Resituating the Automatic Stay within the Federal Common Law of Bankruptcy

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SITUATING REIMPOSITION OF THE AUTOMATIC STAY WITHIN THE FEDERAL COMMON LAW OF BANKRUPTCY

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INTRODUCTION

Many bankruptcy judges and practitioners make broad references to the equitable powers of bankruptcy courts. Bankruptcy courts, they exclaim, are “courts of equity” and so may do as “equity” requires. To the layman, and to many who are law-trained, “equity” denotes justice, fairness, and, more generally, those principles that demand recourse to the spirit of the law when the letter is harsh and unfeeling. The history of equity jurisprudence lends credence to this understanding, equity jurisdiction stemming from those instances when the Chancellor remedied certain harsh rulings of the courts of law. Indeed, the bankruptcy processes in England and the

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1 See Honorable Marcia S. Krieger, “The Bankruptcy Court Is a Court of Equity”: What Does That Mean?, 50 S. C. L. REV. 275, 275 n. 1 (1999) (remarking that “the frequency of reference to the bankruptcy court as a court of equity is second only to introductions, ‘May it please the Court’ or ‘Good morning (afternoon), Your Honor.’”; N.L.R.B. v. Bildisco and Bildisco, 465 U.S. 513, 527 (1984) (declaring that “[t]he Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities . . . ”).

2 Steven H. Nickles & David G. Epstein, Another Way of Thinking About Section 105(a) and Other Sources of Supplemental Law Under the Bankruptcy Code, 3 CHAP. L. REV. 7, 14 (2000).


4 See BLACK’S LAW DICTIONARY 272 (4th pocket ed.) (definition of “equity”). Of course, for many lawyers, the word “equity” first brings to mind equitable remedies such as the injunction. C. Scott Pryor, Third Time’s the Charm: The Coming Impact of the Restatement (Third) of Restitution and Unjust Enrichment in Bankruptcy, 40 PEPP. L. REV. 843, 846 (2013).

5 See Thomas O. Main, Traditional Equity and Contemporary Procedure, 78 WASH. L. REV. 429, 441-42 (2003) (writing that “[t]he Chancellor unrolled a vast body of legal principle that we know as “equity” to offer relief in those cases where, because of the technicality of procedure, defective methods of proof, and other shortcomings in the common law, there was no ‘plain, adequate and complete’ remedy otherwise available.”) (citing ROBERT WYNESS Millar, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 24 (1952) and JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA 22-26 (12th ed. 1877)).
United States embrace many procedures, rights, and remedies exercised by courts acting in equity.  

One often-cited source of bankruptcy courts’ apparently vast equitable and supplemental powers is § 105(a) of the Bankruptcy Code. Section 105(a) empowers bankruptcy courts to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of” the Code. Section 105(a) has been used to equitably toll limitations periods, surcharge exemptions, stay proceedings against third-party non-debtors, grant partial student loan discharges, and achieve other ends supported by one or another bankruptcy policy, but not the text of the Bankruptcy Code.

Along with the aforementioned, § 105 has been cited as the basis for re-imposing the Bankruptcy Code’s automatic stay once the stay has been terminated or otherwise modified. The automatic stay enjoins all collection activities pertaining to a debtor after he has filed a petition for bankruptcy. Section 362 provides for the imposition of the stay, its lifting, modification, and cancellation, and those times when it shall not be imposed. Nowhere in § 362, nor elsewhere in the Bankruptcy Code, however, is there a provision authorizing

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6 Krieger, supra note 1, at 295 (noting that equitable traditions inhere in many attributes of the modern American bankruptcy system, including the automatic stay and the bankruptcy administrative process).
8 Id. § 105(a).
12 Id. at 805-06.
14 See infra Part II.
16 Id.
17 Id. § 362(d), (e).
18 Id. § 362(b), (c).
reinstatement of the stay. Despite the lack of a textual foundation, however, bankruptcy courts have re-imposed the stay with gusto when they believe such action is warranted by their “broad” equitable powers under § 105(a).19

When courts reinstate the automatic stay, they generally do so for good reasons. Following a court’s lifting of the stay, the Chapter 13 debtor may find herself able to provide her secured creditor adequate protection of its collateral.20 The Chapter 11 corporate debtor, due to, for example, the disallowance of claims or the acquisition of additional resources, may propose a feasible plan for reorganization after the court has lifted the stay.21 Further, many times the stay lapses not due to any fault of the debtor’s, but due to the court’s or the debtor’s lawyer’s scheduling errors or tardiness.22 In these and other instances, re-imposition of the protections afforded by the automatic stay is consistent with the fundamental bankruptcy policy of ensuring the debtor is granted a fresh start23 post-bankruptcy. Section 105’s history, recent scholarship, and the Supreme Court’s recent decision in Law v. Siegel, however, highlight that section’s inability to serve as a vehicle for reinstating the stay. The question arises, then, whether bankruptcy courts are imbued with the authority to re-impose the automatic stay by another source of authority.

19 See, e.g., In re Whitaker, 341, 346-47 B.R. 336 (Bankr. S.D. Ga. 2006) (referring to “[t]he powers conferred by § 105(a)” as “unambiguously broad,” and finding that the court’s “only authority for reinstating the stay is to use the equitable powers conferred by § 105(a).”)
21 See id. § 1129(a)(11) (providing that a Chapter 11 plan may not be confirmed if “[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.”).
22 See id. § 362(e).
This Article argues, based on a well-researched 2006 article written by Professor Adam Levitin published in *The American Bankruptcy Law Journal*, that bankruptcy courts are able to reimpose the stay pursuant to their abilities to craft federal bankruptcy common law rules of decision. Part I briefly summarizes the automatic stay. Part II describes the circumstances in which courts are tasked with determining whether or not they may reinstate the stay, as well as the methods they use to reinstate. This Part explains that courts base reinstatement on § 105(a), but in doing so have devised a series of formulae that can be synthesized into a basic two-part test in the common law tradition. Part III details § 105’s history, including its broad application by courts in other areas on which the Bankruptcy Code is silent, and explains why the section’s history and its limitation by the Supreme Court in the *Law* decision renders it unavailable as a tool for reimposing the stay. Part III also discusses two arguments issued from the scholarly community that support the conclusion that § 105 is not an independent source of broad supplemental authority such that it may not be used to reimpose the stay. In Part IV, this Article discusses Levitin’s argument that bankruptcy courts may engage in federal common lawmaking. Part V accepts Levitin’s argument and argues that reimposition of the automatic stay pursuant to the general two-part test explained in Part II is simply an example of federal bankruptcy common lawmaking and is necessary if courts wish to continue protecting the debtor’s right to a fresh start.

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25 See infra Part V.
26 See infra Part I.
27 See infra Part II.
28 See id.
29 See infra Part III.
30 See id.
31 See infra Part IV.
32 See infra Part V.
I. THE AUTOMATIC STAY

The automatic stay is sourced in § 362(a) of the Code.\(^{33}\) The stay arises by operation of law – that is, automatically – upon the filing of a bankruptcy petition.\(^{34}\) Its sweep is broad, enjoining the commencement, continuance, or enforcement of judicial proceedings, attempts to create, perfect, or enforce liens, and other collection efforts.\(^{35}\) By its terms, the stay only operates against efforts to collect pre-petition debts, not debts incurred post-bankruptcy.\(^{36}\) It is even inoperable against certain pre-petition efforts, such as domestic support proceedings.\(^{37}\) Even so, § 362(a)’a proscription of most collection activities is beneficial to the debtor, affording him respite from financial pressure and the time necessary to propose an effective plan for reorganization or effect an orderly liquidation.\(^{38}\)

\(^{34}\) Id.
\(^{35}\) Section 362(a) states in full:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of –
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
> (4) any act to create, perfect, or enforce any lien against property of the estate;
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;
> (7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and
> (8) the commencement or continuation of a proceeding before the United States Tax Court concerning a tax liability of a debtor that is a corporation for a taxable period the bankruptcy court may determine or concerning the tax liability of a debtor who is an individual for a taxable period ending before the date of the order for relief under this title.

