# TO STRIKE OR TO DISMISS, THAT IS THE QUESTION: HOW COURTS SHOULD DISPOSE OF BANKRUPTCY CASES FILED BY DEBTORS WHO FAILED TO OBTAIN CREDIT COUNSELING

Lindsay Sherp

## I. INTRODUCTION

Peter Thompson is a mechanic who has fallen on hard times. His wife, Lois, is a housewife who was recently in a car accident that left her a paraplegic. In addition, Peter and Lois's youngest son, George, was diagnosed with leukemia six months before Lois's car accident. Luckily, Peter and Lois's two other children are in good health. While the Thompsons have health insurance, the insurance company has been less than willing to cover George and Lois's medical treatments. The Thompsons struggled to make ends meet before George's diagnosis and now they are four months behind on their house and credit card payments. The bank has sent notice of its intent to foreclose on the Thompson's home. Afraid of losing his home, Peter contacted his lawyer who suggested he file for bankruptcy. Peter filed his bankruptcy petition the day after he received the bank's notice.

While Peter was correct in his understanding that filing for bankruptcy could stall the bank's ability to foreclose on his home, Peter failed to obtain credit counseling prior to filing his petition as is required by 11 U.S.C. § 109(h).[1] Unfortunately for Peter, his failure to abide by section 109(h) rendered him ineligible to be a bankruptcy debtor.[2] As only eligible debtors may receive relief under any chapter of the Bankruptcy Code (Code), the

[1] 11 U.S.C.A. § 109(h) (West 2005).

[2] *See In re* Watson, 332 B.R. 740, 747 (Bankr. E.D.Vir. 2005); *In Re* Rios, 336 B.R. 177, 178 (Bankr. S.D.N.Y. 2005). Section 109 sets forth who is eligible to be a debtor under the Code. 11 U.S.C.A. § 109. The various subsections provide for who may be a debtor under particular chapters. *Id.* For instance, subsection 109(b) provides who may be a debtor under chapter 7, while subsection 109(c) provides who may be a debtor under chapter 9. *Id.* Subsection 109(h) states that in addition to the basic eligibility requirements for particular chapters, individuals seeking bankruptcy relief must also obtain credit counseling prior to filing for bankruptcy. *See id.* § 109(h).

bankruptcy court must dispose of Peter's case.[3] However, the Code does not state how the bankruptcy court should or must dispose of the case.[4] Since the implementation of subsection 109(h) in 2005, the bankruptcy courts have used the following two mechanisms for disposing of such cases: (1) dismiss the case, or (2) strike the petition.[5] To date, the United States Supreme Court has not ruled on which mechanism is the appropriate means for disposing of an ineligible debtors' bankruptcy proceeding.[6]

This comment will address whether bankruptcy courts should dismiss or strike the petition of a debtor who failed to comply with subsection 109(h) before filing for bankruptcy. Part II of this comment will provide the general backdrop for the discussion by providing the provisions of section 109(h), as well as the section's legislative history. Part III explains the differences between dismissing the case and striking the petition. Specifically, Part III addresses the consequences of dismissing the case, as opposed to striking the petition. Part IV sets forth the basic arguments in favor of striking the petition. Following these arguments are the corresponding responses of those who are in favor of dismissing the petition. Like Part IV, Part V contains arguments in favor of dismissal with responses thereto. Part VI contains this commentator's view on how courts should dispose of the proceeding. Finally, Part VII concludes this comment with a summary of the court's options and the appropriate result.

[3] *See In re* Wallart, 332 B.R. 884, 891 (Bankr. D.Minn. 2005).

[4] *See* 11 U.S.C.A. § 109.

[5] This comment comes to the conclusion that only one of these remedies is the proper solution. However, the Bankruptcy Court for the Southern District of New York held in *In re Elmendorf* that under the Code a court has the authority to dismiss or strike the petition. 345 B.R. 486, 503 (Bankr. S.D.N.Y. 2006). According to the *Elmendorf* court, the appropriate remedy should be based upon the facts and circumstances of the particular case. *Id.* The court stated that the following factors should be considered:

> [T]he number of previous bankruptcy filings; whether the previous filings were dismissed/stricken for failure to file a credit counseling certificate; thereby signaling debtor's awareness of the requirement; whether a secured creditor was sought to be stayed by the filing; whether the debtor is acting in concert with others to forestall a secured creditor; whether the debtor has filed all the required schedules and statements with the petition; whether there was little or no effort to reorganize in prior filed cases; or other indications that a debtor is abusing the protections of the automatic stay.

