

I. Appealability of Orders Denying Relief From the Automatic Stay — A Modest Proposal on a Modest Controversy

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I. Introduction

Though it is well settled that an order *granting* relief from the automatic stay² is a final appealable order,³ a “modest controversy”⁴ exists as to whether and under what circumstances an order *denying* relief from the automatic stay will be a final appealable order. Though a number of circuits have held that such denials are appealable as of right,⁵ most have “stopped short of adopting [the Second Circuit’s] broad rule that *all* denials of relief from the automatic stay constitute final appealable orders.”⁶ In contrast to the Second Circuit’s broad rule that all orders denying relief from the stay are final, the Third Circuit has “expressly adopted a pragmatic, case-by-case approach to determine whether an order denying stay relief [is] final and appealable.”⁷ The Third Circuit thus recognizes that there may be circumstances in which

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²11 U.S.C. § 362.

³See, e.g., *In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1284 (2d Cir. 1990); *In re Comer*, 716 F.2d 168, 172 (3d Cir. 1983); *In re Shepard Clothing Co.*, 280 B.R. 786, 789 (D. Mass. 2002).

⁴*Sonnax*, 907 F.2d 1280, 1284.

⁵See, e.g., cases cited *infra*, note 68.

⁶*In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1284 (emphasis added).

⁷*In the Matter of FRG, Inc.*, 114 B.R. 75, 77 (E.D. Pa 1990). See also *In re West Elecs., Inc.*, 852 F.2d 79 (3d Cir. 1988).

an order denying stay relief will not be a final appealable order. Two recent cases from courts in the First Circuit adopted the Third Circuit's approach and held that the orders denying relief from the stay in those cases were not final appealable orders.⁸ These cases illustrate the relative strengths and weaknesses of both the Second Circuit's "broad rule" and the Third Circuit's "pragmatic, case-by-case approach," and show the advantages of the former.

This article begins with a discussion of the relevant statutes. It then discusses the policy behind the finality rule and the meaning of "final" for purposes of appellate jurisdiction. Finally, the article analyzes the leading Second and Third Circuit cases on the issue of finality of orders denying relief from the stay as well as two recent cases decided by courts in the First Circuit, and concludes that the Second Circuit's "broad rule" is the better one for both policy (e.g., judicial economy) and pragmatic (e.g., preventing harm from lack of a meaningful remedy) reasons.

II. The Statutes

A number of statutes may be relevant when determining whether a particular order of a bankruptcy court denying relief from the automatic stay⁹ or an order of a district court affirming or reversing such an order will be appealable as of right.

28 U.S.C. § 158 provides in relevant part:

(a) The district courts of the United States shall have jurisdiction to hear appeals

(1) from *final* judgments, orders, and decrees. . .

of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. . .

(d) the courts of appeals shall have jurisdiction of appeals from all *final* decisions, judgments, orders and decrees entered under subsections (a) and (b) of this section.¹⁰

28 U.S.C. § 1291, entitled "Final decisions of district courts," provides in relevant part: "The courts of appeals. . . shall have jurisdiction of appeals from all *final* orders of the district courts of the United States. . ."¹¹

⁸In re Henriquez, 261 B.R. 67 (1st Cir. BAP 2001); In re Shepard Clothing Co., Inc., 28 B.R. 786 (D. Mass. 2002).

⁹11 U.S.C. § 362.

¹⁰28 U.S.C. § 158 (emphasis added). Section 158(b) provides for the establishment of bankruptcy appellate panels (hereinafter "BAPs") ". . .to hear and determine with the consent of all the parties, appeals under subsection (a). . ."

¹¹28 U.S.C. § 1291 (emphasis added).

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Certain interlocutory orders of district courts are also appealable as of right. 28 U.S.C. § 1291 provides in relevant part:

(a) Except as provided in subsection (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) *Interlocutory* orders of the district courts of the United States. . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions or *refusing to dissolve or modify injunctions*, except where a direct review may be had in the Supreme Court.¹²

Prior to the Supreme Court's 1992 decision in *Connecticut National Bank v. Germain*,¹³ it had been held that Section 158(d) is the exclusive source of court of appeals jurisdiction over orders of district courts reviewing bankruptcy court rulings.¹⁴ In *Germain*,¹⁵ however, the Supreme Court made clear that both § 1291 and § 1292 can provide a basis for appellate jurisdiction in the bankruptcy context. In that case, the Court, in reversing the decision of the Second Circuit, rejected the contention that when a district court enters an order pursuant to § 158(a) in its capacity as an appellate court in a bankruptcy case, the only source of appellate jurisdiction for the court of appeals is § 158(d) and that § 158(d) precludes, by negative implication, appellate jurisdiction under § 1292.¹⁶

The Supreme Court explained that while § 1291 "confers jurisdiction over appeals from 'final decisions of the district courts' acting in any capacity," § 158(d) confers jurisdiction over "appeals from final decisions of the district courts when they act as appellate courts under § 158(a), and also confers jurisdiction over final decisions of the appellate panels in bankruptcy acting under § 158(b)."¹⁷ Thus, while § 1291 and § 158(d) "do overlap, . . . each section confers jurisdiction over cases that the other section does not reach."¹⁸ Because giving effect to both § 1291 and § 158(d) would not render one or the other "wholly superfluous," the Court concluded that "we do not have to read § 158(d) as precluding courts of appeals, by negative implication, from exercising jurisdiction under § 1291 over district courts sitting in bankruptcy. We similarly do not have to read § 158(d) as precluding jurisdiction under

¹²28 U.S.C. § 1292(a)(1) (emphasis added).

¹³*Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391, 22 Bankr. Ct. Dec. (CRR) 1130, 26 Collier Bankr. Cas. 2d (MB) 175, Bankr. L. Rep. (CCH) ¶ 74457A (1992) (hereinafter "*Germain*").

¹⁴*Germain v. Connecticut Nat'l Bank*, 926 F.2d 191, 194 (2nd Cir. 1991), rev'd by *Germain*, 503 U.S. 249 (1992). See also *In re Hester*, 899 F.2d 361 (5th Cir. 1990).

¹⁵*Germain*, 503 U.S. 249.

¹⁶*Germain*, 503 U.S. 249 (1992).

¹⁷*Germain*, 503 U.S. 249 (1992).

¹⁸*Germain*, 503 U.S. 249, 253 (1992). Under certain circumstances, a district court may enter orders in a bankruptcy case in the first instance, rather than on an appeal from an order of the bankruptcy court. See 28 U.S.C. § 157 (c) and (d).