\(^{36}\) Id. § 362(a)(1)–(8).
\(^{37}\) See § 362(b)(1).
While automatic, the stay is not permanent. Unsecured creditors generally must endure § 362(a)’s prohibitions throughout the entire case. Secured creditors, however, may benefit from the modification or even termination of the automatic stay under certain circumstances. Section 362(d) states that, on motion, the court “shall” provide a secured creditor relief from the automatic stay, “such as by terminating, annulling, modifying, or conditioning” the stay “for cause, including the lack of adequate protection,” or because the debtor lacks equity in the collateral and such property “is not necessary to an effective reorganization.” The adequate protection requirement imposes on the debtor an obligation to safeguard her creditor’s interest in the collateral against loss. Adequate protection may be afforded, for example, by insuring collateral or granting the creditor a replacement lien. Even if the debtor adequately protects her secured creditor, however, the stay will be lifted or otherwise modified if she owes a sum in

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40 LOUCKI & WARREN, supra note 38, at 98.
42 Id. § 362(d)(1).
43 Id. § 362(d)(2)(A)–(B). The court may also grant relief from the stay as concerns security interests in single asset real estate, id. § 362(d)(3), and security interests in real property when the bankruptcy petition was filed as “part of a scheme to delay, hinder, or defraud creditors,” id. at § 362(d)(4).
44 See LOUCKI & WARREN, supra note 38, at 100 (7th ed. 2012).
45 See 11 U.S.C. § 361(2). Section 361 provides a non-exhaustive list of ways a debtor can adequately protect its secured creditor. It states in full:

When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by –

1. requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, use, sell, or lease under section 363 of this title, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity’s interest in such property;

2. providing to such entity an additional or replacement lien to the extent that such stay, use, sale, lease, or grant results in a decrease in the value of such entity’s interest in such property;

3. granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity’s interest in such property.

Id. § 361(1)–(3).
excess of the value of the collateral (i.e., she has no equity in the collateral) and her reorganization is not dependent on her retention of the property.\textsuperscript{46}

A motion under § 362(d) is not the secured creditor’s only avenue for relief from the stay. The Bankruptcy Code also provides that the stay may be shortened in certain situations. The 2005 amendments to the Bankruptcy Code\textsuperscript{47} added a new subparagraph to § 362(c) – subparagraph (3).\textsuperscript{48} Subparagraph (3) states that, if a debtor files a petition for bankruptcy relief within one year of the dismissal of a prior case, “the stay . . . shall terminate with respect to the debtor” within thirty days of the filing of the present case.\textsuperscript{49} The debtor may move to extend the stay before the thirty-day period expires; however, to do so successfully, he must demonstrate that he filed the instant case in good faith.\textsuperscript{50}

Section 362 contains one last avenue of relief from the automatic stay. Under § 362(e),\textsuperscript{51} the stay is terminated by operation of law if a final hearing on a motion for relief is not timely held. Subsection (e) obliges the court to hold a hearing within thirty days of the filing of a § 362(d) motion.\textsuperscript{52} The hearing may be a final or preliminary hearing. If a preliminary hearing, and the court finds “there is a reasonable likelihood that the party opposing relief . . . will prevail at the conclusion” of a final hearing, the court must order the stay continued pending a final hearing.\textsuperscript{53}

\begin{itemize}
  \item \textsuperscript{46}Id. § 362(d)(2).
  \item \textsuperscript{48}11 U.S.C. § 362(c)(3), (4). BAPCPA also added subparagraph (4). See id. § 362(c)(4). Subparagraph (4) states that the stay shall not go into effect if the debtor filed and had dismissed within the previous year two or more cases. Id. § 362(c)(4)(A)(i). The debtor can effect imposition of the stay within thirty days of the filing of the present case by motion if, as in the subparagraph (3) context, he successfully demonstrates good faith. Id. § 362(c)(4)(B). Bad faith will be presumed in certain instances. Id. § 362(c)(D).
  \item \textsuperscript{49}Id. § 362(c)(3)(A). Subparagraph (3) does not apply when the previous case was dismissed pursuant to § 707(b). Id. § 362(c)(3).
  \item \textsuperscript{50}Id. § 362(c)(3)(B). In certain instances, bad faith will be presumed. Id. § 362(c)(3)(C).
  \item \textsuperscript{51}Id. § 362(e).
  \item \textsuperscript{52}Wedgewood Investment Fund, Ltd. v. Wedgewood Realty Group, Ltd. (In re Wedgewood Realty Group, Ltd.), 878 F.2d 693, 697 (3d Cir. 1989).
  \item \textsuperscript{53}Id. § 362(e)(1); Wedgewood, 878 F.2d at 697.
\end{itemize}
The final hearing must then be held within thirty days.\textsuperscript{54} If § 362(e)’s strict statutory schedule is not followed, whether due to inadvertence or neglect by the debtor, the debtor’s lawyer, or the court, the stay will extinguish.

Once the automatic stay is terminated, the creditor may pursue state collection remedies to realize on its interest in the debtor’s property, including repossession and liquidation.\textsuperscript{55} Sometimes, however, a debtor’s financial situation changes such that, for example, subsequent to the lifting of the stay, she is able to make timely payments under her Chapter 13 plan sufficient to provide her creditor adequate protection. Or, a debtor may have the funds available to propose a feasible reorganization but is deprived of his house, car, or other property regardless because the court failed to timely schedule a preliminary hearing. In these and like situations, debtors, quite naturally, seek to halt the creditor’s collection efforts. One way sought is through reimposition\textsuperscript{56} of the stay under § 105(a).\textsuperscript{57}

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\textsuperscript{54} 11 U.S.C. § 362(e)(1).
\textsuperscript{55} See, e.g., U.C.C. § 9-609(a)(1) (a secured creditor “may take possession of the collateral” after default); id. § 9-610(a) (“After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.”).
\textsuperscript{56} Not all courts adhere to the “reimposition” or “reinstatement” terminology used in this Article. Some courts believe that, as humorously written by Judge Randall Dunn of the U.S. Bankruptcy Court for the District of Oregon, “once the automatic stay of § 362 has been lifted, like Humpty Dumpty, it cannot be ‘put back together again’ or reinstated.” In re Wishon, 410 B.R. 295, 307 (Bankr. D. Or. 2009). This sentiment, however, is less about substance than form. After invoking the symbolism of Humpty Dumpty and his “great fall,” Judge Dunn cited the Ninth Circuit’s opinion in Andreiu v. Reno, 223 F.3d 1111 (9th Cir. 2000), in which the court wrote in a footnote that “the bankruptcy automatic stay is differentiated from a bankruptcy court-ordered injunction, which issues under 11 U.S.C. § 105.” Id. at 1121 n.4; see Wishon, 410 B.R. at 307 (citing Canter v. Canter (In re Canter), 299 F.3d 1150, 1155 n.1 (9th Cir. 2002) (quoting Andreiu, 223 F.3d at 1121 n.4)). Instead of reimposing the automatic stay under § 105, Judge Dunn and like-minded jurists preliminarily enjoined collection activities under § 105, or, as stated by Judge Dunn: “[O]nce the § 362 stay has been lifted, that is not necessarily the end of the game – the debtor can seek injunctive relief pursuant to the bankruptcy court’s authority under § 105(a).” Wishon, 410 B.R. at 307 (footnote omitted). Enjoining creditor action has the same effect as staying it. Both remedies are allegedly authorized by § 105, and both are predicated on the satisfaction of the necessary prerequisites for injunctive relief. See infra Part III. Therefore, while Judge Dunn and other judges believe that reimposition is impossible, they, like courts that refer to their actions as reimposing or reinstating (or some other synonym) the stay, believe that the debtor can receive the benefits of the once-lifted automatic stay through proper application of § 105.
\textsuperscript{57} It should be noted that § 105(a) is not the only vehicle through which courts are able to reverse previous orders lifting the automatic stay. Federal Rules of Bankruptcy Procedure 9023 and 9024 authorize the modification or revocation of final judgments or orders, including orders modifying the stay. Rule 9023, which incorporates into contested bankruptcy proceedings Federal Rule of Civil Procedure 59, authorizes the filing of a motion to reconsider
II. REIMPOSITION OF THE AUTOMATIC STAY

Section 105(a) states, in relevant part, that “[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.” It is the statutory basis for a wide-range of judicial actions. In the reimposition context, courts have crafted rules based on § 105’s broad language that delineate the basis for reinstating the once-terminated automatic stay. Although variously articulated, the rules can be distilled into a simple two-part test consisting of the standard for preliminary injunctive relief and the consideration of general equitable considerations. A few examples will demonstrate the variety of articulation and application of this test and, accordingly, its general framework.