*Id.* at 503, n. 24. Therefore, under the *Elmendorf* rationale, the court is not constricted to one remedy, but may choose the proper remedy based upon the underlying facts and circumstances.

## II. BACKGROUND

In 1898 Congress passed the first bankruptcy provisions.[7] Since 1898, there have been numerous amendments to the bankruptcy laws.[8] The most notable amendments occurred in the Chandler Act of 1938, the Bankruptcy Reform Act of 1978 and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[9] With the passage of BAPCPA, Congress "made significant changes in how, when and to what extent putative debtors could obtain debt relief."[10] Specifically, individual debtors must meet the credit counseling requirements set forth in section 109(h) in order to be eligible for bankruptcy relief.[11] By requiring individual debtors to undergo credit counseling before filing for bankruptcy, Congress "intended to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy—such as the potentially devastating effect it can have on their credit rating—before they decide to file for bankruptcy relief."[12] In other words, Congress has determined that bankruptcy should be a last resort instead of "the first place where an individual consumer debtor turns for help."[13]

The language of section 109(h) unambiguously reflects Congress' intention to prevent individuals from filing for bankruptcy without first receiving credit counseling. Subsection 109(h)(1) provides:

> [A]n individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual

[7] *See* William Houston Brown, 2 The Law of Debtors and Creditors § 10:7.

[8] *Id.*

[9] *Id.*

[10] *In re* Thompson, 344 B.R. 899, 901 (Bankr. S.D.Ind. 2006).

[11] 11 U.S.C.A. § 109(h) (West 2005).

[12] *In re* Henderson, 339 B.R. 34, 35 (Bankr. E.D.N.Y. 2006).

[13] *In re* Tomco, 339 B.R. 145, 152 (Bankr. W.D.Pa. 2006) ("There is a growing perception that bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort").

in performing a related budget analysis.[14]

Fortunately, Congress had the foresight to recognize that under certain circumstances individuals may not have the ability to comply with subsection 109(h)(1). Therefore, Congress set forth three exceptions to the rule.[15] First, an individual debtor may circumvent credit counseling if he or she resides in a district in which the United States Trustee or the bankruptcy administrator has determined that the approved nonprofit budget and credit counseling agencies in the district are reasonably unable to provide adequate credit counseling services.[16] The second exception applies when the situation involves exigent circumstances.[17] The individual debtor must submit a certification to the court that (1) describes exigent circumstances meriting a waiver of the credit counseling requirement, (2) states that the debtor attempted to procure credit counseling services, but was unable to obtain the services during the five-day period beginning on the date the debtor made the request, and (3) is satisfactory to the court.[18] Finally, the credit counseling requirement shall not apply if, after notice and a hearing, the court determines that the individual is unable to comply with the requirement due to incapacity, disability, or active military duty in a military combat zone.[19]

While Congress laid the groundwork for eligibility in section 109, Congress failed to provide guidance to courts faced with a bankruptcy petition filed by an ineligible debtor.[20] Consequently, judges are left to determine the appropriate manner in which to dispose of such petitions through statutory construction. The majority of the courts have opted to dismiss the petition.[21] However, the majority of these courts dismiss the cases without mentioning or discussing whether dismissal is the appropriate avenue for disposition of the case.[22] Therefore, in these cases where the

[14] 11 U.S.C.A. § 109(h) (emphasis added).

[15] *Id.* § 109(h)(2)–(4).

[16] *Id.* § 109(h)(2)(A).

[17] *Id.* § 109(h)(3)(A).

[18] *Id.*

[19] *Id.* § 109(h)(4).

[20] *In re* Carey, 341 B.R. 798, 804 (Bankr. M.D.Florida 2006).

[21] *In re* Elmendorf, 345 B.R. 486, 501 (Bankr. S.D.N.Y. 2006) (noting the majority of bankruptcy courts have dismissed for cause the cases filed by individuals who failed to comply with subsection 109(h)).

[22] *See In re* Tomco, 339 B.R. 145, 157 (Bankr. W.D.Pa. 2006); *In re* Ross, 338 B.R. 134, 135 (Bankr. N.D.Ga. 2006); *In re* Carr, 344 B.R. 774, 776 (Bankr. N.D.W.V. 2006); *In re* Wallace,

court simply dismisses the case without such discussion, it is arguable that the judges never conceived of an alternative method for disposing of the case. As a result, the fact that the majority of the courts have dismissed the cases should have no bearing on the appropriate disposition of a bankruptcy proceeding filed by an ineligible debtor.