§ 1292.”¹⁹

Where, for example, a district court issues orders in non-core matters related to a bankruptcy case and the parties have not consented to disposition of the matters by the bankruptcy court,²⁰ or where the district court withdraws the reference,²¹ a district court may determine bankruptcy issues in the first instance, rather than as an appellate court. In these cases, where a final order results, § 1291 provides the basis for the court of appeals to exercise jurisdiction. As the Court in *Germain* explained, “[s]ection 1291 confers jurisdiction over appeals from ‘final decisions of the district courts’ acting in any capacity.”²² Likewise, when, in such circumstances, a district court issues an interlocutory order granting, modifying, or dissolving (or refusing to grant, modify, or dissolve) an injunction, § 1292(a)(1) provides a basis for review by the court of appeals.²³

Though *Germain* established the applicability of § 1291 and § 1292 with respect to orders of district courts in bankruptcy cases, there is no statutory provision for appeals as of right from interlocutory injunctive orders entered by a bankruptcy judge or a BAP²⁴ because § 1292(a)(1) on its face gives the courts of appeals jurisdiction to hear, as of right, interlocutory orders “of the *district courts* of the United States. . . .”²⁵ *Germain* mandates that § 1291 provides a basis for jurisdiction only “so long as a party to a proceeding or case in bankruptcy meets the conditions imposed by § 1292.”²⁶ Because § 1292(a)(1) requires an order of the district court, appeals of bankruptcy court orders denying relief from the stay must, in the first instance, be “final” under § 158(a) for the district court to have jurisdiction over an appeal.²⁷ Thus, whether a bankruptcy court order denying relief from the stay is appealable as of

¹⁹*Germain*, 503 U.S. 249 (1992).

²⁰28 U.S.C. § 157(c).

²¹28 U.S.C. § 157(d).

²²*Germain*, 503 U.S. 249, 253.

²³*Germain*, 503 U.S. 249.

²⁴*Germain*, 503 U.S. 249, 254 (“Section 158(d) is silent as to review of interlocutory orders.”).

²⁵28 U.S.C. § 1292(a)(1) (emphasis added). Because 28 U.S.C. § 151 provides that “bankruptcy judges in regular active service shall constitute a unit of the district court. . . [and] may exercise the authority conferred under this chapter with respect to any action suit or proceeding. . .” it could be argued that § 1292(a)(1) allows appeals from bankruptcy court orders denying relief from the automatic stay directly to the courts of appeals. The authors are not aware of any cases so holding. In light of the clear wording of § 1292(a)(1) and § 151’s limitation to “authority conferred under this chapter” (i.e., chapter 6 of title 28), as well as the text of the provisions of Part VIII of the Federal Rules of Bankruptcy Procedure, such argument seems tenuous.

²⁶*Germain*, 503 U.S. 249, 254.

²⁷Because § 1291 states “[t]he courts of appeals. . . shall have jurisdiction of appeals from all final decisions of the district courts,” it appears that it will be relevant only with respect to an appeal to a court of appeals from a final order of a district court hearing an appeal from an order of the bankruptcy court. However, as § 152(a) and § 1291 each require a final order for an appeal as of right, § 1291’s inapplicability to appeals of bank-

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right to the district court will turn on whether the order is “final.”

It is worth noting that, in addition to the appellate process discussed above, review of lower court decisions can be had by writ of mandamus.²⁸ Under this authority, federal courts can issue a writ of mandamus to correct certain exceptional errors, in particular where an order of an inferior court is clearly beyond its jurisdiction or where an inferior court fails to take some action required by law. In a recent decision, the Ninth Circuit BAP held that it had authority to entertain a petition for a writ of mandamus in respect of an order granting relief from the stay, but declined to issue the writ because the petitioner failed to establish “that its right to issuance of the Writ is clear and indisputable.”²⁹ Though a writ of mandamus is an extraordinary and drastic remedy,³⁰ and mandamus is most often used to remedy unwarranted denials of jury trials,³¹ it has been applied in other contexts in bankruptcy cases,³² and could perhaps, under certain circumstances, be used to seek redress in the court of appeals when a district court dismisses, for lack of jurisdiction, an appeal of an order denying relief from the stay.

III. Policy Considerations Underlying the Finality Requirement

The Judiciary Act of 1789 established the final judgment rule for federal courts.³³ “Since then, it has been recognized as a defining characteristic of the federal judicial system, serving multiple purposes for appellate courts, trial courts and litigants.”³⁴ The most clear, and perhaps most significant concerns which the finality rule addresses are judicial economy³⁵ and the prevention of needless costs, delay and harm to litigants.³⁶

In this connection, Justice Frankfurter observed:

ruptcy court orders is, unlike the inapplicability of § 1292(a)(1), of no particular moment with respect to the matter at hand.

²⁸The All Writs Act gives the federal courts authority “to issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” 28 U.S.C. § 1651(a).

²⁹In re Salter, 279 B.R. 278, 283 (9th Cir. AP 2002) (holding BAP has authority to issue writ of mandamus, but finding that petitioner failed to establish entitlement for writ and discussing standard).

³⁰In re Salter, 279 B.R. 278, 283

³¹See, e.g., In re Kaiser Steel Corp., 911 F.2d 380, 288 (10th Cir. 1990); In re United Missouri Bank, 901 F.2d 1449 (8th Cir. 1990).

³²See In re First South Sav. Ass’n, 820 F.2d 700 (8th Cir. 1987) (mandating the district court to stay a bankruptcy court order pending appeal where there was risk of irreparable loss to appellant).

³³Judiciary Act of 1789, ch. 20, “ 21, 22 & 25, 1 Stat. 73.

³⁴John P. Hennigan, Jr., Toward Regularizing Appealability in Bankruptcy, 12 Bank. Dev. J. 583, 588 (1996) (hereinafter “Hennigan”).

³⁵See Hennigan, 12 Bank. Dev. J. 583, 616.

³⁶Hennigan, 12 Bank. Dev. J. 583, 589 (“A pattern of repeated delay and relearning would also consume the attorneys’ time and their clients’ time and money. A litigant with greater financial resources than its adversary could employ frequent appeals as a technique of harassment.”) (citing Flanagan v. United States, 465 U.S. 259, 264 (1984))

Since its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance. . . this requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice.³⁷

More recently, the Supreme Court explained:

Restricting appellate review to ‘final decisions’ prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is in practical consequence, but a single controversy. . . We know, of course, that § 1291 does not limit appellate review to ‘those final judgments which terminate an action. . .’ *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. at 545, 69 S. Ct. at 1225, but rather that the requirement be given a ‘practical rather than a technical construction.’ *Id.* at 546, 69 S. Ct. at 1226. *The inquiry requires some evaluation of the competing considerations underlying all questions of finality. . . ‘the inconvenience and costs of piecemeal review on [the] one hand and [the] danger of denying justice by delay on the other.’* *Dickerson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S. Ct. 322, 324, 94 L. Ed. 299 (1950).³⁸

The courts have thus recognized that the primary underlying policy reasons for the finality rule, i.e., the preservation of judicial resources and prevention of the costs and delay inherent in piecemeal appellate disposition, must be tempered by cognition of “denying justice by delay.”³⁹ As discussed herein, the Second Circuit’s broad rule that all orders denying relief from the automatic stay are final and appealable does a better, albeit not perfect, job of recognizing and balancing these important policy considerations than does the approach taken by the First and Third Circuits.

IV. The Meaning of “Final”

As a general rule, a final order or decision is one that “ends the litiga-

(noting that the finality rule “reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals”). See also *In re San Juan Dupont Plaza Hotel Fire Litig.*, 859 F.2d 1000, 1006 (1st Cir. 1988). For other policy reasons for the finality rule, see *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (discussing efficiency of requiring finality prior to appeal); *In re Gould & Eberhardt Ger Mach. Corp.*, 852 F.2d 26, 29 (1st Cir. 1988) (observing that if objecting party ultimately prevails in the trial court, order may never be appealed); *Taylor v. Board of Educ.*, 288 F.2d 600, 605 (2nd Cir. 1961) (review by appellate court may be broader and more complete after lower court has entered final order); *In re Magic Circle Energy Corp.*, 899 F.2d 950, 953 (10th Cir. 1989) (noting danger of delay of proceedings in lower court from interlocutory appeals); *Coopers & Lyband v. Livesay*, 437 U.S. 463, 474 (1978) (avoiding immediate appeal from every order of lower court preserves respect for lower court judges).

