moved to convert to

223 *Supra* note 157.

224 *See supra* Section II.C.

225 *See, e.g.*, Hendon v. Lufkin (*In re* Lufkin), 393 B.R. 585, 592 (Bankr. E.D. Tenn. 2008) ("Section 727(a) is liberally construed in favor of the debtor, and the party objecting to discharge bears the burden of proof by a preponderance of the evidence."); Barclays/Am. Bus. Credit, Inc. v. Adams (*In re* Adams), 31 F.3d 389, 393 (6th Cir. 1994); Fed. R. Bankr. P. 4005 (stating that plaintiff bears the burden of proof in an adversary proceeding seeking to deny the debtor a discharge).

226 The burden of proof is by a preponderance of the evidence. Adams, 31 F.3d at 394 (relying on Grogan v. Garner, 498 U.S. 279, 291 (1991)).

227 *In re* Thu Thi Dao, 616 B.R. 103, 113 (Bankr. E.D. Cal. 2020), discussed *supra* text accompanying notes 176–82.

228 Francis v. Desmond (*In re* Francis), 996 F.3d. 10, 14 (1st Cir. 2021).

chapter 11 upon being notified that the case was subject to dismissal because his secured debts exceeded the debt cap in Section 109(e).[229] The request to convert was granted on September 26, but the debtor then failed to meet several additional deadlines set by the court for furnishing information. Eventually, on motion of the United States Trustee, the case was converted to chapter 7.[230] However, the debtor continued to ignore deadlines set by both the Code and the court; finally, the bankruptcy court entered an order denying discharge *sua sponte* and dismissed the case.[231] On appeal, both the First Circuit's Bankruptcy Appellate Panel,[232] and then the First Circuit, affirmed.[233]

The basis for denial of discharge in *Francis* was Section 727(a)(6).[234] It was well-justified on the record. However, I have suggested that, because none of the existing grounds for objecting to discharge might be available in another case warranting such treatment, a new ground for objection might be added to Section 727(a). This would be based on a finding of bad faith in the filing of a second (or more) case within a designated period of time preceding filing of the new petition.[235] The point of *Francis*, however, is to demonstrate how a bankruptcy court might deal with a recalcitrant repeat filer while also taking into account the other interests in the case. Moreover, even if the later filing is not under chapter 7, as was originally true in *Francis*, the case still provides a roadmap for how that case might yet end up in liquidation through conversion, leading potentially to global denial of discharge.[236] Finally, while it did not become an issue in *Francis* itself, the case also illustrates the necessity of placing some

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229 *Id*.

230 *Id*. at 14–15.

231 *Id*. at 15–16.

232 *In re* Francis, 604 B.R. 101, 108 (B.A.P. 1st Cir. 2019); Francis, 996 F.3d at 21.

233 The court ruled that when "a debtor disregards such orders without adequate justification, he must be prepared to suffer the consequences of his recalcitrance. The consequence resulting here — the denial of a discharge — was well within the universe of permissible responses to the debtor's feckless course of conduct." Francis, 996 F.3d at 21. Among other arguments, the debtor contended that the bankruptcy court erred when it did not promptly dismiss his case upon the debtor's failure to comply with Section 521(i)(1). *See id*. at 16–17; *see also supra* note 138. The court also rejected the argument that bankruptcy courts may only deny discharge upon motion of a party in interest, and not *sua sponte*. *See id*. at 18–19.

234 *See id*. at 16; *see also* 11 U.S.C. § 727(a)(6) (2018) (pertaining to the refusal to obey a lawful order of the court).

235 *See infra* Section IV.A.2 for further discussion of the appropriate look-back period. The fact that the burden of proof for denial of discharge on this basis might be placed on the debtor, rather than the objecting party, is an independent reason for creating a separate ground for relief. *See supra* note 217; *cf.* Barclays/Am. Business Credit v. Adams (*In re* Adams), 31 F.3d 389, 394 (6th Cir. 1994) (discussing the burden of proof under § 727(a) generally).