How else may a court dispose of the petition? According to Judge Isgur's opinion in In re Hubbard, the court could strike the petition.[23] Hubbard was the first case in which a court opted to strike the petition. Soon after, some bankruptcy courts followed Judge Isgur's example and began to strike the petitions of debtors who failed to comply with subsection 109(h).[24] To date, neither Congress nor the United States Supreme Court has addressed this issue and the bankruptcy courts are still grappling over the appropriate remedy.

## III. THE CONSEQUENCES

Why does it matter whether the court chooses to strike or dismiss an individual debtor's petition? Prior to BAPCPA, how the court disposed of an ineligible debtor's petition made no difference. However, under BAPCPA the dismissal of a petition comes with specific consequences, namely a limitation on the automatic stay.[25] If a debtor re-files for bankruptcy within one year after his or her previous petition for bankruptcy has been dismissed, the automatic stay in the subsequent bankruptcy proceeding will be limited to thirty days.[26] Fortunately for these debtors, the court may grant an extension of the automatic stay if the petitioner

338 B.R. 399, 401 (Bankr. E.D.Ark. 2006); *In re* Watson, 332 B.R. 740, 747 (Bankr. E.D.Vir. 2005); *In Re* Cleaver, 333 B.R. 430, 436 (Bankr. S.D.Ohio 2005); *In re* Talib, 335 B.R. 417, 424 (Bankr. W.D.Mo. 2005); *In re* Fields, 337 B.R. 173, 180 (Bankr. E.D.Tenn. 2005); *In re* Childs, 335 B.R. 623, 631 (Bankr. D.Md 2005); *In re* Sosa, 336 B.R. 113, 115 (Bankr. W.D.Tex. 2005); James Allen Causey@U.C.C. v. US Trustee, No. 1:06-CV-1182-TWT, 2006 WL 2583134, at *2 (N.D.Ga. Aug. 31, 2006); *In re* Delone, No. 06-10087DWS, 2006 WL 3898390, at *4 (Bankr. E.D.Pa. May 31, 2006) (mem. op.); *In re* Allen, No. 05-15847 SSM, 2005 WL 4862559, at *12 (Bankr. E.D.Va. Nov. 15, 2005) (mem. op.).

[23] 333 B.R. 377, 389 (Bankr. S.D.Tex. 2005).

[24] *See In re* Thompson, 344 B.R. 899, 907–08 (Bankr. S.D.Ind. 2006); *In re* Carey, 341 B.R. 798, 804 (Bankr. M.D.Fla. 2006); *In Re* Rios, 336 B.R. 177, 179–80 (Bankr. S.D.N.Y. 2005); *In Re* Valdez, 335 B.R. 801, 803–04 (Bankr. S.D.Fla. 2005).

[25] *See* 11 U.S.C.A. § 362(c)(3).

[26] *Id.*

proves that he or she filed the subsequent petition in good faith.[27] Therefore, all is not lost for a debtor simply because a court dismisses his or her petition, but the loss of the automatic part of the automatic stay may have severe consequences for a debtor facing foreclosure or repossession.

The consequences of striking a bankruptcy petition are not laid out in the Bankruptcy Code and remain subject to speculation. Many courts in favor of striking the petition agree that striking the petition will render the bankruptcy case void ab initio.[28] However, courts differ over whether a striken bankruptcy petition ever gave rise to an automatic stay. This inherent conflict is important because, "[t]he automatic stay gives debtors one of the most powerful weapons known to the law."[29]

The Bankruptcy Court for the Southern District of Texas in In re Salazar was the first court to hold that the automatic stay never arose when the court struck the petition due to ineligibility under subsection 109(h).[30] On the other hand, the Bankruptcy Court for the Southern District of Indiana in In re Thompson, is the only court thus far who decided to strike the petition, but held that the automatic stay was in fact imposed.[31] In making their respective decisions, both courts attempted to construe the language of subsection 362(a)[32] and the sections referenced therein—sections 301, 302, and 303—after determining the individual was ineligible under subsection 109(h).[33] The pertinent portion of subsection 362(a) states, "Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities."[34]

The Thompson court interpreted section 362 as providing that the event that triggers the automatic stay is not the commencement of a bankruptcy case, but rather the filing of the bankruptcy petition pursuant to sections 301, 302, and 303.[35] The Thompson court further noted that sections 301, 302, and 303 do not restrict an ineligible debtor from filing a bankruptcy

[27] *Id.*

[28] *In re* Salazar, 339 B.R. 622, 631 (Bankr. S.D.Tex. 2006); *In re* Rios, 336 B.R. 177, 178 (Bankr. S.D.N.Y. 2005).

