

POSTBANKRUPTCY REFUSALS TO DEAL WITH THE DEBTOR AND THE AUTOMATIC STAY: A FRESH APPROACH

A debtor's primary objective in filing for bankruptcy is to obtain relief.¹ The creditor, on the other hand, seeks to recover as much of a debt as possible when it becomes apparent that the debtor cannot satisfy its obligation in full.² Filing a petition in bankruptcy suspends the usual course of dealing between the debtor and its creditors so that a bankruptcy court can modify the rights and liabilities between them.³

After filing a petition, the debtor requires instant protection from a creditor's attempts at collection.⁴ Accordingly, the Bankruptcy Act of 1978⁵ mandates that creditors stop all collection efforts when the debtor files a petition in bankruptcy.⁶ Under section 362(a),⁷ filing a bankruptcy petition automatically stays certain actions against the debtor, including "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case."⁸

Recently, courts have struggled to determine when a prebankruptcy creditor's postbankruptcy refusal to deal with the debtor amounts to an "act to collect" the prebankruptcy debt, thus violating section 362(a)(6).⁹ Courts have set forth a determinative standard to be used in cases when a

1. 1 DANIEL R. COWANS, *BANKRUPTCY LAW AND PRACTICE* § 1, at 1 (2d ed. 1978).

2. *Id.* In order to understand completely the law of bankruptcy, one must bear in mind its dual nature as a remedy for both debtors and creditors. *Id.*

3. 1 *Bankr. Serv., L. Ed. (Law. Co-Op)* § 1:1, at 10 (1989). For example:

[C]ollection and foreclosure activities are brought to a halt, executory contracts, including collective bargaining agreements and unexpired leases, may be assumed or rejected by the trustee or debtor in possession, and liens become subject to avoidance by the debtor or by the trustee or debtor in possession as do certain preferences and fraudulent transfers and obligations.

Id.

4. 1 DAVID G. EPSTEIN ET AL., *BANKRUPTCY* § 3-1, at 77 (1992). In both voluntary and involuntary cases, creditors' recovery efforts must cease immediately so that the debtor's property and financial matters may be managed fairly and uniformly. *Id.*

5. *Bankruptcy Reform Act of 1978*, 11 U.S.C. §§ 101-1330 (1988).

6. 11 U.S.C. § 362 (1988). See 1 EPSTEIN ET AL., *supra* note 4, § 3-1, at 77. See also *infra* note 8 and accompanying text.

7. 11 U.S.C. § 362(a) (1988).

8. *Id.* § 362(a)(6).

9. 1 EPSTEIN ET AL., *supra* note 4, § 3-8, at 119; THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* 157 (1986); Daniel L. Keating, *Offensive Uses of the Bankruptcy Stay*, 45 *VAND. L. REV.* 71, 81-82 (1992).

creditor declines to provide future services unless the debtor repays his prepetition obligation.¹⁰ This coercive impact test seeks to distinguish coercive conduct from noncoercive conduct.¹¹ Courts find coercive conduct constitutes an "act to collect," thus violating the automatic stay under section 362(a)(6).¹² However, it is unclear whether a creditor's mere refusal to deal with a debtor constitutes coercive behavior.¹³

This Note contends that courts have unjustifiably broadened the scope of section 362(a)(6) by advancing and utilizing the coercive impact standard. Part I examines the historical development of debtor and creditor relief in bankruptcy. Part II analyzes the application, scope, objectives, and goals of the Bankruptcy Code's automatic stay provision. Part III reviews the judicial interpretation of section 362(a)(6), as it applies to a prebankruptcy creditor's postbankruptcy conditional refusal to deal with the debtor. Part IV critiques the judicial interpretations discussed in Part III and concludes that the judicially-prescribed distinction is problematic. Finally, Part V argues that courts should read section 362(a)(6) to prohibit only affirmative acts undertaken by creditors to collect prepetition debts.

I. HISTORY OF DEBTOR AND CREDITOR RELIEF IN BANKRUPTCY

Under early English law, a debtor had few rights in bankruptcy.¹⁴ The system provided solely for involuntary proceedings, whereby creditors forced the debtor into bankruptcy.¹⁵ The Englishman who failed to meet his obligations was routinely imprisoned.¹⁶

The United States Constitution gives Congress the right to create uniform laws on bankruptcy.¹⁷ The first American bankruptcy act, adopted in 1800,¹⁸ emulated the early English bankruptcy practices,¹⁹ and provided

10. See *infra* part III.

11. *Morgan Guar. Trust Co. v. American Sav. and Loan Ass'n*, 804 F.2d 1487, 1491 & n.4 (9th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987); *Sechuan City, Inc. v. North Am. Motor Inns, Inc.* (*In re Sechuan City, Inc.*), 96 B.R. 37, 41 (Bankr. E.D. Pa. 1989).

12. See *infra* part III.

13. See JACKSON, *supra* note 9, at 158.

14. Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 226-27 (1976).

15. *Id.*

16. *Id.*

17. U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have the power to establish uniform laws on the subject of bankruptcies throughout the United States.").

18. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (1800) (repealed 1803).

19. Countryman, *supra* note 14, at 228; 1 EPSTEIN ET AL., *supra* note 4, § 1-1, at 1.

for imprisoning bankrupt debtors.²⁰ The Act of 1800, consistent with early English practice, permitted only involuntary proceedings against merchants.²¹

However, the perception of the debtor as a criminal slowly began to change.²² Eventually, Congress adopted the Bankruptcy Act of 1898,²³ which remained in effect for eighty years. The Act of 1898 broadened debtors' rights further by eliminating the necessity of creditor consent for discharge in bankruptcy.²⁴

During the 1900s, debtors continued to garner more protection.²⁵ The legal age of the consumer arose after World War II.²⁶ As the amount of consumer credit increased significantly, the number of bankruptcies, both consumer and business related, grew accordingly.²⁷ Recognizing this intensifying condition, Congress determined that the Act of 1898 failed to provide adequate relief for consumer debtors.²⁸ Thus, Congress decided to modernize the bankruptcy laws²⁹ by enacting the Bankruptcy Reform Act of 1978.³⁰ The adoption of a new Bankruptcy Code represented substantial change in substantive American bankruptcy law.³¹ One significant change was the expansion of consumer-debtor rights.³²

II. THE AUTOMATIC STAY

The new Bankruptcy Code (Code) enlarged both the power and scope of

20. Countryman, *supra* note 14, at 228. At this time in the United States, only a few states had insolvency laws discharging the debtor from debt or releasing him from prison. *Id.*

21. *Id.* See also 1 EPSTEIN ET AL., *supra* note 4, § 1-1, at 1.

22. Countryman, *supra* note 14, at 229.

23. Ch. 541, 30 Stat. 544 (1898) (repealed 1979).

24. Countryman, *supra* note 14, at 231.

25. Robert E. Ginsberg, *Introduction to the Symposium: The Bankruptcy Reform Act of 1978—A Primer*, 28 DEPAUL L. REV. 923, 923 n.5 (1979).

26. *Id.*

27. H.R. REP. NO. 595, 95th Cong., 1st Sess. 5 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 5966; S. REP. NO. 989, 95th Cong., 2d Sess. 2 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5788.

28. H.R. REP. NO. 595, *supra* note 27, at 116-17, reprinted in 1978 U.S.C.C.A.N. at 6076-77.

29. H.R. REP. NO. 595, *supra* note 27, at 3, reprinted in 1978 U.S.C.C.A.N. at 5965; S. REP. NO. 989, *supra* note 27, at 1, reprinted in 1978 U.S.C.C.A.N. at 5787.