In Wedgewood Investment Fund, Ltd. v. Wedgewood Realty Group, Ltd. (In re Wedgewood), the Third Circuit Court of Appeals held that bankruptcy courts may, under § 105(a), reimpose the automatic stay after it extinguishes pursuant to § 362(e). Wedgewood

a final order to effectuate the order’s alteration or amendment. FED. R. BANKR. P. 9023; see In re Oak Brook Apartments of Henrico County, Ltd., 126 B.R. 535, 536 (Bankr. S.D. Ohio 1991) (“Motions filed under [Bankruptcy Rule 9023 and Rule 59(e) (Rule 59(c) at the time of this decision)] are properly characterized as motions for reconsideration”).

Rule 9024 incorporates Rule 60 of the Federal Rules of Civil Procedure into contested matters. Rule 60(b) provides six bases for which the court may vacate a final order or judgment, including the opened-ended “any reason that justifies relief.” FED. R. CIV. P. 60(b)(6). Rule 60(b) states in full:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

Many debtors, however, fail to meet the rules’ temporal requirements, or to prove a basis for vacating under the rules. Further, for Rules 9023 or 9024 to operate, there must be a prior order or judgment. If the automatic stay terminates by operation of law, no such order was issued. In such instances, many debtors seek relief under § 105(a).

59 See infra Part xx.
60 878 F.2d 693 (3d Cir. 1989).
61 Id. at 701.
Realty Group filed a Chapter 11 petition the day before a foreclosure hearing brought by its lender was scheduled to be heard. The lender filed a motion in the bankruptcy case to lift the automatic stay so that it could continue with the foreclosure action in state court. The bankruptcy court denied the lender’s motion; however, in doing so it dragged its feet, issuing its decision well outside § 362(e)’s statutory schedule. On appeal, the district court affirmed.

The Third Circuit reversed, holding that the automatic stay had extinguished due to the bankruptcy court’s failure to comply with § 362(e)’s strict temporal requirements. The debtor argued, however, that even if the automatic stay had lapsed, the court was authorized to reimpose the stay under § 105(a). The Third Circuit agreed, determining that § 105’s “equitable provisions” grant courts the ability to enjoin activities even after the stay has lapsed. Unfortunately for the debtor, however, it did not satisfy the rule of decision crafted by the Third Circuit.

Section 105(a)’s text does not state the prerequisites for its application. The Third Circuit, therefore, took it upon itself to state the preconditions for § 105 relief, basing reimposition on two requirements. First, the court held that the debtor must establish the traditional standard for preliminary injunctive relief. To establish that standard, the party seeking relief must

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62 Id. at 695.
63 [Procedural History].
64 Id. at 698.
65 Id. at 696.
66 Id. 696-99, 702.
67 Id. at 699.
68 Id. 700-01.
69 Id. at 699-702.
70 Wedgewood, 878 F.2d at 701. In so far as the preliminary injunction test requires the party seeking equitable relief establish that the “equities,” or the balance of hardships, tip in his favor, the second prong of the test is arguably redundant. However, given courts’ insistence on separating the two prongs, it appears that the second prong is expansive, covering the hardship to be experienced by the debtor, the existence of any changed circumstances, and the extent to which the debtor acted in good faith.
71 The injunction is a traditional equitable remedy. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982). It is, put simply, a court order that commands a party to do or not do something. DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 209 (4th ed. 2012) (concise ed.). Courts grant preliminary
demonstrate: (1) substantial likelihood of success on the merits; (2) irreparable harm if preliminary relief is not granted; (3) harm to the party seeking relief outweighs the harm to the opposing party; and (4) the relief sought would not violate the public interest. This four-part inquiry does not stem from statute but, rather, is a venerable judge-made test based on traditional equitable principles.

It is not enough, however, that a debtor meet the standard for preliminary injunctive relief. The Wedgewood court also ruled that reimposition under § 105 is only permitted if such a remedy is supported by “the equities.” The equities of a case will tip in the debtor’s favor, and thus support reimposition, when the court’s inadvertence causes non-adherence to § 362(e)’s statutory schedule, but not when the debtor’s own conduct resulted in the court failing to hold a timely hearing, nor “when the equities are neither manifest nor no longer present.” The second requirement, therefore, rests on the assumption that § 105 authorizes “the court to do equity where the debtor is not at fault and the circumstances justify relief.”

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injunctions to preserve the status quo until a final hearing on the availability of a permanent injunction can be held. See John Leubsdorf, The Standard for Preliminary Injunctions, 91 HARV. L. REV. 525, 534-35 (1978).

72 Wedgewood, 878 F.2d at 700-01.

73 11A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2941 (3d ed. 2014). The Supreme Court recently formulated the test thusly:

A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.


The Wedgewood court implicated Rule 65 of the Federal Rules of Civil Procedure as the source for this standard. Rule 65, except for, in certain situations, subsection (c), is incorporated into bankruptcy adversary proceedings by Rule 7065 of the Federal Rules of Bankruptcy Procedure. See FED. R. BANKR. P. 7065. It is true that Rule 65(a) establishes the procedural requirements for the granting of a preliminary injunction in federal civil actions; however, the rule nowhere mentions the substantive test for the granting of a preliminary injunction. See FED. R. CIV. P. 65(a). This is proper in light of the fact that the Federal Rules of Civil Procedure may not modify substantive rights. See 28 U.S.C. § 2072(b).

74 Wedgewood, 878 F.2d at 701.

75 Id.

76 Id.
Courts in the § 362(c)(3) context have adopted frameworks akin to the test applied in *Wedgewood*. In *In re Whitaker*, the debtors moved to extend the automatic stay twenty-seven days after filing their second Chapter 13 case in less than one year. After each interested party was given notice and a hearing was finally scheduled, fifty-four days had passed since the debtors filed their petition. Pursuant to § 362(c)(3), the automatic stay terminated after the thirtieth day. With no other options available, the debtors moved to reimpose the stay.

Acknowledging that the automatic stay had extinguished, the bankruptcy court concluded that it could nonetheless be reimposed pursuant to “the equitable powers conferred by § 105(a).” Unlike in *Wedgewood*, however, the *Whitaker* court actually ordered the stay reimposed. The court’s decision was based on the debtors’ satisfaction of the test for injunctive relief, and its finding that the debtors had acted in good faith and only failed to effect the extension of the stay because their lawyer did not timely file the motion to extend – i.e., because the equities weighed in the debtors’ favor.

Similar frameworks have been applied by courts in the § 362(d) context. In *Smith v. CITIFED (In re Smith)*, for example, not only did the bankruptcy court determine that reimposition of the stay under § 105(a) must be predicated on the debtor’s satisfaction of the preliminary injunction test, but it also concluded that reimposition is only proper “when all of the

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78 *Id.* at 340.
79 *Id.*
80 *Id.* at 342.
81 Because there was no order to reconsider or vacate, the debtors could not seek relief pursuant to Federal Rules of Bankruptcy Procedure 9023 or 9024. See supra note 57.
82 While most courts condition reimposing the automatic stay on the debtor’s filing of an adversary proceeding, the Tenth Circuit held that the stay’s reinstatement could be predicated on the filing of a Rule 60(b) motion. *State Bank of Southern Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1077-80 (10th Cir. 1996).
83 *Whitaker*, 341 B.R. at 346.
84 *Id.* at 347.
85 *Id.* at 348 (citing *Wedgewood*, 878 F.2d at 701).
86 The court also considered that all interested parties received notice and did not object or otherwise respond. *Id.* at 347.
equities are in the proper constellation.”88 Whether the case’s equities are in the proper constellation depends on two “important general equitable considerations”: “(1) the manner in which relief from the automatic stay was granted in the first place; and (2) the timeliness of the request for relief.”89 Similarly, the court in In re Salzer90 predicated reimposition under § 105 on the debtor’s establishment of the preliminary injunction standard and “proof of a substantial change in circumstances.”91

The aforementioned cases demonstrate that courts have devised, using varying language, a two-part test in the common law tradition that must be satisfied before the automatic stay may be reinstated. This test provides that reimposition is available pursuant to § 105(a) if (1) the debtor satisfies the preliminary injunction test, and (2) the equities tip in the debtor’s favor. The test allows courts to prevent the creation of harsh obstacles to the debtor’s fresh start when fairness so dictates and is based on a provision of the Bankruptcy Code that has long been relied on as a source of broad equitable powers. Unfortunately, § 105(a) provides a limited grant of power that does not authorize reimposition.