[29] *In re* Russo, 94 B.R. 127, 129 (Bankr. N.D.Ill. 1988).

[30] 339 B.R. 622, 626 (Bankr. S.D.Tex. 2006).

[31] *In re* Thompson, 344 B.R. 899, 906 (Bankr. S.D.Ind. 2006).

[32] 11 U.S.C.A. § 362(a).

[33] *See Salazar*, 339 B.R. at 626; *Thompson*, 344 B.R. at 906.

[34] 11 U.S.C.A § 362(a).

[35] *Thompson*, 344 B.R. at 906.

petition.[36] Rather, these sections merely prohibit the actual commencement of a case.[37] Based upon this reasoning, the court held that a stay may be imposed without a case having ever been commenced.[38]

The Salazar court recognized that the operative event triggering the automatic stay is the filing of a petition.[39] However, this court turned to the definition of "petition" in subsection 101(42) when it ruled that a petition filed by an ineligible debtor could not invoke the stay.[40] Under subsection 101(42), "The term 'petition' means petition filed under section 301, 302, 303, or 304 of this title, as the case may be, commencing a case under this title."[41] Because this court reasoned that an ineligible debtor cannot commence a bankruptcy case, the petition filed by an ineligible debtor does not constitute a petition as defined by the Code.[42] As such, a petition filed by an ineligible debtor does not constitute the filing of a petition under sections 301, 302, or 303.[43] Consequently, a petition filed by an ineligible debtor will not invoke the automatic stay.[44]

The language of subsections 301(b) and 302(a) also suggest that the automatic stay should not apply when the court strikes the petition as void ab initio. Subsections 301(b) and 302(a) both state that the commencement of a case constitutes an order for relief.[45] This language indicates that an individual debtor may not obtain any form of relief until he or she has commenced a bankruptcy case. Certainly one of the greatest forms of relief, aside from the discharge of debts, is the automatic stay. Thus, because the automatic stay is a form of relief, the only way a debtor can get the benefit of the automatic stay is if he or she actually commences a case. Furthermore, it makes sense that only eligible debtors should obtain the benefits and protection of the Bankruptcy Code. After all, why else would Congress impose restrictions upon debtor eligibility?

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Salazar*, 339 B.R. at 626.

[40] *Id.*

[41] 11 U.S.C.A. § 101(42) (West 2005).

[42] *Salazar*, 339 B.R. at 626.

[43] *Id.*

[44] *Id.*

[45] 11 U.S.C.A. §§ 301(b), 302(a).

## IV. ARGUMENTS IN FAVOR OF STRIKING THE PETITION

### *A. No bankruptcy case was ever commenced*

A hotly contested issue amongst bankruptcy courts is whether an ineligible debtor can commence a bankruptcy proceeding. The most logical argument in favor of striking the petition was first set forth by Judge Isgur in In re Hubbard. In Hubbard, five unrelated Chapter 13 debtors failed to comply with subsection 109(h) and sought an extension of time to obtain the requisite credit counseling.[46] Each of the debtors claimed they were unable to obtain credit counseling due to exigent circumstances.[47] However, instead of filing certifications with the court in compliance with subsection 109(h)(3)(A)[48], the debtors filed certifications that they had received post-petition credit counseling.[49] As a result, the debtors could not invoke the exigent circumstances exception to acquiring credit counseling before filing for bankruptcy.[50] Therefore, the debtors were ineligible to file for bankruptcy.[51]

Instead of simply dismissing the petitions as previous courts had done, the court considered the language 11 U.S.C. § 301, which governs the commencement of a bankruptcy case.[52] Under subsection 301(a), a voluntary case "is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter."[53] Therefore, pursuant to subsection 301(a), a voluntary bankruptcy case may not be commenced by an individual who would be deemed an ineligible debtor under the chapter of bankruptcy for which he or

[46] *In re* Hubbard, 333 B.R. 377, 381 (Bankr. S.D.Tex. 2005).

[47] *Id.* at 384.

[48] 11 U.S.C.A. § 109(h)(3)(A) ("Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1); (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and (iii) is satisfactory to the court.").