30. See also 1 PATRICK A. MURPHY, CREDITORS' RIGHTS IN BANKRUPTCY § 1.05 (2d ed. 1988). The Bankruptcy Reform Act of 1978 was the first full revision of the bankruptcy laws since the Bankruptcy Act of 1898. *Id.* Congress created the Commission on Bankruptcy Laws of the United States in 1970 to study and recommend changes to the Act of 1898. *Id.* Afterward, Congress and the Commission labored for seven years toward the completion of the Reform Act. *Id.*

31. 1 WILLIAM M. COLLIER, COLLIER ON BANKRUPTCY ¶ 1.01, at 1-1 (Lawrence P. King, ed., 15th ed. 1991).

32. H.R. REP. NO. 595, *supra* note 27, at 117-18, reprinted in 1978 U.S.C.C.A.N. at 6077-79.

the automatic stay.³³ Section 362(a)(1) of the Code stays any action or proceeding against the debtor to recover a prepetition claim.³⁴ Section 362(a)(6) goes further, staying "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case."³⁵ The broad scope³⁶ of this provision affords greater protection to the debtor because it prohibits collection acts independent of a "judicial, administrative or other action or proceeding against the debtor."³⁷ Section 362(a)(6) prevents creditors from collecting a prepetition debt "in any way."³⁸

Filing a petition with the bankruptcy court activates the automatic stay.³⁹ The stay applies to all entities, whether the bankruptcy proceeding is voluntary or involuntary.⁴⁰ However, the stay does not eradicate a creditor's claim against the debtor.⁴¹ Rather, it postpones the enforcement of creditor claims.⁴² During this delay, the Code may change, diminish, or even eliminate a creditor's rights against a debtor.⁴³ When the stay

33. Keating, *supra* note 9, at 75. See also Frank R. Kennedy, *Automatic Stays Under the New Bankruptcy Law*, 12 U. MICH. J.L. REF. 3, 10 (1978). Kennedy describes the automatic stay as a "logical feature" of the Code in part because "[i]t is necessary to prevent creditors from improving their positions by resorting to means not under the control of the [bankruptcy] court [in order to achieve] equitable distribution, satisfaction, [and] . . . security." *Id.* at 61-62.

34. 11 U.S.C. § 362(a)(1) (1988).

35. *Id.* § 362(a)(6). See also Doug Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 750-51 (1980). The stay remains in effect until the bankruptcy court replaces it with the discharge injunction, unless the court removes the stay under sections 362(d), (e), or (f). The discharge releases the debtor from those debts which the court has discharged. *Id.*

36. 2 COLLIER, *supra* note 31, § 362.04, at 362-34. The stay applies to almost every formal or informal action against the debtor. *Id.*

37. 11 U.S.C. § 362(I)(1) (1988). See 1 EPSTEIN ET AL., *supra* note 4, § 3-8, at 115.

38. H.R. REP. NO. 595, *supra* note 27, at 342, reprinted in 1978 U.S.C.C.A.N. at 6298; S. REP. NO. 989, *supra* note 27, at 50, reprinted in 1978 U.S.C.C.A.N. at 5836.

39. 11 U.S.C. § 362(a) (1988); 2 COLLIER, *supra* note 31, § 362.01, at 362-8. See also 1 EPSTEIN ET AL., *supra* note 4, § 3-1, at 78. When a debtor files a bankruptcy petition, the stay automatically takes effect without any order or request. *Id.*

40. 1 EPSTEIN ET AL., *supra* note 4, § 3-3, at 78. If creditors are not stayed, the resultant disfunction of the debtor's estate will frustrate the Code's goal of distributive equality. Kennedy, *supra* note 33, at 3. Moreover, the continuation of creditor-initiated actions could hinder the debtor's pursuit of a fresh start. *Id.*

41. 1 EPSTEIN ET AL., *supra* note 4, § 3-1, at 81. The automatic stay "preserve[s] relative values and . . . prevent[s] strategic jockeying by one creditor (or group of creditors) during the bankruptcy process." JACKSON, *supra* note 9, at 157. The stay maintains the creditor's standing within the debtor's estate. During the period of the stay, no creditor may advance its claim over that of another. 1 EPSTEIN ET AL., *supra* note 4, § 3-1, at 81.

42. 1 EPSTEIN ET AL., *supra* note 4, § 3-1, at 81.

43. *Id.*

ceases to operate, the creditor may enforce its rights to the extent that bankruptcy law allows.⁴⁴

A primary purpose of the stay is to stop creditors from collecting debts that will further their individual self-interests. Such actions could detrimentally affect the good of all creditors.⁴⁵ Yet the stay also attempts to protect the debtor.⁴⁶ The automatic stay provides the debtor with a breathing spell from those creditors seeking the debtor's assets⁴⁷ by preventing creditors from harassing the debtor.⁴⁸ Additionally, the stay allows the debtor to try to reorganize or to repay debts.⁴⁹ If the debtor cannot make repayment, the stay relieves the debtor of the financial pressures that caused the bankruptcy.⁵⁰ This protection supports the Code's fundamental goal: giving the debtor a fresh start.⁵¹ This objective relieves the honest debtor from obligations, and allows the debtor to start over free from any indebtedness.⁵²

44. *Id.* at 81. Secured creditors maintain the rights to their collateral even after the case. Conversely, unsecured creditors generally possess no rights that outlive bankruptcy. *Id.* at 81-82.

45. JACKSON, *supra* note 9, at 12. An important purpose of bankruptcy law is to stop individual creditors from initiating a "run" on the debtor, known as "grab law." *Id.* at 8-19; 1 Bankr. Serv., L. Ed., *supra* note 3, § 1:2. Bankruptcy law prevents runs by providing collective creditor execution on the assets of the debtor. *Id.*

Therefore, the automatic stay actually protects the creditor, as well:

Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for the debtor's assets prevents that.

H.R. REP. NO. 595, *supra* note 27, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297.

46. Jeffrey Sapir, *Automatic Stay*, in HANDLING YOUR FIRST PERSONAL BANKRUPTCY 149, 149 (PLI Com. L. & Prac. Course Handbook Series No. 641, 1992).

47. H.R. REP. NO. 595, *supra* note 27, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6296-97; S. REP. NO. 989, *supra* note 27, at 54, *reprinted in* 1978 U.S.C.C.A.N. at 5840-41.

48. H.R. REP. NO. 595, *supra* note 27, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297; S. REP. NO. 989, *supra* note 27, at 54, *reprinted in* 1978 U.S.C.C.A.N. at 5840.

49. H.R. REP. NO. 595, *supra* note 27, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297; S. REP. NO. 989, *supra* note 27 at 54-55, *reprinted in* 1978 U.S.C.C.A.N. at 5840-41.

50. H.R. REP. NO. 595, *supra* note 27, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297; S. REP. NO. 989, *supra* note 27, at 55, *reprinted in* 1978 U.S.C.C.A.N. at 5841.

51. JACKSON, *supra* note 9, at 4.

52. *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904). The Supreme Court stated: "[S]ystems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes." *Id.*

See also Rendleman, *supra* note 35, at 723-24 ("Bankruptcy's fresh start should provide the bankrupt with 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'") (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

The goal of providing such significant debtor protection, however, begs an important policy question. Because the Code also aims to provide relief to the creditor,⁵³ how broad is the automatic stay of section 362(a)(6).⁵⁴ In formulating section 362(a), Congress recognized that creditors in some consumer cases telephone debtors to pressure them into repayment despite their bankruptcy.⁵⁵ Inexperienced debtors, Congress noted, might yield to such pressure.⁵⁶ Therefore, in formulating section 362(a)(6), Congress intended to prevent sophisticated creditors from avoiding the protective purpose of the bankruptcy laws.⁵⁷

At least one commentator has stated that courts have interpreted the stay more broadly than Congress originally intended.⁵⁸ The Code understandably forbids traditional creditor collection activities upon the filing of a bankruptcy petition.⁵⁹ Nevertheless, critics argue that any expanded interpretation of the stay conflicts with the Code's attempt to protect creditors.⁶⁰ Others, however, support the expanded stay's hard line against self-serving creditors.⁶¹ Since its introduction, courts have grappled with the scope of section 362(a)(6).