III. THE LIMITS OF SECTION 105(a)

Under normal circumstances, the automatic stay’s termination can be devastating to the debtor. When the debtor’s financial situation has changed for the better or the stay’s termination was the fault of a third party or the court, termination can smack not only of devastation, but of fundamental unfairness. The judicial solution – reinstating the stay under § 105(a) – is admirable; reinstatement in such instances is necessary to promote the fundamental bankruptcy

88 Id. at 105-06.
89 Id. at 105. The court fleshed out the “equitable considerations” somewhat, holding that, as to the first consideration, where the court is fully briefed on the matter and issues a written opinion, only “a substantial change of circumstances” will warrant reimposition. Id. As to the second consideration, the court held that a complaint seeking reimposition of the stay filed at the last-minute indicates that the equities are not properly positioned. Id.
91 Id. at *4. See also In re Twenver, Inc., 149 B.R. 950 (D. Colo., 1993).
policy of ensuring the debtor’s fresh start. Moreover, basing reimposition on § 105(a) appears perfectly reasonable given the propensity of courts to ground many other rules and remedies unspecified in the Bankruptcy Code on that seemingly open-ended provision. History, scholarly commentary, and a recent Supreme Court decision, however, cast a shadow over § 105’s validity as a vehicle to reimpose the stay.

A. History and Application of § 105(a)

Before explaining why reimposing the automatic stay under § 105 constitutes an abuse of that provision, this subpart provides a history of § 105’s and an overview of its broad application.92

1. History of § 105(a)

Prior to the adoption of the Bankruptcy Code,93 United States bankruptcy law was governed by the Bankruptcy Act of 1898.94 Section 105(a) replaced section 2a(15) of the Act.95 Section 2a(15) was textually similar to § 105(a), authorizing courts to “[m]ake such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this Act.”96 Section 2a(15) was merely an enforcement provision designed to replicate the All Writs Act97 in the bankruptcy arena.98 Another statutory provision, however, authorized courts of bankruptcy to issue remedies and rules of decision governing factual circumstances not covered by the Act.

The introductory paragraph to section 2a broadly defined bankruptcy jurisdiction, stating:

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92 See infra Part III.A.1—2.
94 Ch. 541, 29 Stat. 544.
96 Id.
The courts of the United States hereinbefore defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held . . . .

In Pepper v. Litton, the Supreme Court held that section 2a’s introductory paragraph rendered the bankruptcy court “a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the [Bankruptcy] Act, it applies the principles and rules of equity jurisprudence.” The Court wrote that the equitable powers conferred by section 2a “have been invoked to the end that fraud will not prevail, that substance will not give way to form, that technical considerations will not prevent substantial justice from being done.” The Supreme Court thus interpreted section 2a’s introductory paragraph – but not subparagraph (15) – to authorize the achievement of “substantial justice” even when no statutory provision authorized such a result.

With the passage of the Bankruptcy Reform Act of 1978, the Bankruptcy Act was repealed and replaced with the Bankruptcy Code. The 1978 legislation was an ambitious project. Bankruptcy jurisdiction, until then exercised by district courts, was vested in newly formed bankruptcy courts presided over by bankruptcy judges. Pursuant to 28 U.S.C. § 1471(b), Congress vested bankruptcy courts with broad jurisdiction over “civil proceedings arising

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100 308 U.S. 295 (1939).
101 Id. at 304.
102 Id. at 304-05.
under [the Bankruptcy Code] or arising in or related to cases under [the Bankruptcy Code].”

The 1978 Act also ensured that the new bankruptcy courts would have substantive powers requisite to meet their new expansive jurisdiction. While section 2a was repealed along with the rest of the 1898 Act, Congress replaced that section with an equally expansive statutory grant of open-ended powers: 28 U.S.C. § 1481. Section 1481 provided that “[a] bankruptcy court shall have the powers of a court of equity, law, and admiralty.” As explained by one court, § 1481 “grant[ed] the bankruptcy court sweeping authority to tailor its orders to meet the needs of bankruptcy proceedings.”

As mentioned above, section 2a(15) was the bankruptcy version of the All Writs Act. The All Writs Act, currently located in 28 U.S.C. § 1651, states that “[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” This provision did not apply to bankruptcy courts under the 1898 Act. Under the 1978 legislation, however, the All Writs Act was to be made applicable to the newly formed bankruptcy courts through an amendment to the definition of “courts” in 28 U.S.C. § 451. Section 105(a), replacing section 2a(15), gave bankruptcy courts additional authority to enforce their judgments in bankruptcy-unique situations.

105 Id. § 1471(b) (1978) (repealed).
106 Id. § 1481 (repealed 1984); Levitin, supra note 24, at 27.
109 Agin, supra note 98.
110 28 U.S.C. § 1651(a). The Supreme Court has held that “[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute.” Pennsylvania Bureau of Correction v. United States Marshals Service, 474 U.S. 34, 43 (1985). The Court noted, however, that, “[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling.” Id.
111 Agin, supra note, at 98.
112 Id.
113 Id. The legislative history to the 1978 Act states that “the courts are brought within the terms of the All Writs Statute. They are given the power to ‘issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of’ proposed title 11. The proposed bankruptcy courts will be able to enforce their own orders,
The Supreme Court struck down Congress’s expansion of bankruptcy court power in 1982 in Northern Pipeline Construction Co. v. Marathon Pipe Line Co, holding that 28 U.S.C. § 1471’s broad jurisdictional grant violated Article III of the U.S. Constitution by vesting “most, if not all, of ‘the essential attributes of the judicial power’” in non-Article III courts. The Court stayed its decision to give Congress time to cure the 1978 Act’s constitutional frailties. Congress responded in 1984 with the passage of the Bankruptcy Amendments and Federal Judgeship Act (BAFJA). Congress could have bestowed Article III status upon bankruptcy judges. Instead, opting to retain their non-Article III status, Congress limited bankruptcy courts’ jurisdiction by replacing 28 U.S.C. § 1471(b) with a limited jurisdictional grant that provides district courts “original and exclusive jurisdiction of all cases under” the Bankruptcy Code, allowing them to refer cases “arising under” or “arising in or related to” the Bankruptcy Code to bankruptcy judges.

and to issue writs of execution in aid of enforcement.” H.R. Rep. 95-595, 95th Cong., 1st Sess. (1978), at 12 (citations omitted). In this regard, § 105(a) was largely redundant. Nichols & Epstein, supra note xx, at xx. The House Report stated:

Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651, under which the new bankruptcy courts are brought by an amendment to 28 U.S.C. 451. HR 8200 § 213. The section is repeated here for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.


Id. at 87 (plurality) (quoting Crowell v. Benson, 285 U.S. 22, 51 (1932)).

Id. at 88 (plurality).


Id. § 157(a). Upon being referred the authority to entertain bankruptcy cases, bankruptcy judges are authorized to enter final orders and judgments in so-called “core” proceedings – those cases that concern “the restructuring of debtor-creditor relations.” Marathon, 458 U.S. at 71 (plurality) (writing that “the restructuring of debtor-creditor relations . . . is at the core of the federal bankruptcy power”); 28 U.S.C. § 157(b)(1). Section 157(b)(2) contains a non-exhaustive list of core proceedings. Id. § 157(b)(2). This list was partially abrogated in Stern v. Marshall, 131 S.Ct. 2594 (2011). In non-core proceedings, bankruptcy judges may only submit proposed findings of fact and conclusions of law absent the consent of the parties. 28 U.S.C. § 157(c)(1). Such findings and conclusions are reviewable by the district court de novo. Id.
Significantly, in enacting BAFJA, Congress refused to re-authorize 28 U.S.C. § 1481, the source of bankruptcy courts’ broad equitable powers. Further, the amendment to § 451 never went into place prior to BAFJA’s restructuring of the bankruptcy courts. Without the broad jurisdictional and substantive powers conferred by §§ 1471 and 1481 and the enforcement powers of the All Writs Act, the only statutory provision that arguably bestows upon bankruptcy courts supplemental powers is, therefore, § 105(a).

2. Application of § 105(a)

Courts apply § 105(a) in innumerable factual scenarios and for seemingly equally innumerable uses. Its authorization to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of” the Bankruptcy Code has been used, as one bankruptcy judge explains, to enlist “the aid of judicial authority whenever the Bankruptcy Code does not expressly address a particular situation.” Thus, it has been cited in support of the imposition of traditional enforcement mechanisms and remedies, such as sanctions for contemptuous behavior and injunctive relief. Section 105(a), however, has also been used in less innocuous manners, such as when courts cite to the statute in support of conditioning the Chapter 13 debtor’s right to dismiss on good faith, equitably tolling limitations periods.