³⁷*Radio Station Wow, Inc. v. Johnson*, 326 U.S. 120, 123-24 (1945) (citations omitted).

³⁸*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 168 (1974) (emphasis added).

³⁹*Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). See also, *Forgay v. Conrad*, 47 U.S. 201, 205 (1848), where Justice Taney observed that “. . . if by an interlocutory order or decree [a party] is required to deliver up property which he claims, or to pay money which he denies to be due, and the order [is] immediately carried into execution by the Circuit Court, his right of appeal is of very little value to him, and he may be ruined before he is [permitted] to avail himself of the right.”

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tion on the merits and leaves nothing more for the court to do but execute judgment.”⁴⁰

Because, however, as one commentator has explained,

Notwithstanding its salutary general efforts, the final judgment rule can sometimes carry adverse consequences. . . . Appeal from a final judgment may. . . . come too late to redress other sorts of injuries, such as loss of property inflicted by an incorrect interlocutory decision,⁴¹

the definition of “final” for purposes of appeal has been given a much broader interpretation than seems originally was contemplated.

In specific circumstances, a more flexible and liberal approach to finality has developed. Examples of exceptions to the general finality rule in civil litigation include orders for the immediate delivery of property;⁴² orders that “conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action and [are] effectively unreviewable on appeal from a final judgment”;⁴³ interlocutory orders of district courts granting or denying injunctions;⁴⁴ and orders entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.⁴⁵

Additionally, 28 U.S.C. § 1292(b),⁴⁶ allows district court judges to certify an interlocutory order not immediately appealable if the district judge determines that such order presents a determinative and genuinely debatable question of law, the immediate appeal of which might expedite the litigation. It is then left to the discretion of the court of appeals to grant or deny the appeal of the certified order.

These exceptions to the strict finality rule have been applied in bankruptcy cases. For example, in *Moxley v. Comer*⁴⁷ the Third Circuit, relying on the doctrine established in *Forgay*, i.e., that orders for the immediate delivery of property are immediately appealable, held that an order lifting the automatic stay, and thereby allowing the secured party

⁴⁰Catlin v. United States, 324 U.S. 229, 233 (1945).

⁴¹Hennigan, 12 Bank. Dev. J. 583, 588.

⁴²See *Forgay v. Conrad*, 47 U.S. 201 (1848).

⁴³*Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) (establishing the “Collateral Order Rule”).

⁴⁴28 U.S.C. § 1292(a)(1).

⁴⁵Fed. R. Civ. P. 54(b) allows the trial court, in the context of complex litigation with multiple parties, to enter a final, appealable judgment when there has been a disposition as to at least one, but not all of the claims or parties, and “only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.”

⁴⁶28 U.S.C. § 1292(b) provides:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: provided, however, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

⁴⁷*Moxley v. Comer*, 716 F.2d 168, 171-74 (3d Cir. 1983).

to foreclose on the property, was a final appealable order.⁴⁸ After *Germain*, courts hearing bankruptcy appeals have found a basis for appellate jurisdiction in § 1292(a)(1) with respect to orders of district courts involving injunctions or relief from the automatic stay.⁴⁹ Rule 54(b) of the Federal Rules of Civil Procedure applies in adversary proceedings⁵⁰ and contested matters⁵¹ in bankruptcy cases.

Numerous courts and commentators⁵² have stated that “the finality requirement is less rigidly applied in bankruptcy than in ordinary civil litigation.”⁵³ These courts and commentators have explained that this more flexible standard is appropriate “[b]ecause bankruptcy proceedings often continue for long periods of time, and discreet claims are often resolved at various times over the course of the proceedings.”⁵⁴ Most courts thus allow for immediate appeal of orders in bankruptcy cases where the order “finally disposes of discrete disputes within the larger case.”⁵⁵

This definition of finality “includes an order that conclusively determines a separable dispute over a creditor’s claim or property.”⁵⁶ In this connection, however, courts have explained that “[by] ‘disputes’ we do not mean merely competing contentions with respect to separable issues; rather, we apply the same standards of finality that we apply to an appeal under 28 U.S.C. § 1291.”⁵⁷ It is thus unclear to what extent the standards of finality in bankruptcy are more flexible than in other civil litigation or if the nature of bankruptcy is such that the general exceptions to strict finality will apply more often in bankruptcy cases.

With respect to determining the finality of district court orders affirming or reversing and/or remanding a final order of the bankruptcy court, courts of appeals have generally applied a two-step analysis.

⁴⁸*Moxley v. Comer*, 716 F.2d 168 (3d Cir. 1983).

⁴⁹See, e.g., *In re Affeldt*, 60 F.3d 1292, 1294 (8th Cir. 1995) (allowing, under § 1292(a)(1), appeal from an order granting an injunction to enforce debtors’ discharge); *In re James Wilson Assocs.*, 965 F.2d 160, 165-67 (7th Cir. 1992) (allowing, pursuant to § 1292(1)(1), appeal of order denying relief from automatic stay).

⁵⁰F.R.B.P. 7054.

⁵¹F.R.B.P. 9014(c).

⁵²See *Collier on Bankruptcy* ¶ 5.07(1)(b) (15th ed., rev. 2003); But see Hennigan, 12 *Bank. Dev. J.* 583, (contending that there is no reason why greater flexibility should apply with respect to bankruptcy appeals and suggesting a more regularized approach to bankruptcy appeals).

⁵³*In re Johns-Manville Corp.*, 824 F.2d 176 (2d Cir. 1987). See also *In re Chateaugay Corp.*, 880 F.2d 1509 (2d Cir. 1989).

⁵⁴*In re Prudential Lines, Inc.*, 59 F.3d 327, 331 (2d Cir. 1995) (quoting *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir. 1989)). See also *In re James Wilson Assocs.*, 965 F.2d 160, 166 (7th Cir. 1992); *In re Integrated Res., Inc.*, 3 F.3d 49 (2d Cir. 1993).

⁵⁵*In re Sonnax Indus., Inc.*, 907 F.2d 1280, 1283 (2d Cir. 1990). See also *In re Shepard Clothing Co., Inc.*, 280 B.R. 786, 788 (D. Mass. 2002) (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) for the proposition that bankruptcy court orders are final “if they finally dispose of discrete disputes within the larger case.”).

⁵⁶*In re Shepard Clothing Co., Inc.*, 280 B.R. 786, 789 (quoting *Saco*, 711 F.2d 441, 444).

⁵⁷*In re Fugazy Express, Inc.*, 982 F.2d 769, 775 (2d Cir. 1992). See also *Prudential Lines*, 59 F.3d 327, 330.