236 Following denial of discharge, liquidation might proceed or the case be dismissed. *See* Francis, 996 F.3d at 15, 16.

barriers around a debtor's absolute right to dismiss a chapter 13 case, as will be urged in the materials that follow.[237]

2. *Reorganization Cases*

In rehabilitation proceedings, and most importantly chapter 13, the focus should be on balancing protection of the integrity of the system with minimizing the impact on those individuals in most dire need of bankruptcy protection. This requires the exclusion of blanket relief from the stay, either after a brief period of time or because it is deemed never to arise, from the solution. The ramifications of wholesale stay relief are too disruptive of core bankruptcy aims and there simply is no need. Instead, a combination of targeted stay relief, coupled with imposition of new restrictions in chapter 13 cases (including *in rem* orders, eliminating the debtor's absolute right to dismiss, and dismissals with prejudice) should produce a more optimal accommodation of competing policies than is achieved under the current regime.

To begin, the provisions dealing with automatic termination of the stay based on bad faith filings do not belong within the structure of Section 362(c) at all. This assertion concerning the location for stay terminations based on bad faith is a product of two considerations: (1) global termination of the stay should no longer be an option as part of the response to abusive filings; and (2) even under the current law, the basis for elimination of the stay in subsections (c)(3) and (c)(4) are conceptually very different than the circumstances triggering termination under subsections (c)(1) and (c)(2), where the issue is whether the purposes served by the stay no longer attain.[238] The logical location for the bulk of the revised language, then, would be in subsection (d),[239] and in particular subsection (d)(4),[240] as it would be akin to other grounds on which a party in interest may seek relief from stay. However, as detailed below, an alternative proposal could also prompt the need for conforming changes to subsections (e) and (g).[241] Thus, the proposal might just as easily warrant a single self-contained subsection.[242] My purpose is to outline the contours of such a proposal, rather

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237 *See infra* text accompanying note 243.

238 *See supra* text accompanying notes 36–37.

239 This subsection, of course, collects the grounds for stay relief on a selective basis. *See supra* text accompanying notes 40–47.

240 This would so as to reap the benefit of the *in rem* effect of the order. *See supra* note 47 and accompanying text.

241 *See infra* Section IV.A.2.

242 The alternative would be to combine Sections 362(c)(3) and (c)(4) into a single subsection conforming with the proposals advanced herein. *See* 11 U.S.C. § 362(c) (2018).

than to draft it; therefore, I leave the question of how it is incorporated into the Code to those better suited to make those judgments.

In fashioning a revised proposal for addressing successive bad faith filings, it should be recognized front and center that one crucial reason the repeat filing conundrum predominantly occurs in chapter 13 cases is that Section 1307(b) gives the debtor the right to dismiss the case at will.[243] The same discretion does not exist, for example, in individual chapter 11 cases, where dismissal requires a showing of cause after notice and a hearing.[244] While it is certainly conceivable that this freedom was deemed necessary to preserve chapter 13 from attack under the Thirteenth Amendment,[245] that concern, for better or worse, has been largely vitiated by the amendments effected by BAPCPA in individual chapter 11 cases.[246] Moreover, in a chapter 13 case perceived to be abusive, creditors can respond by seeking conversion in lieu of dismissal, which, as noted above,[247] can be structured to make repeat filing highly unappealing.[248]

Conversely, the court might permit dismissal, but with conditions, including a restriction on refiling under any debtor relief chapter for a specified period of time in the case of particularly egregious behavior.[249] Another alternative a court might employ, and that could be pressed into service independently of in combination with dismissals with prejudice, would be more robust use of *in rem* orders, as recommended by the NBRC,[250] and as currently contemplated with respect to real property collateral by Section 362(d)(4).[251] This would eliminate

243 *See supra* notes 69, 156 and accompanying text.

244 *See id.* § 1112(b).

245 Toibb v. Radloff, 501 U.S. 157, 165–66 (1991) (noting "Congress' primary concern about a debtor's being forced into a bankruptcy under chapter 13" because being "compelled to toil for the benefit of creditors [would be] in violation of the Thirteenth Amendment's involuntary servitude prohibition"); *see* Harris v. Viegelahn, 575 U.S. 510, 514 (2015) (observing that chapter 13 is a "wholly voluntary" proceeding).

246 *See* Erwin Chemerinsky*, Constitutional Issues Posed in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,* 79 AM. BANKR. L.J. 571, 583–84 (2005).

247 *See supra* text accompanying notes 227–32.

248 This would necessarily require some limitation on the debtor's unconditional right to dismiss a chapter 13 case, but support for that position is already beginning to take place in the caselaw. *See supra* notes 69–156.