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120 Levitin, supra note 24, at 28.
121 Agin, supra note 98.
124 See Placid Refining Co. v. Terrebonne Fuel and Lube, Inc. (In re Terrebonne Fuel and Lube, Inc.), 108 F.3d 609, 613 (5th Cir. 1997); Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC, 474 B.R. 76, 84-5 (S.D. N.Y. 2012). Such uses are not without controversy. See, e.g., Leal, supra 123 at 509 (discussing conflicting case law over the bankruptcy court’s authority to issue civil contempt orders). The Supreme Court’s invalidation of 28 U.S.C. § 1471 in Marathon and Congress’s refusal to re-authorize 28 U.S.C. § 1481 has deprived bankruptcy courts both of general jurisdiction at equity, as well as the substantive authority to apply equitable powers (except where authorized in specific Bankruptcy Code provisions). See infra Part III.B. This calls into question § 105’s use as a source of injunctive and other extraordinary relief.
surcharging exemptions,\textsuperscript{126} staying proceedings against third-party non-debtors,\textsuperscript{127} granting partial student loan discharges,\textsuperscript{128} and, the focus of this Article, reimposing the automatic stay.

The extent to which courts stretch the bounds of § 105 is well illustrated by a few examples. One example is in the Chapter 13 context. Section 1307(b) of the Code\textsuperscript{129} states:

On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.\textsuperscript{130}

Courts are currently split as to whether this provision grants the Chapter 13 debtor an absolute right to dismiss a previously unconverted case.\textsuperscript{131} A large minority of courts hold that § 1307(b) is qualified by a bad faith exception.\textsuperscript{132} Section 1307(b)’s text obviously contains no such exception; however, courts feel the need to impose a good faith requirement in order to correct abuses of the bankruptcy system and prevent the bad faith debtor from dismissing her Chapter 13 case before the court or an interested party can successfully convert it to a Chapter 7 liquidation.\textsuperscript{133} Courts locate such an exception in, among other sources,\textsuperscript{134} § 105(a).\textsuperscript{135}

\textsuperscript{126} In re Scrivner, 370 B.R. 346, 351-55 (10th Cir. BAP 2007), rev’d, 535 F.3d 1258 (10th Cir. 2008). See supra note 10 (noting that the Supreme Court recently held this procedure a violative application of courts’ inherent powers and § 105(a) in Law v. Siegel, 134 S.Ct. 1188 (2014)).
\textsuperscript{127} Bogart, supra note 11, at 807-10.
\textsuperscript{128} Id. at 805-06.
\textsuperscript{129} 11 U.S.C. § 1307(b).
\textsuperscript{130} Id.
\textsuperscript{131} See Sheffner, supra note 10.
\textsuperscript{132} Id.
\textsuperscript{133} See, e.g., Molitor v. Eidson (In re Eidson), 76 F.3d 218 (8th Cir. 1996); 11 U.S.C. § 1307(c). Section 1307(c) of the Code allows conversion under certain situations. It states:

Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including –

(1) unreasonable delay by the debtor that is prejudicial to creditors;
(2) nonpayment of any fees and charges required under chapter 123 of title 28;
(3) failure to file a plan timely under section 1321 of this title;
(4) failure to commence making timely payments under section 1326 of this title;
(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;
(6) material default by the debtor with respect to a term of a confirmed plan;
Another example involves the concept of the partial discharge of student loan debt. Student loans are not dischargeable in bankruptcy unless excepting them from discharge would “impose an undue hardship.”\[136\] The Code makes no reference to the discharge of a *portion* of a debtor’s student loan debt. Nonetheless, many bankruptcy courts allow just that. For example, in *In re Hornsby*,\[137\] the Sixth Circuit disagreed that the absence of a specific provision authorizing partial discharge should serve to prevent such a remedy, opining that “where facts and circumstances require intervention in the financial burden on the debtor, an all-or-nothing treatment thwarts the purpose of the [Code].”\[138\] Such intervention is authorized “pursuant to [the bankruptcy court’s] powers codified in § 105(a).”\[139\]

One last example concerns the application of the automatic stay to non-debtor third parties. Section 362(a) refers to the “debtor” and “property of the estate,” but not to other individuals or entities.\[140\] Nonetheless, many courts apply the automatic stay to third parties in “unusual circumstances.”\[141\] Such third parties may be corporate insiders or family members serving as

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(7) revocation of the order of confirmation under section 1330 of this title, and denial of confirmation of a modified plan under section 1329 of this title;  
(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;  
(9) only on request of the United States trustee, failure of the debtor to file, within fifteen days, or such additional time as the court may allow, after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a);  
(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521(a); or  
(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.


Courts also source the bad faith exception to the Chapter 13 debtor’s absolute right to dismiss in § 1307(c), the courts’ inherent powers, and policy. See Sheffner, *supra* note 10.

\[135\] See, e.g., Jacobsen v. Moser (*In re Jacobsen*), 609 F.3d 647 (5th Cir. 2010).


\[137\] 144 F.3d 433 (6th Cir. 1998).

\[138\] *Id.* at 439.

\[139\] *Id.* at 440.


guarantors on a debtor’s obligations. No matter who or what they are, such parties are not mentioned in § 362(a). Nonetheless, courts have determined that the stay applies to them “under [the bankruptcy court’s] equity jurisdiction pursuant to 11 U.S.C. § 105(a).”

These examples seem to indicate that basing reinstatement on § 105(a) is not only unremarkable, but correct. Unfortunately, § 105(a)’s history, recent scholarship, and the Supreme Court’s decision in *Law v. Siegel* indicate that § 105(a) is neither a fount of equitable powers, nor an independent source of supplemental power in its own right, and so may not be used as a vehicle to achieve the above ends, much less reimposition of the automatic stay,

**B. Section 105(a) Does Not Authorize Reimposition of the Automatic Stay**

Bankruptcy law is predominately statutory. Article I, § 8, clause 4 of the United States Constitution grants Congress the authority “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.” Since 1898, Congress has exercised its bankruptcy power through the establishment of a comprehensive statutory scheme that, along with applicable state and other federal laws, governs every aspect of bankruptcy law in the United States. The current statutory scheme, contained in the Bankruptcy Code and complemented by the Federal Rules of Bankruptcy Procedure, meticulously details the bankruptcy process from the filing of the bankruptcy petition to the debtor’s discharge, and

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142 *Id.* at 808-09.
144 *U.S. CONST.*, art. I, § 8, cl. 4.
governs the various administrative tasks,^{149} contested matters,^{150} and adversary proceedings^{151} that fill the bankruptcy courts’ dockets.

Most courts believe that § 105 authorizes reimposition due to its alleged grant of equitable powers. The bankruptcy court, however, is a statutory court, not a court of equity; any equitable powers belonging to the bankruptcy court are those granted by statute. The Bankruptcy Code leaves many matters up to the judge’s discretion^{152} and even mandates, in some sections, the application of flexibility and a consideration of the competing equities by the bankruptcy court.^{153} Section 105(a) does imbue courts with the discretion to issue necessary or appropriate orders to fulfill the mandates of the Code; however, it is not one of those sections that explicitly authorizes the application of open-ended equitable principles. Section 105(a) replaced section 2a(15) of the Bankruptcy Act.^{154} 28 U.S.C. § 1481 replaced the broad grant of equitable authority contained in the introductory paragraph to section 2a of the Act.^{155} Upon Congress’s failure to reauthorize § 1481,^{156} the bankruptcy courts lost any general equitable powers.^{157} Judicial reliance on § 105(a)’s “broad equitable powers” to reinstate the stay, then, is misplaced.

Because the bankruptcy court no longer benefits from a broad grant of powers in equity, § 105(a) cannot be used to wield equitable powers not provided for in the Bankruptcy Code. Section 105(a) is also not an independent, supplemental source of power amenable to use as a vehicle for reimposing the stay. Two recent articles, one by Professors Steven Nickles and David

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^{150} See FED. R. BANKR. P. Part IX.
^{151} See FED. R. BANKR. P. Part VII.
^{152} See, e.g., 11 U.S.C. §§ 362(d) (whether to lift the automatic stay), 506(a) (claim valuation), 1307(c) (conversion or dismissal of a Chapter 13 case).
^{153} See Levitin, supra note 24, at 19-20 & nn 99-103 (citing the Bankruptcy Code sections that require the application of equitable considerations).
^{154} See supra Part I.A.
^{155} See id.
^{156} See id.
^{157} See Levitin, supra note 24, at 30.
Epstein, the other by Professor Daniel Bogart, support this conclusion. In the Nickles and Epstein piece, the authors argue that interpreting § 105(a) as a source of supplemental authority enabling courts to issues rules not provided for by the Code engenders separation of powers concerns.