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First, the court determines whether the underlying decision of the bankruptcy court is final.⁵⁸ If the bankruptcy court's order is final, the court asks "whether the district court's disposition independently rendered the matter nonappealable," i.e., whether the district court's decision is also final.⁵⁹ The circuits are split over how to assess the finality of district court orders in bankruptcy proceedings.⁶⁰ The "prevailing view," however, is that a court of appeals "lack[s] appellate jurisdiction over orders when the district court has remanded the case for significant further proceedings in the bankruptcy court."⁶¹ While, in such circumstances, the "district court's disposition [may] independently render the matter non-appealable,"⁶² it is also true that "the action of the district court could transform an interlocutory order of the bankruptcy court into a final appealable order for purposes of [court of appeals] jurisdiction."⁶³

V. Finality of Orders Denying Relief from the Automatic Stay

Sections 362(d) and (e) of the Bankruptcy Code provide in relevant part:

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

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

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization;. . .

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection

⁵⁸In re Pegasus Agency, Inc., 101 F.3d 882, 884 (2d Cir. 1996).

⁵⁹In re Pegasus Agency, Inc., 101 F.3d 882 (2d Cir. 1996) (quoting *Bowers v. Conn. Nat'l Bank*, 847 F.2d 1019, 1022 (2d Cir. 1988)).

⁶⁰See *In re Commercial Contractors, Inc.*, 71 F.2d 1373, 1374-75 (10th Cir. 1985).

⁶¹*Pegasus Agency*, 101 F.3d 882, 885 (quoting *Prudential Lines*, 59 F.3d 327, 331).

⁶²*In re Prudential Lines, Inc.*, 59 F.3d 327, 331 (2d Cir. 1995) (quoting *Bowers v. Conn. Nat'l Bank*, 847 F.2d 1019, 1022 (2d Cir. 1988)).

⁶³*Comer*, 716 F.2d 168, 174, n.11.

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(d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.⁶⁴

The legislative history of Section 362 indicates that the automatic stay “. . . is essentially an injunction.”⁶⁵ Based on that history, and the text of “ 362(d) and (e), courts have likened the automatic stay, and a

⁶⁴11 U.S.C. § 362(d) and (e). Section 362 (a) of the Bankruptcy Code sets forth the scope of the automatic stay and provides:

(a) 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 the debtor.

⁶⁵S. Rep. No. 95-989, 95th Cong., 2d Sess. 53 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5839; H.R. Rep. No. 595, 95th Cong., 1st Sess. 344 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6300.

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subsequent motion for relief from the stay, to the stages of an injunction:

Thus, the filing of a petition in bankruptcy is equivalent to a temporary restraining order, the preliminary hearing on a motion for relief from the stay is similar to a hearing on a preliminary injunction, and a decision as a result of the final hearing on the motion for relief from the stay is equivalent to a permanent injunction.⁶⁶

Also recognizing that, if orders denying relief from the stay “are not considered final and appealable, they would be, for the most part, unreviewable,”⁶⁷ many circuits have adopted a rule that orders denying relief from the stay are final for purposes of appeal.⁶⁸ Among these circuits, the Second Circuit has adopted the broadest rule, considering *all* orders denying relief from the stay to be final and appealable as of right.⁶⁹

The Third Circuit, however, has taken a less categorical view. Instead, it has recognized that “[i]t is conceivable. . . that an order of the bankruptcy court denying relief from an automatic stay, might, in some instances, be interlocutory. . . ,”⁷⁰ though we are aware of no reported decisions in which a court within the Third Circuit has dismissed an appeal for this reason. Applying the Third Circuit’s reasoning on the issue, two recent First Circuit decisions have dismissed appeals from orders denying relief from the stay for lack of jurisdiction. An examination of the leading Second and Third Circuit cases on the issue, as well as the recent cases from the First Circuit applying the Third Circuit’s approach, illustrate the differences in, and practical ramifications of, each position.

The Second Circuit

The Second Circuit’s approach to the finality of bankruptcy court orders denying relief from the stay was developed in three main cases: *In re Taddeo*, *In re Chateaugay Corp.*, and *In re Sonnax Industries*,

⁶⁶In re Chateaugay, 880 F.2d 1509, 1512.

⁶⁷In re Chunn, 106 F.3d 1293, 1241 (5th Cir. 1997).

⁶⁸See, e.g., In re Pegasus Agency, Inc., 101 F.3d 882, 885 (2d Cir. 1996); In re Sonnax, 907 F.2d 1280, 1284 (2d Cir. 1990); In re Taddeo, 685 F.2d 24 (2d Cir. 1982) (stating broadly that relief from automatic stay is equivalent of permanent injunction and thus a final order); In re Chunn, 106 F.3d 1239, 1241 (5th Cir. 1997); Eddleman v. U.S. Dep’t of Labor, 923 F.2d 782, 785 (10th Cir. 1991), overruled in part on other grounds by In re Temex Energy, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992); In re Dixie Broad., 871 F.2d 1028, 1026 (11th Cir. 1989) (holding, without discussion, that order denying relief from stay is final order); In re Cimarron Investors, 848 F.2d 975 (9th Cir. 1988) (same); In re Kemble, 776 F.2d 802, 805 (9th Cir. 1985); In re Leimer, 724 F.2d 744, 745-46 (8th Cir. 1984).

⁶⁹But cf. In re Fugazy Express, Inc., 982 F.2d 769, 776-77 (2d Cir. 1992) (holding that court lacked jurisdiction to consider appeal on motions for summary judgment and that appellants’ contention that adverse ruling “was in effect, a denial of relief from the automatic stay. . . ,] where no motion for such relief had been made,] border[ed] on the frivolous.”).

⁷⁰In re Comer, 716 F. 2d 168 (3d Cir. 1983).

*Inc.*⁷¹

In re Taddeo

Prior to the commencement of their bankruptcy case, the debtors in *Taddeo*⁷² defaulted on their home mortgage. In response to the default, the mortgagee “accelerated the mortgage, declared its balance due immediately, and initiated foreclosure proceedings.”⁷³ The debtors then commenced a case under chapter 13, thus staying the state court foreclosure action, and, relying on § 1322(b)(5) of the Bankruptcy Code, proposed a plan of reorganization that was intended to cure the default and reinstate the mortgage.⁷⁴ The mortgagee rejected the debtors’ plan and moved in the bankruptcy court for relief from the automatic stay to continue the state court foreclosure.⁷⁵ The bankruptcy court rejected the mortgagee’s contention that the acceleration of the mortgage precluded the debtors from curing the default and denied the mortgagee’s motion for relief from the stay.⁷⁶ In rejecting the mortgagee’s position, the court “analogiz[ed] § 1322(b) to 11 U.S.C. [§] 1124(2), which nullifies acceleration clauses in Chapter 11 corporate reorganizations” and held that the debtors “could pay their arrearages and reinstate their mortgage under [§ 1332(b)] notwithstanding [the mortgagee’s] acceleration.”⁷⁷ The mortgagee appealed the bankruptcy court’s order denying relief from the stay to the District Court for the Eastern District of New York, which affirmed the bankruptcy court’s decision.⁷⁸

The Second Circuit heard the case on appeal from the district court’s decision. In a footnote, the Court of Appeals addressed the issue of whether it had jurisdiction to hear the appeal.⁷⁹ The court explicitly rejected the approach set forth at that time in *Collier on Bankruptcy*, which stated that “all appeals from proceedings involving the automatic stay are interlocutory,” because *Collier’s* conclusion relied on, in the opinion of the court, the incorrect legal premise that orders granting injunctions are interlocutory in nature.⁸⁰ Rather, the court held that a bankruptcy court order denying relief from the automatic stay is a final

⁷¹The Second Circuit continues to apply its broad approach. See, e.g., *In re Megan-Racine Assocs., Inc.*, 102 F.3d 671 (2d Cir. 1996).