249 Many courts already are of the view that this is authorized under Section 349(a) in its current form. However, making the power explicit would serve to eliminate the current uncertainty that exists over the matter. *See supra* note 69, 117.

250 *Supra* text accompanying notes 213–15; *see also* Linda E. Coco, *"Using a Cannon to Go After a Fly": "Re-entering the Briar Patch" of Stay Termination for Repeat Filers Under Section 362(c)(3)(A)*, 30 No. 1 J. BANKR. L. & PRAC. NL Art. 5 (Feb. 2021) (opining that Section 362(d)(4) provides a more effective remedy for abusive repeat filings than BAPCPA's new stay termination provision because it provides judicial oversight as well as finality for secured creditors).

251 *See e.g.*, Greenstein v. Wells Fargo Bank, N.A., 576 B.R. 139, 139 (Bankr. C.D. Cal. 2017); *see also supra* notes 46–47. Some courts have also entered such orders other than under Section 362(d)(4). *See, e.g.*, *In re* Trail Management, LLC, 612 B.R. 242, 245 (Bankr. M.D. Fla. 2020) (holding that, in a case to which Sections

the protection of the stay upon refiling, but only as to specific property claimants; namely, those (or their successors) as to whom it is determined that the earlier filing was undertaken solely to frustrate and delay *and* without genuine intent to confirm and carryout a debt adjustment plan.[252]

Although the emphasis should remain on assuring swift relief in connection with successive filings over a designated period of time to root out bad faith misuse of the system, a purely self-executing system of the ilk as Congress imposed under BAPCPA, devoid of the space for any judicial involvement on the front-end, and precious little on the back end,[253] tilts the balance too far in terms of risking elimination of meaningful bankruptcy relief for deserving debtors. In place of the current system, a refashioned proposal would need to include some mechanism for judicial oversight, even if on a summary and expedited basis. That is to say, automatic termination of the stay without benefit of prior judicial involvement runs too high of a risk of eroding the purposes served by the automatic stay, including those beyond protecting debtors filing without improper ulterior motive.[254] However, when such a request is triggered based on alleged bad faith repeat filing, I see no problem with placing the burden of proof on the debtor (i.e., reversing the presumption of good faith), but I believe that burden should be eased in three respects.

362(c)(3) and (c)(4) did not apply because the debtor was not an individual, an order modifying the stay so as to allow a state court action regarding the validity of a lien to proceed would be accompanied by an order that no bankruptcy filing by anyone anywhere in the world, including but not limited to a subsequent transferee, should cause the stay to go into effect as to such property). *But see* Smith v. U.S. Bank, N.A. (*In re* Smith), 999 F.3d 452, 456 (6th Cir. 2021) (overturning lower courts' imposition of lifting of the automatic stay for a two-year period because it entailed re-opening a case that had been dismissed on motion of the debtor). Decisions such as *Smith* reflect why limitation on the debtor's absolute right to dismiss a chapter 13 case must also factor into the approach proposed herein to bad faith filings. *See* text accompanying note *supra* 243–47; *see also supra* note 156.

[252] The benefit of implementing this approach in lieu of a prohibition on refiling is that it preserves bankruptcy options for debtors in the future without prejudice to the creditors that were taken advantage of in the earlier case. It is important not to lose sight of the fact there is nothing inherently improper about filing a chapter 13 case to halt an imminent foreclosure, even if plan confirmation is not likely. *See, e.g.*, Scott F. Norberg & Andrew J. Velkey, *Debtor Discharge and Creditor Repayment in Chapter 13*, 39 CREIGHTON L. REV. 473, 504 (2006). The authors point out:

> Some [c]hapter 13 debtors are able to regain their financial footing simply as a result of the breathing spell afforded by the automatic stay. This breathing spell - perhaps no longer than a few months or a year between filing and dismissal of a case - is enough to allow the debtor to cure defaults or pay off debts without further court supervision or debt relief.

Id. Thus, equating "success" in chapter 13 does not necessarily entail completion of the plan. *See also infra* note 261.

[253] *See supra* text accompanying note 80.

[254] This includes the benefits to creditors of a collectivized system for dealing with insolvency, such as equality of creditors and maximization of value. *See supra* note 195.