The issue is whether the court’s decision is necessary to a fairly specific and certain statutory intention that drives and guides the judge’s decision making and her related actions. It is not enough, for separation of powers, that the court’s decision is compatible with relatively undefined or general legislative purposes, not even when these general purposes are clearly and forcefully expressed.

If partial student loan discharges, extra-statutory bad faith exceptions, reimposed stays, and other ends achieved by application of § 105 “are too much of a legislatively projected reach from [§ 105] to the [judicial] decision,” Nickles and Epstein speculate that the achievement of such ends may be unconstitutional. Therefore, given that § 105(a) authorizes orders that “carry out the provisions of this title,” not the Code’s policies or purposes, the lack of any explicit statutory directive allowing reimposition likely renders reimposition under § 105(a) violative of the Constitution.

In the Bogart article, Professor Bogart laments § 105’s overbroad application and argues that courts should instead model their interpretation and application of that section on judicial treatment of the All Writs Act. Recall that § 105(a) was created to supplement the All Writs Act, which at one time was intended to be made applicable in bankruptcy. Bogart argues that modern judicial treatment of the All Writs Act is typified by a level of constraint and strict

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158 Nickles & Epstein, supra note 2.
159 Bogart, supra note 11.
160 Nickles & Epstein, supra note 2, at 18.
161 Id. at 19.
162 Id.
163 11 U.S.C. § 105(a) (emphasis added); Nickles & Epstein, supra note 2, at 18.
164 Bogart, supra note 11, at 830.
165 See supra Part III.A.1.
construction that is appropriate for a limited statutory grant such as § 105(a). Additionally, Bogart urges equating § 105 with the Necessary and Proper Clause of the U.S. Constitution, which, stating that Congress is authorized “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its express powers, serves a similar gap-filling function as § 105(a) was intended to serve vis-à-vis the All Writs Act. Equating these two provisions would render Chief Justice Marshall’s limitation of the Necessary and Proper Clause in *M’Culloch v. Maryland* applicable in the § 105(a) context. In *M’Culloch*, although Justice Marshall gave the Clause a broad construction, he also included the following important limitation:

> Should congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say, that such an act was not the law of the land.

Applying this limitation to the § 105 context, Bogart writes that “although it may not be a bankruptcy court’s desire, it is the court’s duty to reject attempts to use section 105 of the Code in a manner that circumvents other express provisions of the Code.”

That § 105(a) may not be used, as a grant of equitable power, or serve as independent source of supplemental power, allowing it to be used to reimpose the stay is also implied by the Supreme Court’s recent decision in *Law v. Siegel*. In *Law*, the Court held that a debtor’s homestead exemption could not be applied to attorneys’ fees incurred by the bankruptcy trustee.

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166 *Id.* at 832-32.
167 U.S. CONST. art. I., § 8, cl. 18.
168 *Id.*
169 Bogart, *supra* note 11, at 844-45.
171 Bogart, *supra* note 11, at 797.
173 Bogart, *supra* note 11, at 871.
on account of the debtor’s bad faith. Before Law, many courts held that a debtor’s exemptions were so liable under § 105, notwithstanding the fact that § 522(k) of the Code shields exemptions from liability for administrative expenses. In Law, the Court abrogated this line of decisions in unequivocal terms, stating:

It is hornbook law that § 105(a) does not allow bankruptcy courts to override explicit mandates of other sections of the Bankruptcy Code. Section 105(a) confers authority to carry out the provisions of the Code, but it is quite impossible to do that by taking action that the Code prohibits . . . . Courts’ inherent sanctioning powers are likewise subordinate to valid statutory directives. We have long held that whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code.

The Court rested its decision, in part, on the structure of § 522, stating that the absence of an explicit surcharge exception due to bad faith in that section’s “meticulous – not to say mind-numbingly detailed – enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions.” This reasoning seems to imply that courts may not source reimposition of the stay in § 105 where there is no specific provision in § 362’s comprehensive framework to which it can tether. More importantly, it signals the Supreme Court’s disapproval of the expansive approach to § 105.

The text of § 362, while not authorizing reimposition, does not explicitly prohibit it either. There is, therefore, an interstice – a gap – in § 362’s framework that may be supplemented by application of a nonviolative form of supplemental law. Without § 105 or the court’s inherent authority available, however, there is only one source of supplemental authority available for use in reinstating the automatic stay: federal common law.

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175 Id. at 1195.
178 Id. This protection is subject to two unrelated exceptions. Id. § 522(k)(1)-(2).
179 Law, 134 S.Ct. at 1194-95 (internal quotation marks and citations omitted) (emphasis added).
180 Id. at 1196.
IV. FEDERAL COMMON LAWMAKING IN BANKRUPTCY

In 2006, Professor Adam Levitin (then law clerk to Judge Jane Roth of the Third Circuit Court of Appeals) published an article in The American Bankruptcy Law Journal entitled “Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime.”¹¹⁸¹ In that article, Levitin argued that bankruptcy courts are authorized to create federal bankruptcy common law – that is, to issue rules of decision in certain instances on which the text of the Bankruptcy Code is silent.¹¹⁸² Levitin’s conclusion is based on bankruptcy’s existence as a uniquely federal interest and evidence of Congress’ implicit delegation of substantive lawmaking powers to bankruptcy courts. This Article adopts Levitin’s general conclusion and argues that judicial reimposition of the automatic stay is an example of federal common lawmaking by bankruptcy courts.¹¹⁸³

A. Federal Common Law

The permissibility and extent of a court’s ability to engage in federal common lawmaking, as well as the definition of “federal common law,” is a much-debated topic. Some commentators argue that the application of federal common law by federal courts is in violation of the limited nature of federal jurisdiction.¹¹⁸⁴ Others acknowledge courts’ abilities to craft and apply federal common law rules, but disagree as to scope of federal common law.¹¹⁸⁵ For its part, the Supreme

¹¹⁸¹ Levitin, supra note 24.
¹¹⁸² Id. at 68.
¹¹⁸³ See infra Part III.C.
¹¹⁸⁵ Professor Martha Field embraces an expansive definition, defining federal common law as “any rule of federal law created by a court (usually but not invariably a federal court) when the substance of that rule is not clearly suggested by federal enactments – constitutional or congressional.” Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 HARV. L. REV. 881, 890 (1986) (footnote and emphasis omitted). The expansive approach “includes much we think of as interpretation . . . leav[ing] no clear-cut line between federal common law and federal interpretational law.” Id. at 893-94. A narrow definition limits federal common lawmaking authority to certain enclaves defined by the Supreme Court. Jay Tidmarsh & Brian J. Murray, A Theory of Federal Common
Court defines federal common law as “a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial creation of a special federal rule of decision.”

The Supreme Court has done more than simply supply a definition; it has also indicated under what circumstances and in what areas courts may craft and apply federal common law. In *Texas Industries, Inc. v. Radcliff Materials*, the Court determined that there was no federal statutory or common law right to contribution under antitrust law. The Court did acknowledge, however, that it has long recognized the ability of courts to create federal common law “in some limited areas.”

These instances are few and restricted, and fall into essentially two categories: those in which a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.

The Court elaborated:

The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law, nor does the existence of congressional authority under Art. I [of the Constitution] mean that federal courts are free to develop a common law to govern those areas until Congress acts. Rather, absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the

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*Law*, 100 Nw. U. L. Rev. 585, 593 (2006). In the middle is a description of federal common law as “federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands.” *Id.* at 590 (quoting RICHARD H. FALLON ET AL., HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 685 (5th ed. 2003)).

186 Atherton v. F.D.I.C., 519 U.S. 213, 218 (1997). As any first-year law student can tell you, in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court held that “[t]here is no federal general common law.” *Id.* at 78. *Erie*, however, did not prohibit the development of specialized federal common law. Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N. Y. U. L. Rev. 383, 405 (1964). In fact, on the same day *Erie* was decided, the Court, in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), held that “whether the water of an interstate stream must be apportioned between the two States is a question of federal common law upon which neither the statutes nor the decisions of either State can be conclusive.” *Id.* at 110 (internal quotation marks omitted) (emphasis added). Both *Erie* and *Hinderlider* were authored by Justice Brandeis.