⁷²*In re Taddeo*, 685 F.2d 24 (2d Cir. 1982).

⁷³*Taddeo*, 685 F.2d 24, 25.

⁷⁴*Taddeo*, 685 F.2d 24.

⁷⁵See *Taddeo*, 685 F.2d 24. In this connection, the mortgagee argued that, because she had accelerated the mortgage, the debtors, whose only creditor was the mortgagee, had no way to cure the default under the Bankruptcy Code except to pay the full amount due, as required by state law.

⁷⁶See *Taddeo*, 685 F.2d 24.

⁷⁷See *Taddeo*, 685 F.2d 24, 26.

⁷⁸See *Taddeo*, 685 F.2d 24, 25.

⁷⁹See *Taddeo*, 685 F.2d 24.

⁸⁰See *Taddeo*, 685 F.2d 24, 26 n.4 (“ . . . *Collier’s* conclusion is based on the premise that ‘by definition’ all orders granting an injunction are interlocutory in nature.”).

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order that is appealable as of right.⁸¹ Citing the House reports from the time that the Bankruptcy Reform Act of 1978 was passed, the court held that “denial of relief from the automatic stay [is] the equivalent of a permanent injunction.”⁸² The court reasoned that, because an order granting a permanent injunction is a final order,⁸³ “Congress manifestly intended to treat final denial of relief from the automatic stay as a final order.”⁸⁴ Accordingly, the court reviewed, and affirmed, the bankruptcy court’s order.⁸⁵

In re Chateaugay

*In re Chateaugay*⁸⁶ involved a case in which LTV had issued a promissory note valued at \$117 million (the “LTV Note”) to its debtor-subsidiary, RepSteel.⁸⁷ In turn, RepSteel pledged the LTV Note as collateral for certain convertible secured notes (the “Notes”), having a face value of approximately \$65 million, which were held by Elliott Associates (“Elliott”) and Speer, Leeds & Kellogg (“Speer”) and for which BancTexas was the indenture trustee.⁸⁸ After RepSteel filed its chapter 11 petition, BancTexas moved for relief from the stay so that it could foreclose on the LTV Note. It claimed that “(i) RepSteel lacked equity in the LTV Note, (ii) the LTV Note was not necessary for RepSteel’s reorganization, (iii) the LTV Note was of insufficient value to adequately protect the holders of the Notes, and (iv) fluctuations in the value of the LTV Note provided cause for lifting the stay.”⁸⁹ After holding an evidentiary hearing, the bankruptcy court denied the motion “because BancTexas ha[d] not satisfied the requirements for lifting the stay under § 362.”⁹⁰ However, fearing the “disrupting” effect that the continuation of the automatic stay would have on the parties’ relationships, the court fashioned what it considered a “practical solution.”⁹¹ It would “revisit the matter in one year, and in the meantime [required] LTV to set aside a fund of \$20 million, equal to approximately one-half of the amount that BancTexas’s expert estimated the value of the collateral to be on the date of the hearing, appropriately discounted.”⁹² On appeal to the district court by BancTexas, Elliot, and Speer, the district court held that the bankruptcy court order was interlocutory and that the district

⁸¹See Taddeo, 685 F.2d 24.

⁸²See Taddeo, 685 F.2d 24.

⁸³See Taddeo, 685 F.2d 24 (citing *Vicksburg v. Henson*, 231 U.S. 259, 266-67 (1913)).

⁸⁴Taddeo, 685 F.2d 24.

⁸⁵Taddeo, 685 F.2d 24, 28.

⁸⁶*In re Chateaugay*, 880 F.2d 1509 (2d Cir. 1989).

⁸⁷See *Chateaugay*, 880 F.2d 1509, 1510.

⁸⁸See *Chateaugay*, 880 F.2d 1509.

⁸⁹*Chateaugay*, 880 F.2d 1509.

⁹⁰*Chateaugay*, 880 F.2d 1509.

⁹¹*Chateaugay*, 880 F.2d 1509.

⁹²*Chateaugay*, 880 F.2d 1509, 1510-11.

court, therefore, lacked jurisdiction to consider the appeal.⁹³ BancTexas, Elliott and Speer then appealed to the Second Circuit.⁹⁴ The Second Circuit held that the bankruptcy court's order was final and that the district court had jurisdiction over the appeal pursuant to § 158(a).⁹⁵ Accordingly, it reversed the district court's decision, and remanded the case to the district court for determination of the appeal on the merits.⁹⁶

The issue before the Second Circuit in *Chateaugay* was whether the bankruptcy court's "practical solution," with its attendant promise to review BancTexas' entitlement to relief from the automatic stay in one year's time, rendered the order denying relief from the stay, of which it was a part, interlocutory for the purposes of appellate review. Recognizing that some courts "have had a more difficult time' deciding whether orders denying relief from the stay are final"⁹⁷ than whether orders granting stay relief are final, the court, citing *Taddeo*, repeated its position that "denial of relief from the automatic stay [is] a final appealable order because such denial is the functional equivalent of a permanent injunction."⁹⁸ The court again reviewed the House and Senate reports from the time that the Bankruptcy Reform Act of 1978⁹⁹ was passed.¹⁰⁰ With regard to the character of the automatic stay, both reports stated that

[T]he stay is essentially an injunction. . . . The main difference lies in which party must bring the issue before the court. While in the injunction setting, the party seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move.¹⁰¹

Thus, based on the legislative history of § 362(e) of the Bankruptcy Code, the court concluded that

the filing of a petition in bankruptcy is equivalent to a temporary restraining order, the preliminary hearing on a motion for relief from the stay is similar to a hearing on a preliminary injunction, and the decision as a result of the final hearing on the motion for relief is equivalent to a permanent injunction.¹⁰²

As a permanent injunction, therefore, an order denying relief from the automatic stay, according to the Second Circuit, is a final, appealable order.¹⁰³

Furthermore, the court held that the language of § 362(e) and Rule 4001(a)(2) of the Federal Rules of Bankruptcy Procedure also indicates

⁹³See *Chateaugay*, 880 F.2d 1509, 1511.

⁹⁴See *Chateaugay*, 880 F.2d 1509.

⁹⁵See *Chateaugay*, 880 F.2d 1509.

⁹⁶See *Chateaugay*, 880 F.2d 1509.

⁹⁷*Chateaugay*, quoting *Collier on Bankruptcy* ¶ 3.03(6)(e) (15th ed. 1988).

⁹⁸*Chateaugay*, 880 F.2d 1509.

⁹⁹P.L. 95-598, 92 Stat. 2549 (1978).

¹⁰⁰*Chateaugay*, 880 F.2d 1509, 1512.

¹⁰¹*Chateaugay*, 880 F.2d 1509, 1511 (citations omitted).

¹⁰²*Chateaugay*, 880 F.2d 1509.

¹⁰³See *Chateaugay*, 880 F.2d 1509.