First, imposing a clear and convincing standard of proof is an unreasonably and unnecessarily high bar, particularly given the strong public policy favoring repayment over liquidation,[255] a policy itself that played a major role in BAPCPA.[256] Second, elimination of the stay "as to all creditors" should simply not be an option. If, for whatever set of reasons, the court believes the stay should be lifted entirely, that is effectively a judgment that bankruptcy relief is not appropriate and the proper answer is dismissal, including potentially with prejudice.[257] By contrast, having the case proceed without benefit of the stay is simply setting the case up for potential calamity—*even if* the debtor is somehow able to propose and confirm a plan.[258] Tweaking just slightly former astronaut and Eastern Airlines CEO Frank Borman's quip about capitalism and bankruptcy itself,[259] a bankruptcy case with no stay is like Christianity without hell. Third, the standard for rebutting the presumption should look back at the circumstances attending the earlier filing(s), and not so much forward. While it is reasonable give some consideration to the likelihood of plan confirmation and completion,[260] there are simply too many other reasons that a chapter 13 filing might not lead to confirmation or discharge that are unrelated to misuse of the system.[261] Far more germane to the process of identifying abusive motivation are the reasons and circumstances that prompted the filing and dismissal of the prior case(s).[262] If the earlier case was not filed in bad faith, then the current

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[255] *See* Lawrence Ponoroff, *Rethinking Chapter 13*, 59 ARIZ. L. REV. 1, 6–9 (2017) (discussing Congress's bias in favor of chapter 13 repayment over liquidation).

[256] The means test of Section 707(b)(2) was clearly the centerpiece of BAPCPA's effort to push debtors with the ability to pay a portion of their debts into chapter 13. *See infra* text accompanying note 277; Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way*?, 13 AM. BANKR. INST. L. REV. 665, 671–73 (2005); G. Ray Warner, *Bankruptcy Reform and Economic Recovery*, 25 J. CIV. RTS. & ECON. DEV. 181, 181 (2010) (pointing to BAPCPA's emphasis of making debtors with an ability to pay do just that).

[257] *See supra* Section II.C. Most courts agree bankruptcy courts have the authority to impose a temporal ban on refiling following a bad faith dismissal. *E.g.*, Duran v. Gudino (*In re* Duran), 630 B.R. 797, 809 (B.A.P. 9th Cir. 2021). However, codification of the power would be beneficial. *See supra* note 59.

[258] *But see In re* Fleming, 349 B.R. 444, 444 (Bankr. D.S.C. 2006), discussed *supra* text accompanying notes 167–74. *Fleming*, however, is not the prototypical case by any stretch and hinges very much on the court's conjecture that the confirmation order would override prior stay relief.

[259] Frank Borman, *Thoughts on The Business of Life*, FORBES, https://www.forbes.com/quotes/3057/ (last visited Feb. 5, 2022) ("Capitalism without bankruptcy is like Christianity without hell.").

[260] In addition, a judgment about the likelihood of the debtor's ability to make plan payments and otherwise comply with plan requirements occurs as part of the confirmation process. *See* 11 U.S.C. § 1325(a)(6) (2018).

[261] *See supra* text accompanying note 213; Ponoroff, *supra* note 255, at 42–43 (suggesting the decision to control serial filings with the blanket prohibitions on discharge in Section 1328(f) also swung the pendulum too far off center); Branigan v. Bateman (*In re* Bateman), 515 F.3d 272, 283 (4th Cir. 2008) (noting the protections or benefits available under chapter 13, other than discharge, that might be incentive for a debtor to file for relief even when plan completion is unlikely, and discharge is not available).

[262] It is this factor that underscores the value and importance of introducing greater judicial oversight and discretion in the process. *See supra* text accompanying note 254.

filing should be entitled to the presumption of good faith (and the concomitant protection of the stay) that ordinarily attends a bankruptcy filing.