III. JUDICIAL INTERPRETATION

In the sixteen years since the Code's enactment, relatively few courts have been asked to determine which actions violate the automatic stay

53. JACKSON, *supra* note 9, at 10. Jackson states:

The basic problem that bankruptcy law is designed to handle, . . . is that the system of individual creditor remedies may be bad for the creditors *as a group* when there are not enough assets to go around. Because creditors have conflicting rights, there is a tendency in their debt-collection efforts to make a bad situation worse.

Id. at 10. Bankruptcy law's solution is a collective creditor forum. *Id.* at 12-13.

54. Congress has stated that: "The scope of [362(a)] is broad. All proceedings are stayed, including arbitration, license revocation, administrative, and judicial proceedings. Proceedings in this sense encompass civil actions as well, and all proceedings even if they are not before governmental tribunals." H.R. REP. NO. 595, *supra* note 27, at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297.

55. *Id.* at 342, *reprinted in* 1978 U.S.C.C.A.N. at 6298.

56. *Id.*

57. *Id.*

58. 1 EPSTEIN ET AL., *supra* note 4, § 3-1, at 84. The authors state that skillful attorneys have stretched the stay a great deal. *Id.*

59. *Id.*

60. *Id.* These critics would point out that the expansive interpretation of the stay is expensive, as well as harmful, to legitimate creditors' concerns. *Id.*

61. 1 EPSTEIN ET AL., *supra* note 4, § 3-1, at 84. These supporters find perilous both direct and indirect attempts by creditors to better their situations, and thus favor an expansive interpretation of the stay. *Id.*

under section 362(a)(6).⁶² Nevertheless, of the courts confronted with the issue, most have interpreted the section in a similar fashion.⁶³ These courts have attempted to differentiate between requests for payment that are not coercive or harassing and conduct intended to coerce a debtor into paying a prepetition debt.⁶⁴

Some courts, however, are less stringent than others in deciding which acts are coercive. The varied results appear to be driven by the different manners in which creditors attempt to obtain repayment. Although there are many different types, creditors may be divided into four main classes: credit unions; trade creditors; institutional lenders; and educational lenders. Courts generally find that trade creditors and educational lenders act coercively in their attempts to collect prepetition debts while often determining that credit unions do not use coercion.⁶⁵ Courts view institutional lenders' efforts less consistently. These disparities stem from the fact that the different creditor organizations act with varying degrees of formality.⁶⁶

A. Credit Unions

Many credit unions maintain formal policies that deny future services to any member who causes the credit union to incur a financial loss.⁶⁷ Courts generally hold that a creditor may inform a debtor of such a policy without violating section 362(a)(6). In *Brown v. Pennsylvania State Employees Credit Union (In re Brown)*,⁶⁸ perhaps the most significant decision on the scope of section 362(a)(6), the Third Circuit held that a credit union's letter to the debtor, which informed the debtor of its rule not to provide future services unless the debtor reaffirmed a prepetition debt, did not violate the stay.⁶⁹ The debtor in the case filed a Chapter 7

62. JACKSON, *supra* note 9, at 163.

63. *See* part III.A-D.

64. *Morgan Guar. Trust Co. v. American Sav. and Loan Ass'n*, 804 F.2d 1487 (9th Cir. 1986), *cert. denied*, 482 U.S. 929 (1987).

65. *See infra* part III.A-B, D.

66. *See infra* part III.C.

67. *See infra* notes 69-72, 86-87 and accompanying text.

68. 851 F.2d 81 (3d Cir. 1988).

69. *Id.* at 85. *See also In re Henry*, 129 B.R. 75 (Bankr. E.D. Va. 1991). In *Henry*, the Bankruptcy Court for the Eastern District of Virginia held that a credit union's policy of terminating membership privileges to any member who caused it a loss did not violate the automatic stay. *Id.* at 78. The debtor filed a Chapter 13 petition, the liability schedules of which included debts owed to the credit union. *Id.* at 76. The credit union subsequently revoked the debtor's membership. *Id.* The credit union denied membership privileges in accordance with the its formal policy, which provided:

voluntary petition for bankruptcy.⁷⁰ One month later, the creditor sent the debtor a letter stating that its policy toward members who have some or all of their debt discharged in bankruptcy was to deny them future services.⁷¹ The letter further provided that the debtor would remain qualified to receive future services if she reaffirmed the obligation with the requisite court approval.⁷²

Analyzing whether this action constituted a coercive attempt to collect the prepetition debt, the court observed that the language in the letter was

I. DENIAL OF ALL CREDIT UNION SERVICES TO MEMBERS WHO HAVE CAUSED THE CREDIT UNION TO SUFFER A LOSS

(1) The board of directors has authorized that any member who has caused the credit union to suffer a loss by reason of discharge in bankruptcy or as a result of a default or [sic] a loan, or by any other means will be denied any further use of credit union services or products.

Id.

In determining whether the credit union's policy violated the stay, the court first noted that the debtors encountered no difficulty in obtaining similar banking services at a regular bank, although, perhaps, an increased cost. *Id.* at 77. The court also found that the credit union did not pressure the debtors to reaffirm the debt to ensure that their membership privileges remained intact. *Id.* Finally, the court observed that the credit union's policy applied in a nondiscriminatory manner to all members who caused it a financial loss. *Id.* at 78. The court concluded that the credit union's policy did not violate section 362(a). *Id.*

But see In re Guinn, 102 B.R. 838 (Bankr. N.D. Ala. 1989). In *Guinn*, the Bankruptcy Court for the Northern District of Alabama determined that a credit union had violated § 362 by terminating a debtor's membership, refusing to accept his mortgage payments, and subsequently declaring the mortgage in default. *Id.* at 842. The credit union's membership agreement contained a provision stating that any member who caused the credit union to suffer a loss forfeited membership. *Id.* at 840. The credit union reasoned that upon the termination of membership, it was not required to continue to provide privileges to the debtor, including maintaining the mortgage. *Id.* at 841. Consequently, it determined that it could decline to accept the debtor's mortgage payment, and thus declare the mortgage in default. *Id.*

The court addressed the creditor's justification as follows:

The mere cancellation of the debtor's membership privileges—such as maintaining an interest-bearing share account for the debtor or maintaining a checking account for the debtor—is not a withdrawal of privileges unique [to] union membership and therefore not so valuable as to . . . be found coercive. . . . The asserted use of the membership-termination provision so as to prevent the debtor from being able to maintain payments on the real estate mortgage is also not coercive. . . .

Id. at 842.

Although terminating the debtor's membership was not a coercive act, refusing mortgage payments and foreclosing on the mortgage was coercive, thus violating section 362(a)(6) of the Code. *Id.*

70. *Brown*, 851 F.2d at 82. After filing, Brown's attorney wrote a letter to the creditor disclosing the bankruptcy. This letter also commanded the creditor to terminate immediately all efforts at collection. *Id.*

71. *Id.* at 82. The creditor's bylaws mandated barring debtors who caused it financial loss. *Id.* at 83.

72. *Id.* at 82.

mild.⁷³ Moreover, the court noted that the letter referred to reaffirmation, a formal agreement overseen by the bankruptcy court.⁷⁴ The court found that the creditor did not intend to harass the debtor.⁷⁵ Holding that the creditor did not violate section 362 by simply informing the debtor of its policy, the court noted that the Code declines to mandate that a creditor do business with its debtor.⁷⁶ The court declared that to hold otherwise intolerably broadens the scope of the Code's antidiscrimination provisions,⁷⁷ which prohibit governmental units and private employers from discriminating against any person "with respect to employment."⁷⁸

Further defending its decision, the court asserted that such a conclusion did not upset the bankruptcy laws.⁷⁹ The court deemed the letter was not unfair because it afforded the debtor the option of choosing between retaining the creditor's services and discharging the obligation.⁸⁰ Moreover, the court expressed concern that prohibiting such communication could work to the debtor's detriment when the debtor has no knowledge of its creditor's policy.⁸¹

The *Brown* court also declared that its decision was consistent with both the Code's "fresh start" and "breathing spell" policies.⁸² The court explained that the debtor retained the protective right to a "fresh start" by virtue of court supervised reaffirmation procedures.⁸³ Referring to preserving the breathing spell protection, the court remarked that the stay

73. *Id.* at 84.