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that denial of relief from the stay is appealable as of right.¹⁰⁴ Section 362(e) states:

Thirty days after a request. . . for relief from the stay. . . , such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. . . . If the hearing under this subsection is a preliminary hearing,. . . [a] final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.¹⁰⁵

Moreover, Bankruptcy Rule 4001(a)(2) states:

The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing is commenced. . . unless before that time expires the court denies the motion for relief from the stay or, after notice and a hearing, orders the stay continued pending conclusion of the final hearing.¹⁰⁶

Regarding the appeal before it, the court held that the bankruptcy court hearing on the motion was “a ‘final hearing’ under the statute,”¹⁰⁷ because there was nothing in the record to indicate that it was anything but a final hearing:

There was only one hearing on the motion, at which witnesses testified, and at its conclusion the bankruptcy judge continued the stay in effect. The parties obviously regarded the proceeding before the bankruptcy judge as the section 362 hearing. The judge did not refer to the hearing as a “preliminary” hearing, and the failure of all concerned, including the judge, even to mention the statutory requirement that a “final hearing. . . be commenced not later than thirty days after the conclusion of such preliminary hearing” confirms this view.¹⁰⁸

The court also noted that to allow the one year to pass before the order denying relief from the stay became final would “violate congressional intent”, as Congress “only allowed ninety days to pass between a request for relief from the stay and ‘final judicial determination.’”¹⁰⁹

The court explained that, as a practical matter, the inevitable change in circumstances that occurs in one year’s time would render a postponed review of the stay relief motion an entirely new motion altogether, “which [would] be decided in light of different

¹⁰⁴See *Chateaugay*, 880 F.2d 1509.

¹⁰⁵See *Chateaugay*, 880 F.2d 1509 (citations omitted). The legislative history of § 362(e) indicates that it was intended to provide “a protection for secured creditors that is not available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided of the secured creditor’s interest.” H.R. Rep. No. 595, 95th Cong., 1st Sess. 344 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6300.

¹⁰⁶*Chateaugay*, 880 F.2d. 1509, 1512 (citations omitted).

¹⁰⁷*Chateaugay*, 880 F.2d 1509.

¹⁰⁸*Chateaugay*, 880 F.2d 1509.

¹⁰⁹*Chateaugay*, 880 F.2d 1509, 1513.

circumstances.”¹¹⁰ Ultimately, “the consequences for the parties may be completely different at that time than they would have been had relief been granted at the time the original motion was made.”¹¹¹ Thus, the court reasoned that if the order denying stay relief is appealable only upon confirmation of a plan of reorganization, any appeal that the creditor might take would be rendered moot.¹¹² The bankruptcy court’s order, therefore, “satisfie[d] the test of finality — because it denied appellants the right to foreclose on their collateral *under the circumstances in effect on the date that they requested that relief* and no further hearing would be held for a year.”¹¹³

In re Sonnax

Prior to the commencement of the bankruptcy case in *Sonnax*,¹¹⁴ the debtor in that case, a Vermont corporation, had been sued in New York state court along with its president and one of its sales representatives, by its competitor, Tri Component.¹¹⁵ Tri Component alleged that May, who had been an employee of Tri Component until September 1986 and who had signed a restrictive covenant with Tri Component that forbade him from using “information or knowledge gained [at Tri Component] within three years of leaving his job,” had used that information and knowledge, including Tri Component’s customer lists, in his subsequent employment with *Sonnax*.¹¹⁶ The New York State court granted Tri Component a preliminary injunction, which “prohibit[ed] *Sonnax* from soliciting business from, or doing business with, entities who had been customers of Tri Component prior to September 1986; from distributing or otherwise using a catalog referring to Tri Component’s cataloguing and parts numbering system, copyrighted material and trade secrets; and from using Tri Component’s customer list.”¹¹⁷ *Sonnax*, its president and May appealed the decision to the Appellate Division, First Department, and moved to stay the injunction pending the appeal.¹¹⁸ Their motion was denied.¹¹⁹ One day later, *Sonnax* filed a petition for relief in the Bankruptcy Court for the District of Vermont.¹²⁰

Tri Component filed a proof of claim in *Sonnax*’s chapter 11 case and moved for relief from the automatic stay to pursue its state court action

¹¹⁰Chateaugay, 880 F.2d 1509.

¹¹¹Chateaugay, 880 F.2d 1509.

¹¹²See Chateaugay, 880 F.2d 1509.

¹¹³Chateaugay, 880 F.2d 1509 (emphasis added).

¹¹⁴*In re Sonnax*, 907 F.2d 1280 (2d Cir. 1990).

¹¹⁵See *Sonnax*, 907 F.2d 1280.

¹¹⁶*Sonnax*, 907 F.2d 1280.

¹¹⁷*Sonnax*, 907 F.2d 1280.

¹¹⁸See *Sonnax*, 907 F.2d 1280.

¹¹⁹See *Sonnax*, 907 F.2d 1280.

¹²⁰See *Sonnax*, 907 F.2d 1280.

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in New York.¹²¹ Pursuant to 28 U.S.C. § 157(d), the United States District Court for the District of Vermont withdrew the reference with respect to the motion for stay relief.¹²² The district court denied Tri Component's motion and Tri Component appealed to the Second Circuit.¹²³ In holding that it had jurisdiction to hear the appeal under *Taddeo*, the Second Circuit noted that “[a] modest controversy continues to exist. . . with regard to orders denying motions to lift or to modify the automatic stay, because such orders may seem not necessarily to preclude appellate review later on.”¹²⁴ The court thereupon restated the broad rule of *Taddeo* that “denial of relief from an automatic stay in bankruptcy is equivalent to a permanent injunction and is thus a final order,” but also noted that “[m]ost circuits, however, have stopped short of adopting the broad rule that all denials of relief from the automatic stay constitute final, appealable orders.”¹²⁵

The court then surveyed the alternative position that “not all orders denying relief from the automatic stay [are] appealable[,]”¹²⁶ as that position is understood by the Third Circuit and as it has been adopted by post-*Taddeo* versions of *Collier on Bankruptcy*. As discussed above, at the time that *Taddeo* was decided, *Collier* took the position that “all appeals from proceedings involving the automatic stay are interlocutory and appealable only by leave of the district and appellate courts.”¹²⁷ Within ten years, however, *Collier* changed its position and, in keeping with the Third Circuit approach, declared that:

It may very well be that whether an order refusing to lift a stay is interlocutory or final will depend upon the reason for the court's order. If . . . the court refuses to lift the stay because it finds that the moving party does not have an interest in the property. . . , the litigation between the parties has been finally determined and there is nothing further for the court to do. On the other hand, if the court were to find that there was an equity cushion in the property or for another reason the creditor was adequately protected, the creditor would be free to renew its request for relief from the stay at a later time in the case, and the requisite complete and final determination of the rights between the parties would not have been accomplished. In that situation, such an order can readily be held to be interlocutory.¹²⁸

The court characterized the *Collier* analysis as “flawed” because “[a]llowing jurisdiction to turn on the reasons given for declining to lift the stay assumes those reasons are correct.”¹²⁹ The court recognized that the lower court's findings of fact and conclusions of law on a motion for

¹²¹See *Sonnax*, 907 F.2d 1280.

¹²²See *Sonnax*, 907 F.2d 1280, 1282-83.

¹²³See *Sonnax*, 907 F.2d 1280, 1282.

¹²⁴See *Sonnax*, 907 F.2d 1280, 1283.