In order to minimize the damage caused by the automatic presence of the stay in a bad faith repeat filing, it is proposed that, in addition to the debtor bearing a more manageable burden of proof, the hearing should be held no later than 21 days following a request for relief based on the new standard.[263] Additionally, assuming the court does not rule against granting relief, the stay should be continued beyond this 21-day period only if: (1) the party opposing continuation consents, or (2) the court finds of exceptional circumstances warranting postponement or continuation of the hearing on the motion to lift the stay, but by no more than an additional 14 days.[264]

Returning to the question of the showing required for successfully resisting stay relief, the focus, as noted earlier,[265] should be less on predictions of what may or may not occur in the future, and more on the existence of a plausibly benign explanation for the successive filings inside the relevant look-back period.[266] Accordingly, the debtor or other party opposing stay withdrawal would be obliged to show, under a preponderance standard, either (1) a "satisfactory explanation" for the filing and dismissal of one or more cases inside the prescribed period, and not necessarily a substantial likelihood of plan confirmation;[267] or (2) that removal of the stay would not be in the interests of, or would be prejudicial to, the debtor's creditors. Obviously, this standard is much more open-ended than the specific showings needed to continue the stay under Sections 362(c)(3)(B),(C) and (c)(4)(B)-(D). That is by design, so as to introduce the opportunity for the bankruptcy judge to exercise some measure of judgment based on the particular circumstances of each case. And, unlike under current law, there would be no separate grounds for rebutting the presumption of bad faith as to *all* creditors, nor would a creditor need to demonstrate that it had made a request for relief from stay under subsection (d) in an earlier case to have standing to move for the lifting of the stay based on successive filings inside of the prescribed period. Additionally, continuation might be established by factors exogenous to the conduct and/or financial prospects of the debtor.

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[263] Less time than the current thirty-day is warranted not only to minimize the potential harm to creditors but also because, with the stay being lifted as to all creditors not an option, other creditors less likely to have an interest in the motion.

[264] Under Fed. R. Bankr. P. 9006(a), this would include intermediate weekends and holidays.

[265] *See supra* notes 76–80 and accompanying text.

[266] *See infra* text accompanying note 268

[267] *See supra* note 261.

The final, and perhaps most difficult, component of this revised approach for controlling repeat bad faith filings is to define the prior event(s) required to trigger the right to such a hearing in the current case. Taking a cue from Section 109(g),[268] I would submit that the pendency of one or more cases under chapter 11 or 13 in the 180 days preceding the current filing is a sensible look-back period. Six months ought to be enough time for a creditor frustrated by an earlier filing that was dismissed to exercise its rights under state law. Therefore, the one-year look-back in current Sections 362(c)(3) and (c)(4) is needlessly long. And the issue is of more than trivial import. The longer the period in which an earlier filing will trigger scrutiny, the greater the likelihood that an inculpable debtor might receive less than full bankruptcy relief or be denied needed relief altogether. Hence, there is an advantage to establishing the temporal line no further in the past than necessary to achieve the desired objective.

An ancillary benefit to this alternative approach is that it would eliminate the current confusion over what property is freed from the stay under Section 362(c)(3). The property released could be either property of the estate or property of the debtor, although presumably the former in most instances. However, in no case would the stay be removed as to all property and/or all creditors as allowed under the current regime. The options for the court would be selective lifting of the stay as to certain property or purposes, or dismissal, and in both situations with the ability to make the order binding in the case of future filings, respectively, affecting such property or by the debtor within a specified period of time.

B. Critiques of the Concept

Doubtless, the most likely objection to the set of proposals set out above would be the lack of any self-executing solution.[269] Potentially, that means up to two state law foreclosures (or other processes) might be disrupted before adequate bankruptcy court relief to prevent a third could be put in place. This may seem excessively high, but it is no more than exists under the present system, since the stay is currently in place for at least 30 days under Section 362(c)(3)(A), which may be long enough to require suspension or cancellation of a pending foreclosure sale or other collection efforts. Where the mortgage industry would also regard this revised approach as less than salubrious is the

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[268] *See infra* text accompanying notes 123–25.