74. *Id.*

75. *Brown*, 851 F.2d at 85.

76. *Id.*

77. *Id.* Explaining the potential adverse effects such an extension would occasion, the court stated: Congress rejected a general anti-discrimination policy. . . . Yet, any refusal of future services by a present creditor has some coercive impact. If we hold that the impact itself is sufficient to violate the bankruptcy injunctions of § 362 and § 524, then a creditor—whether or not a governmental unit or employer—may be prevented from denying future services because of a prior discharged debt. The debtor could do indirectly through § 362 and § 524 what she cannot accomplish directly through the anti-discrimination provision. We cannot find that Congress intended this result.

Id.

78. 11 U.S.C. § 525 (1988).

79. *Brown*, 851 F.2d at 86.

80. *Id.* The court noted that one objective of the reaffirmation principle is to preserve a debtor's credit rating. *Id.*

81. *Id.* The court asserted that such a prohibition "might prevent the debtor from making the choice [between reaffirmation which saves one's credit rating, and ruining one's credit rating] until it is too late." *Id.*

82. *Id.* See *supra* notes 51-52 and accompanying text.

83. *Brown*, 851 F.2d at 86. In addition, the court stressed that the "fresh start" policy does not impart rights to the debtor above those which Congress saw fit to grant. *Id.*

does not prohibit *communications* by a creditor but rather forbids the creditor from initiating impending acts, such as a suit or foreclosure.⁸⁴ Therefore, the court held that the creditor did not violate section 362(a)(6) by merely informing the debtor of its policy.⁸⁵

Similarly, in *In re Callender*,⁸⁶ the Bankruptcy Court for the Southern District of Ohio held that when a credit union notifies a debtor of its membership denial policy and suggests that the debtor repay the debt, the credit union does not violate the stay.⁸⁷ The attorney for the credit union wrote a letter to the debtor's attorney stating that because the debtor had caused the credit union to suffer a loss, he was no longer eligible to receive future services.⁸⁸ The court determined that the creditor's letter did no more than state its position and provide the debtor with a method of avoiding the cessation of service.⁸⁹ The court relied on *Brown* to decide whether the communication amounted to an "act to collect" the debt.⁹⁰ The court found that the letter closely resembled the "mildly worded" and noncoercive letter in *Brown*. Accordingly, the court held that the creditor had not violated the statutory stay.⁹¹

B. Trade Creditors

In contrast, courts typically find that entities which extend goods or services on credit act coercively when they refuse to deal with the debtor unless the debtor repays the prepetition obligation. In *Olson v. McFarland Clinic, P.C. (In re Olson)*,⁹² the Bankruptcy Court for the Northern

84. *Id.*

85. *Id.*

86. 99 B.R. 378 (Bankr. S.D. Ohio 1989).

87. *Id.* at 380.

88. *Id.* at 379. The creditor's counsel wrote a letter to the debtor, which stated in part:

I am an attorney writing you on behalf of your credit union. As you will recall, your bankruptcy plan listed your credit union as unsecured. This means that the credit union will suffer a loss.

Please understand that your credit union has a policy stating that *all services shall be terminated for any person who causes the credit union a loss.*

As a possible solution, you might want to consider contacting your attorney and having him place [the credit union] in a special class of unsecured creditors receiving 100% of their claims. That way, the credit union would consider you for future services just as it would any other member in good standing.

Id.

89. *Id.* The debtor had asserted that the creditor's dispatch of the letter constituted an act "to close debtor's account in retaliation of debtor's petition for relief under Chapter 13." *Id.*

90. *Id.* at 380.

91. *Id.*

92. 38 B.R. 515 (Bankr. N.D. Iowa 1984).

District of Iowa determined that a hospital attempted to coerce the debtor to repay his prepetition debt.⁹³ The hospital sent the debtor a letter informing him that the hospital would not provide future medical services, absent repayment.⁹⁴ The court noted that on its face the letter exhibited no express intent to collect the debt.⁹⁵ Nonetheless, the court expressed its disdain for harassment disguised as “respect” for the debtor.⁹⁶ Because the creditor would provide services if the debtor were to repay the prepetition obligation, the court held that refusing medical service functioned only to collect the debt, thus violating section 362(a)(6).⁹⁷

The *Olson* court explained that the Code does not require a postbankruptcy creditor to provide future services to the debtor.⁹⁸ The court remarked that had the defendant merely refused to provide services to the debtor without mentioning the debtor’s bankruptcy filing, section 362(a) would not apply.⁹⁹ The court found, however, that through this communication, the creditor conveyed its wish to collect the debt.¹⁰⁰ Applying the language of section 362(a)(6), which forbids attempts to collect prepetition debts “in any way,” the court concluded that the creditor’s actions violated the automatic stay.¹⁰¹

Similarly, in *Sportfame of Ohio, Inc. v. Wilson Sporting Goods Co. (In*

93. *Id.* at 518.

94. *Id.*

95. *Id.* at 517. The letter from the creditor’s administrator provided:

I wish to inform you that the . . . [hospital] . . . will no longer be able to provide medical care to you and members of your family.

This action has become necessary based on your failure to pay for the medical services provided by [the hospital] Since you have filed bankruptcy, I realize that we cannot legally pursue the collection of this account. However, we are willing to reinstate service if you wish to pay your account voluntarily.

Id. at 516.

96. *Id.* at 517 (citing *In re Hix*, 13 B.R. 752, 754 (Bankr. S.D. Ohio 1981)).

97. *Id.* at 517-18. The court determined that the hospital utilized the refusal of future services as leverage in an attempt to collect the debt. *Id.* at 517.

98. *Olson*, 38 B.R. at 518.

99. *Id.*

100. *Id.*

101. *Id.* Additionally, the court relied upon decisions from comparable prior cases in arriving at its conclusion. *Id.* at 517 (citing *In re Stephens*, 2 B.R. 365, 366 (Bankr. N.D. Ohio 1980) (“[T]he creditor . . . by requesting a reaffirmation of the pre-bankruptcy debt as a condition precedent for the granting of a [new] loan has violated section 362(a)(6)”); *In re Green*, 15 B.R. 75, 78 (Bankr. S.D. Ohio 1981) (“Refusing to execute a reaffirmation agreement unless the dischargeable debt [is] paid violates the statutory rights of the debtor.”); *In re Haffner*, 25 B.R. 882, 886 (Bankr. N.D. Ind. 1982) (“[G]overnment regulations that condition receipt by a debtor in bankruptcy of a service upon payment of a prepetition debt violate section 362(a)(6).”).

re Sportfame of Ohio, Inc.),¹⁰² the Bankruptcy Court for the Northern District of Ohio found that a trade creditor violated the stay when it refused to provide future goods to the debtor.¹⁰³ Prior to filing the bankruptcy petition, the debtor became in arrears with the creditor.¹⁰⁴ Subsequently, the creditor ceased delivering its product to the debtor.¹⁰⁵ The debtor contacted the creditor after filing in an attempt to have shipments resumed,¹⁰⁶ and although he offered to pay cash for the goods, the creditor refused unless the debtor paid the arrearage.¹⁰⁷

Analyzing a possible stay encroachment, the court first noted the broad scope of section 362 and determined that the section should apply to most actions against debtors.¹⁰⁸ Next, the court reiterated Congress' intent that section 362 prevent creditors from avoiding the protectionist purpose of the bankruptcy laws.¹⁰⁹ Observing that refusing to provide future services to the debtor, without any explanation, does not violate the Code, the court declared that this creditor's conditional refusal went too far.¹¹⁰ Therefore, the court found the creditor inherently coerced the debtor, thus violating section 362(a)(6).¹¹¹

102. 40 B.R. 47 (Bankr. N.D. Ohio 1984).