¹²⁵*Sonnax*, 907 F.2d 1280, 1284.

¹²⁶*Sonnax*, 907 F.2d 1280, 1284.

¹²⁷*Taddeo*, 685 F.2d 24, at 26 n 4 (citing 1 *Collier on Bankruptcy* ¶ 3.03(7)(e) (1981)).

¹²⁸*Sonnax*, 907 F.2d 1280, 1284 (quoting *Collier on Bankruptcy* ¶ 3.03(6)(e) (1988)) (citing *United States v. Nicolet*, 857 F.2d 202, 206 (3d Cir. 1988)).

¹²⁹*Sonnax*, 907 F.2d 1280, 1285.

stay relief could very well be incorrect.¹³⁰ Thus, a creditor who claims that he is not adequately protected could be irreparably harmed should he be denied an opportunity to appeal from an order denying relief from the stay, if it comes to pass that, contrary to the bankruptcy court's projection of a debtor's financial future, there are, in fact, insufficient assets to protect that creditor.¹³¹ The right to renew the motion at a later date would, in that instance, be "irrelevant."¹³² Moreover, the *Collier* analysis, which elides jurisdictional considerations with the merits of a case, does not serve "[t]he purpose of the finality rule, judicial economy. . ."¹³³ "Once the appeal is taken, the appellate court will not be able to dispose of it without some consideration of the merits. . ."¹³⁴ Thus, the court reasoned, "any approach short of [the broad rule] of *Taddeo* is likely to be wasteful of judicial resources."¹³⁵

The Third Circuit

The Third Circuit, in contrast, has stated that some orders denying relief from the stay may be interlocutory. In *In re Comer*, the Third Circuit noted that "[i]t is conceivable. . . that an order of the bankruptcy court denying relief from an automatic stay might, in some instances, be interlocutory and remain so by an order of the district court affirming the decision in an appeal under section 1334(b)."¹³⁶ In the Third Circuit, ". . . denials of relief from an automatic stay are not considered final appealable decisions *per se*."¹³⁷ Rather, courts in the Third Circuit use a "functional" or "pragmatic" approach to determine whether denial of relief from the stay is "effectively a final decision."¹³⁸ Thus, while courts in the Third Circuit have held that "a decision that the moving party was not entitled to relief on the merits is considered a final appealable decision,"¹³⁹ they also recognize that ". . . in some instances an order denying relief from the stay may not be final and thus may not be appealable as of right to the district court."¹⁴⁰ For example, the Third Circuit has suggested that an order denying relief from the automatic stay "without prejudice because the record was incomplete,

¹³⁰See *Sonnax*, 907 F.2d 1280.

¹³¹See *Sonnax*, 907 F.2d 1280.

¹³²*Sonnax*, 907 F.2d 1280.

¹³³*Sonnax*, 907 F.2d 1280.

¹³⁴*Sonnax*, 907 F.2d 1280.

¹³⁵*Sonnax*, 907 F.2d 1280.

¹³⁶*In re Comer*, 716 F.2d 168, 174 n.11 (3d Cir. 1983). See also *United States v. Nicolet*, 857 F.2d 202 (3d Cir. 1988); *In re West Elecs., Inc.*, 852 F.2d 79 (3d Cir. 1988).

¹³⁷*In Matter of Eagle Enters., Inc.*, 265 B.R. 671, 677 (E.D. Pa. 2001) (citing *Nicolet*, 857 F.2d at 203 (order lifting automatic stay is appealable and denial of relief from stay "may" be appealable)); *West Elecs.*, 852 F.2d 79, 82; *United States v. Pellulo*, 178 F.3d 196, 200-01 (3d Cir. 1999).

¹³⁸*Eagle Enters.*, 265 B.R. 671, 677. See also *Nicolet*, 857 F.2d 202, 205; *John Hancock Mutual Life Ins. Co. v. Route 37 Bus. Park Assoc.*, 987 F.2d 154, 157 (3d Cir. 1993).

¹³⁹*Eagle Enters.*, 265 B.R. 671, 677.

¹⁴⁰*West Elecs.*, 852 F.2d 79, 82.

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discovery was ongoing or the court required further research on the issue before it,” might not be a final, appealable order.¹⁴¹ We are unaware, however, of any reported cases in the Third Circuit actually dismissing an appeal from an order denying stay relief for these or like reasons.

The First Circuit

Nevertheless, two recent cases from courts in the First Circuit followed the Third Circuit’s pragmatic approach and held that the orders in those cases denying relief from the automatic stay were not final orders.

In re Henriquez

In *In re Henriquez*,¹⁴² the BAP dismissed an appeal of an order denying relief from the automatic stay, holding that it lacked jurisdiction to hear the appeal. The debtor, Edward Henriquez, had purchased a piece of Caterpillar construction equipment, financing the purchase with a loan from the Caterpillar Financial Services Corporation (“Caterpillar”) which was secured by the equipment.¹⁴³ Thereupon, Caterpillar filed financing statements with the Secretary of State and the Clerk of the City of Newton to perfect its security interest in the equipment.¹⁴⁴ Two months later, Henriquez commenced a case under chapter 7 of the Bankruptcy Code.¹⁴⁵ Three months after filing his petition, Henriquez registered the equipment by filing a certificate of title with the Massachusetts Registry of Motor Vehicles.¹⁴⁶ The trustee in Henriquez’ chapter 7 case then commenced an adversary proceeding in the bankruptcy court seeking a determination that the estate’s interest in the equipment was senior to that of Caterpillar.¹⁴⁷ Caterpillar, thereafter, moved for relief from the stay.¹⁴⁸

The bankruptcy court conducted a nonevidentiary hearing on the matter. Because the hearing was nonevidentiary, Caterpillar had no opportunity to demonstrate that the equipment was not, as the trustee alleged, a “motor vehicle” such that the debtor’s registration of it with the Registry of Motor Vehicles created an interest superior to Caterpillar’s.¹⁴⁹ The bankruptcy court denied Caterpillar’s motion for relief from the stay pending the outcome of the adversary proceeding.¹⁵⁰

¹⁴¹West Elecs., 852 F.2d 79, 82.

¹⁴²*In re Henriquez*, 261 B.R. 67 (1st Cir. BAP 2001).

¹⁴³See *In re Henriquez*, 261 B.R. 67, 68.

¹⁴⁴See *In re Henriquez*, 261 B.R. 67.

¹⁴⁵See *In re Henriquez*, 261 B.R. 67.

¹⁴⁶See *In re Henriquez*, 261 B.R. 67.

¹⁴⁷See *In re Henriquez*, 261 B.R. 67.

¹⁴⁸See *In re Henriquez*, 261 B.R. 67.

¹⁴⁹See *In re Henriquez*, 261 B.R. 67, 71 n.6.

¹⁵⁰See *In re Henriquez*, 261 B.R. 67, 71.