188 *Id.* at 647.
189 *Id.* at 640.
190 *Id.* (internal quotation marks and citations omitted).
conflicting rights of States or our relations with foreign nations, and admiralty cases.191

The Supreme Court in Texas Industries, then, held that courts may engage in federal common
lawmaking, and identified the two broad areas under which it is acceptable to so engage: (1)
when a substantive federal rule “is necessary to protect uniquely federal interests,” and (2) when
Congress has authorized courts to create federal substantive rules.192 Under the first prong, the
Court identified specific “uniquely federal” enclaves in which federal common law may be
created and applied: proceedings affecting the rights and obligations of the United States;
interstate disputes implicating the conflicting rights of states; international disputes implicating
the nation’s foreign relations; and admiralty. The Court has added additional enclaves, creating,
for example, specific federal preclusion rules.193 The second Texas Industries prong embraces
those instances where the Court has determined that a federal statute directs courts to develop
and apply common law rules. For example, in National Society of Professional Engineers v.
U.S.,194 the Supreme Court held that section 1 of the Sherman Antitrust Act195 directs “the courts
to give shape to that statute’s broad mandate by drawing on common-law tradition.”196

Considerations of federal common law normally focus on whether a federal common law
rule or a state law should serve as the rule of decision in a case.197 The role of state law is, of
course, central to the examination of property rights in bankruptcy law; the Supreme Court, in

191 Id. at 640-41 (internal citations omitted).
192 Id.
193 Tidmarsh & Murray, supra note 185, at 594.
194 435 U.S. 679
195 Section 1 currently states:
      Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or
      commerce among the several States, or with foreign nations, is declared to be illegal. Every person
      who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal
      shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding
      $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding
      10 years, or by both said punishments, in the discretion of the court.
196 Nat’l Soc. of Professional Engineers, 435 U.S. at 688.
197 Levitin, supra note 24, at 68.
Butner v. United States,\textsuperscript{198} held that “[u]nless some federal interest requires a different result,” bankruptcy courts must analyze the creation and scope of property interests under the law of the applicable state.\textsuperscript{199} Like Levitin’s article, however, this Article concerns the applicability of federal common law in bankruptcy where state law is not at issue. While the termination of the automatic stay allows creditors to benefit from the application of state law remedies,\textsuperscript{200} whether there is an automatic stay, and whether it may be reinstated, is purely a matter of federal bankruptcy law.

There is no question that federal district courts may craft federal common law. Levitin, however, sought to prove that there is a federal common law of bankruptcy because the Supreme Court has remained silent on the question, and the only federal appellate court to directly address the issue, the Fifth Circuit, denied courts “wide discretion” to create federal bankruptcy common law.\textsuperscript{201}

\textbf{B. Federal Common Lawmaking in Bankruptcy: Professor Levitin’s Argument}

Levitin argued that courts may craft federal bankruptcy common law under both prongs of the Texas Industries test.\textsuperscript{202} As the test is disjunctive, only one prong need be satisfied. Levitin wrote, nonetheless, that a federal common law of bankruptcy may be established by virtue of bankruptcy’s position as a uniquely federal interest and Congress’s authorization of courts to create bankruptcy common law.

Levitin argued that bankruptcy is “uniquely federal,” and therefore may be supplemented by federal common law, due the Bankruptcy Clause’s “uniformity” requirement and the \textit{in rem}

\textsuperscript{198} 440 U.S. 48 (1979).
\textsuperscript{199} \textit{Id}. at 55.
\textsuperscript{200} See \textit{supra} Part I.
\textsuperscript{201} Levitin, \textit{supra} note 24, at 68-9; Walker v. Cadle Co. (\textit{In re Walker}), 51 F.3d 562, 567 (5th Cir. 1995).
\textsuperscript{202} Levitin, \textit{supra} note 24, at 68.
The nature of bankruptcy proceedings.\textsuperscript{203} The Bankruptcy Clause empowers Congress to establish “uniform” bankruptcy laws.\textsuperscript{204} Prior to the enactment of the country’s first bankruptcy statute,\textsuperscript{205} each state had a unique set of bankruptcy or insolvency laws that encouraged forum shopping and flight to debtor-friendly states.\textsuperscript{206} Levitin points out that the Full Faith and Credit Clause could have been used to handle this problem; however, the Constitution’s drafters instead sought to allow for the creation of a uniform federal scheme that would treat creditors fairly and uniformly across state lines.\textsuperscript{207} The uniformity provision, therefore, in prohibiting conflicting state laws, “leaves little room for non-federal bankruptcy law,” rendering bankruptcy law uniquely federal.\textsuperscript{208}

It is not just the Bankruptcy Clause’s uniformity provision that qualifies bankruptcy as an interest uniquely and exceptionally federal. The nature of bankruptcy jurisdiction also engenders satisfaction of the first \textit{Texas Industries} prong. The Bankruptcy Code, through its broad definition of the “bankruptcy estate,”\textsuperscript{209} imbues bankruptcy courts with essentially \textit{in rem} jurisdiction over the debtor and his legal and equitable interests in property.\textsuperscript{210} The automatic stay prohibits concurrent state proceedings while the bankruptcy case is ongoing (absent, of course, the stay’s modification or termination), and the discharge injunction enjoins creditors from holding debtors personally liable on discharged debts following the close of the bankruptcy

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\footnotesize
\textsuperscript{203} \textit{Id.} at 71-2.
\textsuperscript{204} U.S. \textsc{Const.} art. I, § 8, cl. 4.
\textsuperscript{206} Levitin, \textit{supra} note 24, at 72.
\textsuperscript{207} \textit{Id.} Of course, state law plays an important part in bankruptcy, \textit{Butner}, 440 U.S. at 55, and “[a] bankruptcy law may be uniform and yet ‘may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States.’” \textit{Railway Labor Executives Ass’n v. Gibbons}, 455 U.S. 457, 469 (1982) (quoting \textit{Stellwagen v. Clum}, 245 U.S. 605, 613 (1918)).
\textsuperscript{208} Levitin, \textit{supra} note 24, at 71-2.
\textsuperscript{209} 11 \textit{U.S.C.} § 541(a).
\textsuperscript{210} \textit{Id.;} Levitin, \textit{supra} note 24, at 72.
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These provisions ensure that parallel state insolvency proceedings are functionally preempted, ensuring “that Congress essentially occupies the field.” The Bankruptcy Clause’s uniformity provision, then, “combined with the in rem nature of bankruptcy and the Code’s expansive definition of the bankruptcy estate, automatic stay, and discharge injunction make bankruptcy a uniquely federal interest.”

Levitin also argued that courts may create federal common law in bankruptcy based on the second Texas Industries prong – the congressional authorization prong – although he admits that “significant assumptions” are required to show implicit, for there is no explicit, congressional authorization. Congressional authorization, according to Levitin, is evidenced by the existence of the “pre-Code practices doctrine,” the Bankruptcy Code’s legislative history, and the judicial nature of bankruptcy proceedings.

The pre-Code practices doctrine is the principle that bankruptcy practice under the previous 1898 Act is presumed valid absent clear congressional intent to so abrogate. The doctrine, therefore, enshrines pre-1978 case law as long as such case law is not explicitly repealed by the Code. Under this doctrine, for example, the Supreme Court held that the pre-Code practice of shielding punitive damages obligations from discharge survived enactment of the Bankruptcy Code because no Code provision evinced intent to depart from the practice. That Congress has amended the Code multiple times but has not prohibited courts from adhering to pre-Code case

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211 11 U.S.C. § 524(a)(2); Levitin, supra note 24, at 72-3.
212 Levitin, supra note 24, at 73.
213 Id. at 73-4 (internal quotation marks omitted). Levitin also points out that Article I, § 8, clause 4 of the Constitution also houses the Naturalization Clause. The clause states in full that “[t]he Congress shall have Power . . . to establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States . . . .” U.S. CONST. art. I, § 8, cl. 4. Levitin writes that the drafters’ decision to place the Naturalization and Bankruptcy powers in the same clause, along with the clauses’ “parallel construction[,] suggests a parity between the issues. No one would doubt that naturalization is a uniquely federal interest. It follows then that bankruptcy too is a uniquely federal interest.” Levitin, supra note 24, at 74 (internal quotation marks omitted).
214 Levitin, supra note 24 at 74.
215 Id.
216 Id. at 57.
217 Cohen v. de la Cruz, 523 U.S. 213, 221-22 (1998); Levitin, supra note 24 at 62.
law principles indicated to Levitin implicit congressional delegation of federal common lawmaking powers.\textsuperscript{218}