103. *Id.* at 50-51. The court stated that the creditor could have simply refused to sell goods to the debtor for any reason, or could have given no explanation at all for refusing to deal with the debtor. *Id.* at 50.

104. *Id.* at 48.

105. *Id.* at 48-49.

106. *Id.* at 49.

107. 40 B.R. at 49. The debtor asserted that because the creditor refused to ship these goods, the debtor could not continue to supply its customers with a certain brand of sporting goods. Many of the debtor's customers asked for this brand by name and refused other lines of goods as replacements. Accordingly the debtor claimed that Sportfame would experience customer dissatisfaction and a loss of profits. *Id.*

108. *Id.* at 50 (citing 2 COLLIER, *supra* note 31, ¶ 362.04, at 362-27).

109. *Id.* (citing H.R. REP. NO. 595, *supra* note 27, at 50-51, reprinted in 1978 U.S.C.C.A.N. at 5826-37; S. REP. NO. 989, *supra* note 27, at 342, reprinted in 1978 U.S.C.C.A.N. at 6298).

110. *Id.*

111. *Id.* at 50-51. See also *Karsh Travel, Inc. v. Airlines Reporting Corp.* (*In re Karsh Travel, Inc.*), 87 B.R. 110 (Bankr. N.D. Cal. 1988). In *Karsh*, the court found that an airline ticket clearinghouse violated the automatic stay when it refused to send more tickets to the debtor travel agency unless the agency repaid a prepetition debt. *Id.* at 111-12. At the time of the Chapter 11 filing, the debtor had a substantial amount of tickets in stock that it continued to issue in a normal fashion. *Id.* at 111. The creditor refused to send more tickets to the debtor due to a bad prepetition check. *Id.* The creditor requested that the debtor return certain hardware and documents "pending payment of the prepetition debt." *Id.* Stating that "[i]t is a clear violation of the automatic stay to refuse to do business with a debtor unless prepetition debt is paid," the court found that the creditor's actions in this case violated section 362(a)(6). *Id.* at 112.

C. Institutional Lenders

Unlike the cases involving credit unions and trade creditors, courts are more divided in their decisions concerning possible automatic stay violations by institutional lenders. In *In re Stephens*,¹¹² the Bankruptcy Court for the Northern District of Ohio found that a creditor violated section 362(a)(6) by requiring a debtor to reaffirm his prepetition obligation before granting him a new loan. In *Stephens*, the creditor did not solicit repayment until the debtor sought a new loan.¹¹³ Nevertheless, the court noted that in drafting section 362(a)(6), Congress undertook to preclude a creditor from harassing a debtor in order to collect a prepetition debt.¹¹⁴ The court further observed that Congress intended to protect a debtor's right to both a discharge and a fresh start.¹¹⁵ Finding the scope of section 362(a)(6) extensive, the court concluded that the reaffirmation agreement was unenforceable because the creditor's request violated the automatic stay.¹¹⁶

However, in *Schmidt v. American Fletcher National Bank and Trust Co. (In re Schmidt)*,¹¹⁷ the Bankruptcy Court for the Southern District of Indiana held that the creditor could refuse to reaffirm a secured debt unless the debtors agreed to reaffirm an unsecured debt without violating the automatic stay.¹¹⁸ The *Schmidt* court emphasized that the debtor had contacted the creditor first.¹¹⁹ Accordingly, the court interpreted the creditor's efforts to collect as passive, and not violative of section 362(a)(6).¹²⁰ The court surmised that its ruling was consistent with the

112. 2 B.R. 365, 366 (Bankr. N.D. Ohio 1980).

113. *Id.* at 366.

114. *Id.* ("The conduct prohibited ranges from that of an informal nature, such as by telephone contact or by dunning letters to more formal judicial and administrative proceedings that are also stayed under paragraph (1).") (citing 2 COLLIER, *supra* note 31, ¶ 362.04, at 362-65).

115. The court remarked that creditors must file reaffirmation applications with the court for approval. *Id.* at 366-67 (citing 9 Bankr. Serv., L. Ed., *supra* note 3, § 82:4, at 139-41). The *Stephens* court noted that Congress requires courts to review reaffirmation so that creditors may not coerce debtors into reaffirming their debts. *Id.*

116. *Id.* at 367.

117. 64 B.R. 226 (Bankr. S.D. Ind. 1986).

118. *Id.* at 228.

119. *Id.* The court stated:

Here, [the creditor] did not contact the Schmidts, but only discussed its policies on reaffirmation after contacted by the Schmidts and their attorney. [The creditor] did not repossess its collateral until after the Schmidts indicated that they would abandon it.

Id.

120. *Id.*

stay's basic purpose: benefitting the debtor by preventing creditor harassment.¹²¹ The court found that the creditor had not harassed the debtor, but had merely communicated its policy on reaffirmation.¹²² Such a statement, the court held, is not coercive, and therefore does not infringe upon the automatic stay.¹²³

D. Educational Lenders

The courts that have examined cases concerning educational loan debts consistently hold that an educational lender violates the automatic stay by refusing to release the debtor's transcript unless the loan obligation is repaid. In *California State University, Fresno v. Gustafson (In re Gustafson)*,¹²⁴ the court concluded that withholding a student-debtor's transcript was an act to collect an educational loan debt in violation of section 362(a)(6).¹²⁵ In this case, after filing for bankruptcy relief, the debtor requested his transcripts for employment purposes.¹²⁶ The university replied that it would release the transcript only if the debtor agreed to reaffirm his student loan.¹²⁷

The *Gustafson* court distinguished these facts from the *Brown* creditor's mere communication of policy, stating that the university actually withheld the debtor's transcript, rather than merely communicating that it would do so.¹²⁸ The court deemed it immaterial that the university made no

121. *Id.* (citing *In re Matthews v. Rosene*, 739 F.2d 249 (7th Cir. 1984)).

122. *Schmidt*, 64 B.R. at 229.

123. *Id.* (citing *In re Brown*, 49 B.R. 558 (Bankr. M.D. Pa. 1985)).

124. 111 B.R. 282 (Bankr. 9th Cir. 1990), *rev'd on other grounds*, 934 F.2d 216 (9th Cir. 1991).

125. *Id.* at 286-87. In reaching its decision, the court partially relied on two other decisions, *In re Parham*, 56 B.R. 531 (Bankr. E.D. Va. 1986), and *In re Heath*, 3 B.R. 351 (Bankr. N.D. Ill. 1980). Unlike *Gustafson's* Chapter 7 filing, *Parham* and *Heath* involved Chapter 13 debtors, however, the court determined that the distinction was not relevant. *Id.*

In *Heath*, the court held that a university's refusal to issue a transcript to a debtor violated the automatic stay. 3 B.R. at 355. The university denied the debtor his transcript until he repaid the debt. *Id.* at 351. The court considered Congress' intent that section 362(a)(6) prohibit creditors from attempting to collect a prepetition debt "in any way." *Id.* at 354-55. Next, the court determined that the university acted solely to collect the debtor's obligation. *Id.* at 355. Consequently, the court found that the university acted within section 362(a)(6)'s scope, and thus violated the stay. *Id.*

126. *Gustafson*, 111 B.R. at 284. The debtor stated that he needed a transcript in order to take a civil service exam. *Id.*

127. *Id.* The letter stated that: "the only way [we] would release your transcripts before . . . receiv[ing] the 'Discharge from the Bankruptcy Court' would be for you to reaffirm your [student loan obligation] with [the university]." *Id.*

128. *Id.* at 287 n.5.