Citing *In re Pegasus Agency, Inc.*,¹⁵¹ the court held that denials of relief from the automatic stay are final if they “completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief.”¹⁵² Thus, the BAP held that “for the bankruptcy court’s order denying Caterpillar’s motion to be final, it would have to completely resolve all issues between Caterpillar and the trustee with regard to the [equipment]. The order before us did not do so. It is not a final order under 28 U.S.C. § 158(a)(1).”¹⁵³

The First Circuit BAP’s decision in *Henriquez* eschewed the broad rule of *Taddeo, Chateaugay, and Sonnax*, and embraced the Third Circuit approach represented by *Comer, Nicolet, and West Electronics*, by holding that “a denial of relief from the stay may be . . . appealable,”¹⁵⁴ but that such a determination requires an “analysis of the nature and posture of the underlying dispute”¹⁵⁵ in order to determine the finality of the bankruptcy court’s order. Thus, the BAP held that an order is only final when “[a]s far as [the creditor] is concerned, nothing remains for the Bankruptcy Court to do”¹⁵⁶ and, as the bankruptcy court had yet to determine the respective priorities of the claims of the trustee and Caterpillar to the collateral, the bankruptcy court order was not final.

In re Shepard Clothing, Co.

In *In re Shepard Clothing Co.*,¹⁵⁷ the district court granted the appellee’s motion to dismiss an appeal from an order denying relief from the stay for lack of jurisdiction. In *Shepard*, the debtor filed a chapter 11 petition and then sought authorization to use cash collateral.¹⁵⁸ In support of its cash collateral motion, Shepard calculated the value of its assets and claimed that its primary secured creditors, Congress and GB, who held security interests in substantially all of its assets, including inventory and receivables, were oversecured by approximately \$4 million.¹⁵⁹ Shepard also offered to grant Congress and GB the following adequate protection:

- 1) a lien on all inventory generated post-petition and on accounts receivable generated by the use of the cash collateral, 2) a promise to insure all assets and to name Congress and GB as the loss payees, and 3) a promise to supply Congress and GB’s counsel with all of the operating statements

¹⁵¹*In re Pegasus Agency, Inc.*, 101 F.3d 882, 884 (2d Cir. 1996).

¹⁵²*Henriquez*, 261 B.R. 67, 70 (citing *Pegasus*, 101 F.3d 882, 885).

¹⁵³*Henriquez*, 261 B.R. 67, 70

¹⁵⁴*Henriquez*, 261 B.R. 67, 72.

¹⁵⁵*Henriquez*, 261 B.R. 67, 71.

¹⁵⁶*Henriquez*, 261 B.R. 67, 71 (quoting *In re Leimer*, 724 F.2d 744, 745 (8th Cir. 1984)).

¹⁵⁷*In re Shepard Clothing Co.*, 280 B.R. 786 (D. Mass. 2002).

¹⁵⁸See *Shepard*, 280 B.R. 786, 787-88.

¹⁵⁹See *Shepard*, 280 B.R. 786.

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[that Shepard] filed. . .and with any other reasonably requested financial information.”¹⁶⁰

In opposition to Shepard’s motion, Congress and GB alleged that Shepard exaggerated the value of its assets and that they were undersecured.¹⁶¹ After evidentiary hearings were held on Shepard’s motion, the bankruptcy court granted Shepard’s motion to use cash collateral and denied the motion for stay relief made by Congress and GB.¹⁶² In deciding the motions, the court found that Congress and GB “were adequately protected and should not be given relief from the automatic stay.”¹⁶³ Congress and GB appealed the order to the District Court of Massachusetts.

The district court dismissed the appeal for lack of jurisdiction. The court held that, while the First Circuit recently had “specifically declined to reach the issue,”¹⁶⁴ it had expressed agreement with the position taken by the courts of the Third Circuit that “a denial of relief is not inherently or automatically ‘final.’”¹⁶⁵ The court explained that “rather than analogizing the automatic stay to a permanent injunction, the First Circuit has treated it as more like a preliminary order.”¹⁶⁶ As such, the court found that the bankruptcy judge had never made a final determination of the value of Shepard’s assets because, as a debtor in possession with an ongoing business, the value of the assets was ever changing.¹⁶⁷ Furthermore, Congress and GB could renew their objections to the bankruptcy court’s cash collateral order and the bankruptcy court could review that order in light of the then current value of Shepard’s assets.¹⁶⁸ Thus, finding that the bankruptcy court had not conclusively determined either the value of Shepard’s assets or whether Congress and GB were adequately protected, the district court considered the bankruptcy court order interlocutory and unreviewable.¹⁶⁹

Because the bankruptcy court had determined that there was “a sufficient equity cushion” and that Congress and GB were adequately protected thereby¹⁷⁰ (at least at the time of the hearing), the district court may well have missed the mark. In the event that it were later determined that the bankruptcy court erred in its determinations, and that Congress and GB were not, in fact, adequately protected, Congress

¹⁶⁰See Shepard, 280 B.R. 786, 788.

¹⁶¹See Shepard, 280 B.R. 786.

¹⁶²See Shepard, 280 B.R. 786.

¹⁶³See Shepard, 280 B.R. 786.

¹⁶⁴See Shepard, 280 B.R. 786, 789 (citing *In re Calore Express Co.*, 288 F.3d 22 (1st Cir. 2002)).

¹⁶⁵See Shepard, 280 B.R. 786.

¹⁶⁶*Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 33 (1st Cir. 2002).

¹⁶⁷See Shepard, 280 B.R. 786, 789-90.

¹⁶⁸See Shepard, 280 B.R. 786, 790.

¹⁶⁹See Shepard, 280 B.R. 786, 789-90.

¹⁷⁰Shepard, 280 B.R. 786, 788 (“The existence of an equity cushion also persuaded the [bankruptcy] judge that Congress and GB were adequately protected and should not be given relief from the automatic stay.”).

and GB might be, as a practical matter, without a meaningful remedy. Clearly, the Second Circuit approach avoids such a result.

VI. Conclusion

Of the approaches to the finality of bankruptcy court orders denying relief from the stay discussed above, the Second Circuit's broad rule, as developed in *Taddeo*, *Chateaugay*, *Sonnax*, and subsequent cases, best balances the competing concerns of promoting judicial economy and preventing the irreparable harm to creditors that could result from their inability to immediately appeal an order denying relief from the stay. Though there may be instances, such as in *Henriquez*, where a particular order denying relief from the stay is not analogous to a permanent injunction, such cases are rare and, to the extent that appellate jurisdiction is exercised, there is little or no risk of harm or prejudice to the parties. Indeed, it appears that the greatest potential harm from the Second Circuit's rule is that the courts in the Second Circuit will exercise appellate jurisdiction, perhaps unnecessarily, in cases like *Henriquez*, contrary to the principle of judicial economy upon which the finality rule is grounded.¹⁷¹

Because, however, the approach taken by the First and Third Circuits necessarily requires the appellate court to analyze the merits of the underlying decision in order to determine whether the order is final and thus appealable on balance, the Second Circuit's approach (though not perfectly suited to all circumstances) is the better one. While it may minimally sacrifice judicial economy, it maximally benefits parties by limiting their exposure to the irreparable harm that could occur if a bankruptcy court errs in denying relief from the stay and they are left without an adequate remedy at the end of the case.

¹⁷¹We note, however, that the detailed and fact based approach taken in *Shepard* and *Henriquez*, like that taken in the Third Circuit cases, requires a detailed analysis of the lower court's decision in order to determine if there is appellate jurisdiction. That approach thus does not seem to significantly enhance judicial economy either. Rather, as those cases demonstrate, a dismissal for lack of appellate jurisdiction after a detailed review of the decision below lays waste to notions of judicial economy.