The Code’s legislative history contains another possible indication of congressional authorization. The House Judiciary Committee’s report on the 1978 Act states, in reference to the Code’s authorization of courts to apply the doctrine of equitable subordination of claims,\textsuperscript{219} that “[t]he bankruptcy court will remain a court of equity.”\textsuperscript{220} The Committee cited to then-proposed 28 U.S.C. § 1481 in support of this proposition.\textsuperscript{221} The major theme of Levitin’s article is that, due to the need for bankruptcy courts to exercise discretion in factual scenarios as to which a statutory scheme cannot feasibly cover without being overly complex and ineffectual, along with bankruptcy courts’ statutorily limited “equitable” powers,\textsuperscript{222} “the term ‘equity’ in the context of bankruptcy jurisdiction and powers is a term of art that means ‘federal common law.’”\textsuperscript{223} This argument is buttressed by the drafters’ statement “that the term ‘principles of equitable subordination’ [is intended to] follow existing case law and leave to the courts development of this principle.”\textsuperscript{224} Levitin maintains that this statement indicates that the authority to craft equitable subordination principles in common law-fashion is what is meant by the proposition that “[t]he bankruptcy court will remain a court of equity.”\textsuperscript{225}

\textsuperscript{218}Levitin, \textit{supra} note 24, at 74.
\textsuperscript{219}11 U.S.C. § 510(c).
\textsuperscript{221}Id.
\textsuperscript{222}As well as the “wariness or even hostility” “[t]he ‘court of equity’ tradition” triggers in courts concerned with the limited nature of their jurisdictional grant. Levitin, \textit{supra} note 24, at 83.
\textsuperscript{223}Id. at 75.
Lastly, the judicial nature of bankruptcy evinces congressional vesting of common law powers in bankruptcy courts. In *Freytag v. Commissioner of Internal Revenue*, the Supreme Court held that Article I courts are infused with the “judicial Power” of Article III. Levitin asserted, then, that in placing bankruptcy proceedings in federal courts instead of federal agencies, Congress intended that Article I bankruptcy courts would exercise “the common law power inherent in the judicial power.” This is especially persuasive given that bankruptcy judges wield more expansive judicial powers than did bankruptcy referees under the 1898 Act.

Levitin’s “uniquely federal interest” argument requires fewer inferential leaps than does his “congressional authorization” analysis. That said, both analyses are anchored in constitutional and legislative language, the bankruptcy court’s jurisdiction, bankruptcy history, and the judicial nature of bankruptcy proceedings. But beyond simply satisfying the *Texas Industries* test, Levitin underscores the need to recognize the existence of federal bankruptcy common law by stressing the practical realities of bankruptcy, writing that its fact-specific nature “requires flexibility” and the application of general discretion by bankruptcy judges in more than those specific instances authorized by the Bankruptcy Code. The “court of equity tradition” arose because of this need. Whereas equity is broad and flexible, however, “federal common law is channeled by precedent and judicially devised tests, not the span of the Chancellor’s proverbial foot,” and so is consistent with the limited nature of bankruptcy jurisdiction.

Levitin believes that courts are, at this moment, crafting federal bankruptcy common law under the guise of doing equity. Federal common lawmaking, he argues, can be seen in the

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227 *Id.* at 889; U.S. CONST. art. III, § 1.
228 Levitin, *supra* note 24, at 77.
229 *Id.*
230 *Id.* supra note 24, at 81-3.
231 *Id.* at 83 (internal quotation marks omitted).
232 *Id.*
233 *Id.*
multi-factored tests and rules courts establish when authorizing the substantive consolidation of estates, non-debtor releases, and critical vendor motions, all remedies dictated by the practical realities of bankruptcy but which are not explicitly authorized by the Bankruptcy Code. It can also be seen when, under § 105(a), courts limit the Chapter 13 debtor’s right to dismiss, grant partial student loan discharges, stay actions against third party non-debtors, and, the focus of this Article, reimpose the automatic stay.

V. Reimposition of the Automatic Stay as Federal Common Lawmaking

Levitin’s article established that bankruptcy courts may craft federal common law under Texas Industries, and that the fact-specific nature of bankruptcy proceedings demands the authority to do so. This Article asserts that judicial reimposition of § 362’s automatic stay is but an example of bankruptcy courts’ federal common lawmaking authority. This Article is, therefore, but a specific application of Levitin’s general argument.

Courts that acknowledge their ability to reinstate the automatic stay claim such authority stems from § 105’s “broad” powers. But in determining whether to reimpose the stay, no matter if it was terminated pursuant to subsection (c), (d), or (e) of § 362, courts have required that debtors satisfy judicially-created conditions, not the provisions of the Bankruptcy Code. These conditions can be synthesized into the basic two-part formula described above, which is exactly the type of judge-made test typical of common lawmaking. Under Levitin’s theory, courts applying the fact-specific, judge-made reimposition test are doing nothing more than crafting federal bankruptcy common law pursuant to the Supreme Court’s authorization in Texas Industries. Judicial recognition of this would eliminate the overbroad application of § 105 in at least one area.

234 Id. at 78-81.
The judge-made reimposition test not only looks like a common law test, it also satisfies the gap-filling role that typifies the need for federal common lawmaking in bankruptcy. The Code does not provide for the stay’s reimposition. This fact notwithstanding, the fresh start promised debtors is frequently imperiled when a change in factual circumstances renders a debtor, bereft of the protections of a since-lifted stay, able to become current with her plan payments or provide her creditor adequate protection, or when the actions of someone other than the debtor cause the stay to extinguish. Courts respond to these oft-occurring exigencies by, when circumstances so dictate, reinstating the automatic stay when the debtor satisfies certain procedural requires and proves that the equities of the case tip in her favor. Because bankruptcy is sourced in the Code, judges feel the need to ground reinstatement in a Code section. With no section providing such a remedy, bankruptcy courts do what they so often do when the Code is silent as to a recurring situation – they ground their action in § 105(a). Neither § 105(a) nor any equity powers retained by the bankruptcy courts, however, authorize reimposition. Recognizing reimposition as a common law rule would allow courts to continue remedying such recurring situations while preventing the further expansion of § 105 and further propagation of the myth that the bankruptcy court is a court of equity.

Bankruptcy serves the interests of both debtor and creditor. Debtors are given an opportunity to obtain a “fresh start” so they can reenter the commercial world confident, contributing economic actors. Creditors are afforded an opportunity to realize on a portion of their interests in the debtor’s property that a race to the state courthouse would only afford the fastest among them. The automatic stay, too, benefits both debtor and creditor. Fundamentally, however, the stay is a debtor protection remedy, one of the core elements of the fresh start policy.

235 See CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 144 (BeardBooks ed. 1999).
that is at the heart of the country’s largely voluntary bankruptcy system. The first paragraph of the House Report on § 362(a) indicates as such, stating:

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. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.236

A recent bankruptcy court opinion issued by Chief Judge Laura K. Grandy of the Southern District of Illinois recognizes that § 105 does not authorize reimposition, citing Law v. Siegel for this proposition.237 If other courts come to the same conclusion, the debtor’s fresh start will be imperiled. Recognizing courts’ abilities to craft federal bankruptcy common law will permit courts to continue upholding the right of the debtor to receive a fresh start after bankruptcy and cease any further undue expansion of § 105(a).

CONCLUSION

The automatic stay is a core debtor protection remedy. Unfortunately, oftentimes the debtor is left without the stay’s protections when its presence would help ensure the debtor’s fresh start without imposing a detriment on the creditor. Courts respond to this unfairness by recognizing that the automatic stay may be reimposed in certain situations, pursuant to § 105(a). Unfortunately, § 105(a)’s history, recent scholarly commentary, and the Supreme Court’s recent limitations of that state make it clear that § 105 is not a fount of equitable powers authorizing reimposition. Fortunately, bankruptcy courts are authorized to craft flexible rules of decision pursuant to their federal common lawmaking powers as long as such rules do not violate express statutory law. The judge-made two-part reimposition test is nothing more than the product of


Therefore, § 105’s inability to serve as a vehicle for reinstating the stay is not an obstacle for granting such a remedy.

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