affirmative attempt to collect the debt,¹²⁹ noting that in some instances, refusing to take affirmative action amounts to an act to collect.¹³⁰ The court found that withholding the transcript could not serve any purpose other than to coerce Gustafson into reaffirming his prepetition student loan obligation.¹³¹ Consequently, the court held that this act breached the automatic stay provision.¹³²

Similarly, in *Virginia Union University v. Parham (In re Parham)*,¹³³ the Bankruptcy Court for the Eastern District of Virginia held that a university could not retain a debtor's transcript, releasing it only when she repaid an overdue student loan.¹³⁴ The school had a blanket policy of withholding transcripts from students who were not current on their loan accounts.¹³⁵ Thus, when the debtor requested her transcript, the university refused to issue it until she repaid her loan.¹³⁶ In deciding whether the university had violated section 362(a)(6), the *Parham* court looked to other courts for direction,¹³⁷ acknowledging the importance of a transcript to the debtor in search of gainful employment.¹³⁸ Additionally, the court remarked that section 362(a)(6) prohibits all creditors from attempting to collect any prepetition debt.¹³⁹ Hence, the court concluded that the

129. *Id.* at 287 ("The fact that [the creditor] did not act affirmatively does not alter our conclusion that withholding the transcript is an attempt to collect a debt in violation of section 362(a)(6) . . .") (citing *In re Farmers Markets, Inc.*, 792 F.2d 1400, 1404 (9th Cir. 1986)).

130. *Id.* The paramount consideration, the court stated, was whether, in the totality of the circumstances, the exchange manifested an attempt to collect a prepetition debt. *Id.* at 288.

131. *Gustafson*, 111 B.R. at 286-87.

132. *Id.* at 288.

133. 56 B.R. 531 (Bankr. E.D. Va. 1986).

134. *Id.* at 534. See also *Andrews Univ. v. Merchant (In re Merchant)*, 958 F.2d 738, 741 (6th Cir. 1992) (holding that a prepetition creditor violated section 362(a)(6) when it withheld a student debtor's transcript); *Board of Trustees of Univ. of Ala. v. Howren (In re Howren)*, 10 B.R. 303, 305-06 (Bankr. D. Kan. 1980) (retaining transcript solely to compel repayment of student loan violated automatic stay).

135. *Parham*, 56 B.R. at 532.

136. *Id.* at 531-32.

137. *Id.* at 532. The court relied upon the decisions in *In re Heath*, 3 B.R. 351 (Bankr. N.D. Ill. 1980), and *In re Ware*, 9 B.R. 24 (Bankr. W.D. Mo. 1981). See *supra* note 125 for a discussion of *Heath*. In *Ware*, the student-debtor requested a copy of her transcript from the college to which she was indebted so that she could attend another college. *Ware*, 9 B.R. at 25. The creditor refused to release her transcript. *Id.* The court determined that the college refused to turn over her transcript for the sole purpose of collecting the debt. *Id.* Because section 362 prohibits "any act to collect" a prepetition obligation owed to the creditor, the court concluded that the college's conduct violated the automatic stay. *Id.*

138. *Parham*, 56 B.R. at 534 (citing *In re Reese*, 38 B.R. 681 (Bankr. N.D. Ga. 1984)).

139. *Id.* The court stated: "The case law is clear that a petition under Chapter 13 prohibits a creditor from attempting to collect any debt by any act, provided that such debt would be dischargeable under Chapter 13." *Id.* However, the court noted that because "Congress made certain student loans

university had violated the automatic stay.¹⁴⁰

IV. CRITIQUE OF THE JUDICIAL ANALYSIS

Courts that have addressed the question whether a prebankruptcy creditor's postbankruptcy refusal to deal with the debtor violates the automatic stay have analyzed the question incorrectly. By focusing on whether a creditor's act was coercive or noncoercive, courts have unnecessarily broadened the scope of section 362(a)(6) beyond that which Congress intended. Because refusing future services always involves some degree of coercion, the existing standard suggests that all such actions toward the debtor might violate the stay.¹⁴¹ To decide exactly what, if any, degree of coercion amounts to an act to collect in violation of section 362(a)(6) necessarily invites inconsistency and confusion.¹⁴²

Moreover, with the exception of an educational lender's withholding of a transcript, discussed in greater detail below, there exists no material reason why a creditor's classification should make a difference in stay violation determinations. Educational lenders that decline to release the debtor's transcript absent repayment of a student loan present a unique situation because the debtor cannot obtain from any other institution the record of past academic performance which is so often instrumental in making a fresh start.¹⁴³ The current disparity in the judgments between trade creditors and credit unions epitomizes the irrationality of categorizing all other types of creditors in connection with section 362(a)(6) violations.¹⁴⁴ For example, the court in *Olson* determined that a hospital's letter to the debtor informing him that it would no longer provide services unless he repaid the debt violated section 362(a)(6).¹⁴⁵ However, the *Brown* court found that a credit union's letter to the debtor, which informed him that for policy reasons it would not provide future services save

nondischargeable in Chapter 7, it would not be a violation of the automatic stay to withhold a student's transcript in order to collect a debt which the student still has an obligation to repay." *Id.* at 533 (citing *Johnson v. Edinboro State College*, 728 F.2d 163, 166 (3d Cir. 1984)).

140. *Id.* at 534. The court held that the university must release a copy of a debtor-student's transcript when the student-debtor pays the processing fee. *Id.*

141. *See supra* note 77.

142. JACKSON, *supra* note 9, at 163.

143. *See infra* notes 182-90 and accompanying text.

144. *See supra* part III.A-B.

145. *Olson v. McFarland Clinic, P.C. (In re Olson)*, 38 B.R. 515, 518 (Bankr. N.D. Iowa 1984).

reaffirmation of the debt, complied with the stay.¹⁴⁶ Both courts held that the Code does not compel a postbankruptcy creditor to provide services to the debtor.¹⁴⁷ Additionally, neither of the letters revealed a direct attempt to collect the obligations.¹⁴⁸ Yet the court in *Olson* determined that the hospital could have avoided violating the stay by not mentioning the debtor's bankruptcy in its letter.¹⁴⁹ Though the creditors' actions in these cases were substantially similar, the courts reached different results.¹⁵⁰

Because of this inconsistency, creditors cannot accurately predict how a court will respond to a "conditional refusal to deal": a situation in which a creditor refuses to deal with a debtor in the future unless the prepetition debt is repaid.¹⁵¹ Consequently, creditors expose themselves to significant risk when communicating such a position to the debtor.¹⁵² The only notable consideration courts have given to determinations of stay infringement is whether a creditor has a policy covering its actions.¹⁵³ If a creditor's policy is to decline further dealings with any debtor who causes it a loss, courts find the conditional refusal noncoercive.¹⁵⁴ Yet this formality seems immaterial in principle, especially because any creditor can assert at trial that it possesses such a policy.¹⁵⁵ More importantly, the current test places creditors with less expertise at a disadvantage to sophisticated creditors, whose influence Congress sought to limit.¹⁵⁶ Therefore, the courts' decisions regarding conditional refusals to deal are

146. *Brown v. Pennsylvania State Employees Credit Union (In re Brown)*, 851 F.2d 81, 85 (3d Cir. 1988).

147. *Id.* at 85 (stating that no provision in the Code expressly "requires this creditor to do business with this debtor"); *Olson*, 38 B.R. at 518 (affirming the notion that "the Bankruptcy Code may not be construed to compel the defendant to provide services to . . . [d]ebtors").

148. *See supra* notes 68-72, 95 and accompanying text.

149. *Olson*, 38 B.R. at 518. The court declared that if the creditor had "simply refuse[d] service without any mention of the Debtors' bankruptcy filing, § 362 would not come into play." *Id.*

150. *See supra* notes 73-85, 94-101 and accompanying text.

151. *See Keating, supra* note 9, at 81-82.