[269] This was an important factor in connection with adoption of Sections 362(b)(21) and 362(n). *See generally* Napoli, *supra* note 45, at 753–57.

fact that the filing of a petition triggers the stay, at least temporarily, even in the case of a third filing within the relevant six-month period.[270]

This observation about the operation of the proposal would be an accurate one, although it might be mitigated to some extent if the aggrieved creditor was successful in resisting dismissal and securing an *in rem* order with respect to specific property that the debtor was found in the earlier (second) case to be wrongfully using chapter 13 to shield from foreclosure.[271] Thus, I believe it is a modest reduction in protection from the existing system that is justified by the necessity to correct the imbalance in the current scheme, which has leaned too far in favor of creditor interests in the case of repeat filings. By design, bankruptcy frustrates creditors. Unless however, we decide to make a major change in course and externalize the costs of financial failure to society at large, that is just a fact that goes with the territory and will always be true. Consequently, the clambering from these quarters about inadequate protection against debtor abuse must be tempered with a rather large grain of salt. The criticism of bad-faith repeat filings abound, but hard data is limited.[272] To the extent that misuse does occur, adequate safeguards are already in place or can easily be implemented in chapter 7 cases.[273] In chapter 13, and to a lesser degree in individual chapter 11 cases,[274] there is a greater opportunity to invoke bankruptcy relief for an improper underlying purpose and without serious intent to cooperate in confirming and carrying out a plan of rehabilitation or reorganization.[275] This can be an abuse of the system and those must be taken with appropriate seriousness.

At the same time, however, it is important not to throw the infant out with the bath suds. Self-executing rules triggered purely by circumstances and timing are aleatory, and inevitably reel in non-bad faith filings. When that occurs, an

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[270] Doubtless, the industry would also frown on reduction of the look-back period from one-year to six months.

[271] *See supra* note 250 and accompanying text. It would also be mitigated by the ability of the court to dismiss with prejudice for a specified period of time in appropriate circumstances. *See supra* text accompanying note 249. Dismissals with prejudice and *in rem* orders work hand-in-hand by preventing the debtor from evading the restriction on refiling by transferring the property or an interest therein.

[272] *See supra* note 88.

[273] *See supra* Section IV.A.1.

[274] *See supra* note 20 and accompanying text.

[275] It bears reiterating that filing chapter 13 to stop an impending foreclosure is not *a fortiori* bad faith. Filing a chapter 13 case and utilizing the tools in chapter 13 to cure a mortgage, deal with other secured debts, or simply pay buy time to right the financial ship are all appropriate uses of the system even if the debtor has little prospect of confirming or completing a repayment plan. *See* Ponoroff, *supra* note 255, at 3 n.4 ("A chapter 13 case that stops an imminent foreclosure or provides some other temporary relief is not necessarily a failure just because plan payments are never completed or a discharge is never granted.").

equally serious concern arises, that of infringement on the public policies favoring the availability of bankruptcy to deal with the societal problems stemming from insolvency and financial distress. Obviously, then, the matter comes down to a question of balance, and there is no absolute "right" answer as to how much weight should be placed on one side of the scale or the other. However, for the reasons explained earlier, as in many other areas, BAPCPA overshot the mark due largely to the partisan nature of its enactment.[276] An additional criticism likely to be leveled at the overall proposal is that it places too much discretion, and I suppose trust, in the bankruptcy judge presiding over the case. BAPCPA was keen to limit judicial discretion.[277] But doing so comes at a cost; namely, the cost of experienced and professional judgment in the assessment of individual cases. Legislatures cannot anticipate every scenario that might arise.[278] Thus, when statutes are drafted to operate in a purely mechanical fashion, they will hit their intended mark from time-to-time, but there will also be some "civilian" casualties along the way. In short, blunt tools ought not be called on to perform delicate surgery, but BAPCPA went at bankruptcy reform with a meat cleaver.

This is not to suggest that judicial discretion is always applied prudently and, well, judiciously. Thus, the question devolves to a fairly subjective belief about where one places the greatest faith. There can be little doubt where my preference lies. However, I would also point out that a decision was made by Congress when the Code was adopted in 1978 that bankruptcy cases would be managed and overseen under a judicial system rather than pursuant to some form of administrative process.[279] That being the case, the system must be allowed to operate and perform as intended. Attempting to legislatively micromanage and preempt the work of bankruptcy judges with statutory tests and standards that

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[276] *See supra* Section II.A.

[277] Jack F. Williams, *Distrust: The Rhetoric and Reality of Means-Testing,* 7 AM. BANKR. INST. L. REV. 105, 108 (1999) (noting that those who favor means testing generally seek to restrict judicial discretion).

[278] *See supra* note 122.