152. In *Olson*, for example, the court found that sending debtors a letter that advised them that it would no longer provide medical services unless the debtors repaid debts for medical expenses already incurred, warranted sanctions. *Olson*, 38 B.R. at 518-19.

153. *See supra* notes 66-69, 76, 87 and accompanying text.

154. *See supra* notes 67-91 and accompanying text.

155. *See, e.g., In re Callender*, 99 B.R. 378, 379 (Bankr. S.D. Ohio 1989). The president of the credit union testified at trial that it was the policy of the credit union to deny service to any member who caused it a financial loss. *Id.* at 379. Although the policy of which the president spoke was contained in the credit union's bylaws, the court attached no special significance to this fact. *Id.*

156. Congress intended to prevent sophisticated creditors from taking advantage of debtors. H.R. REP. NO. 595, *supra* note 27, at 342, *reprinted in* 1978 U.S.C.C.A.N. at 6298; S. REP. NO. 989, *supra* note 27, at 51, *reprinted in* 1978 U.S.C.C.A.N. at 5837.

inconsistent, economically inefficient, and unfair.¹⁵⁷

V. PROPOSAL FOR A MORE APPROPRIATE STANDARD BY WHICH TO DETERMINE AUTOMATIC STAY VIOLATIONS

Courts should use a different framework to analyze conditional refusals to deal. The present analysis, which seeks to differentiate coercive from noncoercive behavior, is inadequate because judgments turn on inessential details, semantic differences, and formalities.¹⁵⁸ Instead, when determining which creditor actions violate the automatic stay, courts should prohibit only "affirmative acts to collect": those instances in which a creditor makes an unconditional request or demand to a debtor for repayment of the prepetition debt. Except in the case of educational lenders, prebankruptcy creditors' postbankruptcy conditional refusals to deal with a debtor should fall outside of the scope of section 362(a)(6). Such a distinction will sufficiently balance the interests of debtors and creditors.

A. Section 366 Distinction

Section 366(a) of the Bankruptcy Code supports the proposition that conditional refusals to deal do not violate the automatic stay. This section prohibits public utilities from conditioning future services on repayment of debt.¹⁵⁹ The utility may, however, require the debtor to assure future performance, and the creditor may refuse service if the debtor does not pay a deposit or offer security within twenty days.¹⁶⁰ Section 366 differs drastically from pre-Code caselaw, which permitted utilities to decline to provide prospective services until the debtor repaid a discharged debt.¹⁶¹ In implementing section 366, therefore, Congress balanced the right of a creditor to refuse to deal with a debtor against the debtor's need for utility services.¹⁶²

157. See *supra* notes 144, 150, 152, 156 and accompanying text.

158. See *supra* part III.

159. 11 U.S.C. § 366(a) (1988). Section 366(a) provides:

Except as provided in subsection (b) of this section, a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis of the commencement of a case under this title or that a debt owed by the debtor to such utility for service rendered before the order for relief was not paid when due.

11 U.S.C. § 366(a) (1988). See also 1 EPSTEIN ET AL., *supra* note 4, § 3-9, at 123.

160. 11 U.S.C. § 366(b) (1988).

161. See Keating, *supra* note 9, at 98 n.130 (citing *Ryan v. Ohio Edison Co.*, 611 F.2d 1170 (6th Cir.); *Slenderella Sys., Inc. v. Pacific Tel. & Tel. Co.*, 286 F.2d 488 (2d Cir.)).

162. *Hanratty v. Philadelphia Elec. Co. (In re Hanratty)*, 907 F.2d 1418, 1424 (3d Cir. 1990). The court stated that the purpose of section 366 is "to prevent the threat of termination from being used

The clear mandate of section 366(a) stands in stark contrast to the automatic stay provision.¹⁶³ Section 362(a)(6) does not expressly forbid general creditors or equity holders from refusing to deal prospectively with the prepetition debtor.¹⁶⁴ Had Congress intended to prohibit a general creditor from refusing to deal with the debtor save repayment of a debt, it could have done so as it did in the case of public utility creditors.

Accordingly, this analysis suggests that Congress' intent to prohibit a creditor from engaging in "any act" to collect a prepetition debt was not to forbid every conceivably coercive act. The legislative history of section 362(a)(6) reveals that Congress was concerned that the naive debtor would succumb to a sophisticated creditor's affirmative, rather than conditional, attempt at collecting a prepetition debt.¹⁶⁵

The facts of *In re Gibson*¹⁶⁶ are thus more reflective of the activities that Congress sought to prevent.¹⁶⁷ In *Gibson*, the creditor knew that the debtors had filed a bankruptcy petition.¹⁶⁸ Nevertheless, the creditor made multiple attempts to collect the debt by calling and visiting the debtors at home.¹⁶⁹ The Bankruptcy Court for the Southern District of Ohio found that the creditor had harassed the debtor.¹⁷⁰ As a result, the court determined that the creditor's affirmative attempts to collect the debtors' prepetition debt violated section 362(a)(6).¹⁷¹ The *Gibson* creditor's actions are clearly the "acts . . . to collect" prepetition debts that

to collect prepetition debts while not forcing the utility to provide services for which it may never be paid." *Id.* (quoting *Begley v. Philadelphia Elec. Co.*, 760 F.2d 46, 49 (3d Cir. 1985)). *See also* 1 EPSTEIN ET AL., *supra* note 4, § 3-9, at 123 (stating that the utility "enjoys an absolute or near monopoly").

163. For the text of section 366(a), see *supra* note 159.

164. 11 U.S.C. § 362(a)(6) (1988).

165. Congress worried that "(i)n inexperienced, frightened, or ill-counseled debtors may succumb to suggestions to repay notwithstanding their bankruptcy." H.R. REP. NO. 595, *supra* note 27, at 342, *reprinted in* 1978 U.S.C.C.A.N. at 6298; S. REP. NO. 989, *supra* note 27, at 50-51, *reprinted in* 1978 U.S.C.C.A.N. at 5836-37.

166. 16 B.R. 682 (Bankr. S.D. Ohio 1981).

167. *Id.* at 683-84. In *Gibson*, the debtors filed a voluntary petition for Chapter 13 relief. *Id.* at 683. The creditor held a security interest in a washer, a dryer, and two television sets. *Id.* The Bankruptcy Court for the Southern District of Ohio affirmed the debtors' plan, which provided for a 100% dividend on all claims. *Id.* The creditor, however, failed to file a proof of claim within the time limitation imposed by Rule 13-302(e)(2) of the Bankruptcy Rules of Procedure. *Id.* After confirmation, the creditor made several affirmative attempts to collect the outstanding debt. *Id.*

168. *Id.* at 683. The debtors sent proper notification of their filing to the creditor. *Id.* Moreover, the creditor attended a meeting of the creditors regarding the bankruptcy. *Id.*

169. *Id.*

170. *Id.* at 684.

171. 16 B.R. at 684.

Congress intended to proscribe.

Therefore, courts that have addressed the conditional refusal to deal issue have broadened the scope of section 362(a)(6) by holding that coercive attempts to collect a prepetition debt violate the automatic stay. Because any act to collect is to some extent coercive,¹⁷² the courts' classification may prevent a creditor from refusing to deal with the debtor because of a prepetition debt.¹⁷³ This prospect is inconsistent with the foundation of contract law—the right to freedom of contract.¹⁷⁴ Moreover, such a result enables the debtor to use section 362(a)(6) to obtain advantages normally only available by means of filing for bankruptcy.¹⁷⁵ Under this scenario, the debtor could force the creditor to deal with him even though the creditor has no legal duty to do so.¹⁷⁶ Hence the courts' coercive impact analysis also presents the debtor with a potentially dangerous "offensive use" of the Code's automatic stay provision.¹⁷⁷

Accordingly, the logical point at which to draw the line in such stay violation determinations is between affirmative attempts to collect prepetition obligations from the debtor and conditional refusals to deal. Using this simple delineation, it is unnecessary to examine irrelevant postpetition events, such as which party initiated contact and which creditor possessed a formal policy not to provide future services. The proposed distinction would thus significantly reduce, if not eliminate, the disparate judgments over the refusal to deal issue produced by the existing coercive-noncoercive framework. For example, under the suggested approach the actions of the defendant hospital in *Olson* would not have violated section 362(a)(6). Such interpretive consistency would enable creditors to decide, with certainty, how to communicate appropriately their positions to the debtor.¹⁷⁸ Moreover, because the debtor may seek the services elsewhere, this statutory construction does not impair the debtor's right to a fresh start and a breathing spell.¹⁷⁹ Because countless creditors exist in the United

172. See *supra* note 77.

173. See *supra* note 77.

174. For a discussion of the concept of freedom of contract, see RESTATEMENT (SECOND) OF CONTRACTS ch. 8, Introductory Note (1981); E. ALLAN FARNSWORTH, CONTRACTS 325, 20-23 (1982).

175. See Keating, *supra* note 9, at 82 ("This interpretation of [the] stay gives the Debtor a weapon.").

176. *Id.*

177. For an excellent discussion of the "offensive use" of the stay, see generally Keating, *supra* note 9.

178. The concurrent reduction in risk would, in return, reduce creditors' overall costs. RICHARD G. LIPSEY ET AL., MICROECONOMICS 167 (1988).

179. See *supra* notes 82-84 and accompanying text.

States, a single creditor's denial of future services is generally not essential for the debtor to make a fresh start.¹⁸⁰ Furthermore, a creditor's communication with the debtor, absent any threat of an impending foreclosure or suit, does not frustrate the debtor's breathing spell.¹⁸¹

B. Educational Lender Exception

The sole exception to the proposed distinction between affirmative acts to collect and conditional refusals to deal pertains to those educational lenders that refuse to release the debtor's transcript unless the debtor repays the amount owed on a student loan. Educational institutions are unique in the sense that the debtor cannot, for any amount of money, obtain from any other source a transcript reflective of his work at a particular school.¹⁸² Because proof of education is essential to employment opportunities, the

180. See *supra* note 138 and accompanying text.

181. See *supra* note 84 and accompanying text.

182. See *supra* note 138 and accompanying text. The author realizes that some individuals might draw parallels between educational institutions and suppliers of other unique goods or services or institutions having a virtual monopoly on a service or supply for a particular geographical location. This similarity appears to suggest that these creditors should also be prohibited from making conditional refusals to deal under the proposed approach. However, the author believes that educational lenders that refuse to release a debtor's transcript absent repayment of a prepetition debt remain so distinct from such other limited creditors as to warrant special treatment. As indicated in the text of this Note, educational institutions are unique in the sense that the student-debtor may not obtain a record of his or her academic work from any other source, at any price. There are absolutely no other creditors from which to obtain a transcript. Conversely, it is not impossible for a merchant-debtor to obtain substitute goods or services from other creditors in the "parallel" circumstances mentioned above.

Unlike a debtor desiring a transcript, the debtor in need of the services of a rural goods supplier, for example, that declines to provide its potentially unique goods or services in the future unless the debtor repays the amount owed on a prior obligation can approach the supplier of a close substitute and even offer to pay more than the going rate to secure that good or service. In the unlikely event that there is no close substitute available, the debtor will have no choice but to discontinue his or her business. Although such an outcome seems severe, the line must be drawn at excepting educational lenders. An educational institution withholding a transcript rises above the rare supplier of a good or service for which there is no substitute. A transcript is essential to a fresh start because evidence of it enables the debtor to obtain a job position commanding a higher salary, in any number of fields, than he or she otherwise would be able to procure. The debtor could in turn use a portion of this financial gain to repay creditors. Moreover, permitting the debtor to obtain a transcript from an institution prior to repayment of a student loan is justified because, unlike most other loans, educational loans are not dischargeable in Chapters 7 or 13 bankruptcies. See *infra* note 184 and accompanying text.

Rural banks or hospitals that refuse to extend services to a debtor absent repayment of a prepetition debt should not be excepted from the permitted conditional refusal to deal for the same reasons as those given in the above analysis concerning suppliers. In today's world of myriad financial services, many of which can be accessed by computer or telephone, the rural bank has become just one of a debtor's many banking options. Moreover, in nonemergency medical situations, a debtor can, albeit at an inconvenience, seek treatment at a different hospital.

educational lender's exclusive service of providing a transcript is necessary to the debtor's fresh start.¹⁸³

Additionally, the educational lender does not face the same perils of a possible offensive use of the automatic stay as other kinds of creditors. Because student loans are not dischargeable in Chapter 7 or Chapter 13 bankruptcies, the debtor must ultimately repay such loans.¹⁸⁴ While other debts are also nondischargeable, owing an unforgivable obligation to a general creditor does not compel that creditor to engage in future enterprises with the debtor.¹⁸⁵ Similarly, an educational institution is not required to maintain the debtor's enrollment as a student or to allow the debtor to enroll again in the future. However, a debtor's transcript often directly affects the debtor's ability to make a fresh start.¹⁸⁶ To deny the debtor the transcript results is too great an injustice. Dispensing a transcript does not rise to the level of entering into a separate and distinct transaction—the release simply reflects one's past educational achievements. In light of the foregoing discussion, then, an educational lender should not be able to refuse to release a debtor's transcript merely because the debtor has not repaid a loan.

The proposed delineation imposes no undue hardship upon the debtors of all other kinds of creditors.¹⁸⁷ Consequently, courts should not label creditors when determining whether the denial of future services to the prepetition debtor violates section 362(a)(6). A creditor needs to have the opportunity to inform debtors of its position regarding the availability of future services once the debtor has filed a petition.¹⁸⁸ Such communication helps the debtor to make informed bankruptcy decisions.¹⁸⁹ Prohibiting this type of postpetition communication between the debtor and creditor

183. See *supra* note 138 and accompanying text.

184. 11 U.S.C. § 523(a)(8) (1988).

185. See *supra* notes 76-77 and accompanying text.

186. See *supra* note 138 and accompanying text.

187. See *supra* notes 179-81 and accompanying text.

188. *Brown v. Pennsylvania State Employees Credit Union (In re Brown)*, 851 F.2d 81, 86 (3d Cir. 1988). It is unreasonable to permit the creditor to decline to provide future services to the debtor, but prohibit the creditor from explaining its position. *Id.*

189. *Id.* The *Brown* court stated:

The communication [describing the conditional refusal to deal] works no unfairness on the debtor. On the contrary, it allows [the debtor] to choose between discharging the debt and retaining the creditor's services. Where, as here, a debtor is unaware of the creditor's policy, barring communication might prevent the debtor from making the choice until it is too late.

Id.

goes beyond the intended scope of the Code's automatic stay provision.¹⁹⁰ Therefore, while an affirmative attempt to collect a prepetition debt is clearly contrary to section 362(a)(6), the bankruptcy courts should not consider a creditor's refusal to deal, conditioned upon repayment of a prepetition debt, a violation of the automatic stay.

VI. CONCLUSION

For the past 150 years, Congress has continuously aimed to increase debtor protection in bankruptcy. However, courts have overextended this notion by broadening the scope of the Bankruptcy Code's automatic stay provision. Currently, a prebankruptcy creditor's postbankruptcy refusal to deal with a debtor unless the debtor repays the prepetition debt may violate the stay. Because prior courts' decisions on the conditional refusal to deal issue are disparate, often depending upon the classification of the creditor, future courts should abandon the current coercive impact analysis. These courts need a more workable delineation, such as the one proposed in this Note, in order to determine effectively what creditor conduct amounts to an "act to collect" a prepetition debt in violation of section 362(a)(6).

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190. *Id.* The stay provides the debtor with a respite from immediate action by creditors, not from communication with employers.