[279] In the past, however, there have been attempts to convert the traditional judicial bankruptcy system into an administrative agency under the executive branch. In 1970, Congress created The Commission of the Bankruptcy Laws of the United States (the "Commission") with a mandate to "study, analyze, evaluate, and recommend changes" to the bankruptcy system. Act of July 24, 1970, Pub. L. No. 91-354, § 84 Stat. 468, 468 (1970). "The Proposed Bankruptcy Act of 1973," is commonly referred to as the "Commission Bill." H.R. 10792, 93rd Cong. (1973); S. 2565, 93d Cong. (1973). This bill sought to create an independent bankruptcy administration called the "U.S. Bankruptcy Administration" and to install an "Administrator," who would take over many of the traditional judicial functions. *Id.* Ultimately, Congress rejected the Commission Bill's approach as the basis for the Bankruptcy Reform Act of 1978 in favor of a draft bill prepared by the National Commission of Bankruptcy Judges. H.R. 16643, 93d Cong., (2d Sess. 1974); S. 4046, 93d Cong. (1974); *see* Adam M. Langley, David S. Kennedy, W. Homer Drake, *The Case for a Constitutional Bankruptcy Court*, 88 AM. BANKR. L.J. 515, 525 (2014); *see also* DAVID A. SKEEL, DEBT'S DOMINION 141–44 (2001) (describing this history).

leave little room to maneuver based on the facts and equities of the individual case represents the worst sort of compromise. That is not "judging," it is operating as a low-level functionary. Thus, unless there is a taste to revisit that decision made when the Code was enacted,[280] the relative roles of the legislature and the judiciary should be respected, and the former not get too far into the business of the latter.

CONCLUSION

Serial filings undertaken purely to frustrate state collection processes and without intent to carry through with the case are a problem, even if the full extent thereof is unknown. However, the response to that problem must be measured and calculated to minimize the damage to other systemic goals. BAPCPA seized on the stay as the principal weapon for controlling the phenomenon. Because of both the critical and multiple purposes served by the stay in the accomplishment of bankruptcy policies of equality, value maximization, and fresh start, I believe this was the wrong decision.

I have attempted to point out the reasons why any approach that embraces nondiscriminatory relinquishment of the stay is lamentably overbroad. I have also tried to highlight other tools available to creditors and the bankruptcy court to address the problem that can be used in lieu of or in conjunction with a more limited approach to lifting the stay.

Drawing on these tools, I have sought to put together the outlines of an alternative solution that should be nearly, if not, equally effective as the current approach in rooting out and minimizing the damage associated with abusive filings, but that also curtails the potential damage to other system goals. This solution excludes chapter 7 cases altogether in favor of new ground for objecting to discharge; shortens the look-back period covering repeat filings in rehabilitation proceedings; softens the debtor's burden of proof for continuing the stay; recognizes and clarifies the bankruptcy courts' authority to dismiss with prejudice and enter *in rem* orders affecting property; and places greater faith in

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[280] Doubtless in some quarters there is such a taste. *See* Lauren E. Tribble, Comment, *Judicial Discretion and the Bankruptcy Abuse Prevention Act*, 57 DUKE L.J. 789, 792 n.31 (2007) (explaining that BAPCPA reflected a distrust of bankruptcy judges' ability to properly exercise discretion so as to control bankruptcy abuses); *see also* Rafael I. Pardo, *Eliminating the Judicial Function in Consumer Bankruptcy*, 81 AM. BANKR. L.J. 471, 494 (2007) (suggesting that, after BAPCPA, the blurring of administrative and judicial functions might reverse the "repeatedly failed efforts to transform our consumer bankruptcy system into an administrative one resembling the English system."); *supra* note 118.

the case judge to ultimately determine whether any particular filing was indeed a deliberate ploy to achieve improper ulterior ends.

This approach is decidedly not submitted as a perfect solution; the search for one is a fruitless exercise. We could with 100 percent certainty eliminate all abusive or bad faith filings, repeat or otherwise, by repealing the Bankruptcy Code. Once it is acknowledged that this is not an option, some measure of gamesmanship must be tolerated as inevitable. While we strive to temper that prospect, we must also keep a keen eye on the collateral consequences of the scheme we select. In this analysis, BAPCPA's undisciplined capture of the automatic stay as the primary mechanism for regulating repeat filings compromised and asked too much of a concept and an instrument that plays such a potent and critical role in achieving the multifaceted social and economic goals of the bankruptcy regime.