[49] *Hubbard*, 333 B.R. at 383.

[50] *Id.*

[51] *Id.* at 388.

[52] *Id.*

[53] 11 U.S.C.A. § 301(a).

she filed.[54] The court then turned to subsection 109(h) and noted that an individual debtor who neither obtained credit counseling before filing a petition, nor met one of the exceptions to the rule may not be a debtor in a bankruptcy proceeding.[55] Accordingly, the individuals in Hubbard were not eligible debtors under 109(h) and as a result, the "filing of their voluntary petitions did not commence cases under chapter 13."[56] The court concluded its analysis by stating that because no case was commenced, there was no case to dismiss.[57]

While some courts agree with the Hubbard rationale,[58] other courts in favor of dismissing the petition believe that the petition need not be filed by an eligible debtor in order to commence a bankruptcy proceeding.[59] According to these courts, the operative event that triggers the commencement of a bankruptcy case is the filing of a petition by a person who could possibly be a debtor.[60] This argument focuses on the use of the phrase "may be a debtor" in the language of section 301.[61] In In re Thompson, the court noted that the word "may" has an expansive connotation and that, in ordinary parlance, the word as used in section 301 means "might" or is meant to express a "possibility."[62]

The practical effect of this rationale is to render the language "by an entity that may be a debtor under such chapter"[63] superfluous. Technically speaking, every single individual in the United States has the possibility of being an eligible debtor. Because ever person "might" be an eligible debtor, every petition filed would commence a case. The first portion of subsection 301(a) states that a case is commenced by the filing of a petition under such chapter. If Congress had intended for every petition to commence a bankruptcy case then Congress could have put a period at the

[54] *Hubbard*, 333 B.R. at 388.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *See e.g.*, *In re* Salazar, 339 B.R. 622, 626 (Bankr. S.D.Tex. 2006).

[59] *In re* Ross, 338 B.R. 134, 141 (Bankr. N.D.Ga. 2006); *In re* Tomco, 339 B.R. 145, 159 (Bankr. W.D.Pa. 2006); *In re* Westover, No. 06-10183, 2006 WL 1982751, at *2 (Bankr. D.Va. 2006).

[60] *Tomco*, 339 B.R. at 159; *Westover*, 2006 WL 1982751 at *2; *see Ross*, 338 B.R. at 138-41.

[61] *In re* Thompson, 344 B.R. 899, 905 (Bankr. S.D.Ind. 2006)

[62] *Id.* (referencing RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed.1993)).

[63] 11 U.S.C.A. § 301(a) (West 2005).

end of the word "chapter." Instead, Congress qualified the first portion of subsection 301(a) by adding a restriction upon those petitions that would actually commence a case. In addition, the definition of the word "may" is not limited to meaning something is a possibility. The first definition of the word in Black's Law Dictionary is "to be permitted to."[64] Using this definition, the language of 301(a) would indicate that a petition commences a case when it is filed by a person who is permitted to be a debtor. Therefore, because a person who failed to meet the 109(h) requirements is not permitted to be a debtor, his or her filed petition would not commence a case.

Another argument in favor of dismissal points out a flaw in the Hubbard and Salazar rationale. If ineligible debtors are unable to commence cases and therefore, no automatic stay is invoked, the language of subsection 362(b)(21)(A) would be mere surplusage.[65] Subsection 362(b)(21)(A) is a new addition to the Code and provides an exception to the automatic stay.[66] Under this subsection, the filing of a petition will not operate as a stay "under subsection (a), of any act to enforce any lien against or security interest in real property— (A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title."[67] The language of section 301 does not refer to a specific type of ineligibility.[68] This suggests that a petition filed by an ineligible debtor under any subsection of 109, including 109(g), would also fail to commence a case and thereby fail to invoke the automatic stay. Thus, if an ineligible debtor cannot commence a case, section 362(b)(21)(A) would in fact be useless because there is no automatic stay for the exception to apply to.

The court in In re Elmendorf attempted to rectify this conflict in the Code by differentiating between subsections 109(g) and 109(h). The court explained that the legislative history behind subsection 362(b)(21) reflects that ineligibility pursuant to 109(g) may be cured while ineligibility under 109(h) is an incurable defect.[69] Accordingly, the court explained, "Congress obviously intended section 109(h) ineligibility to have a preclusive effect; there was no need to provide an exception to the

[64] BLACK'S LAW DICTIONARY (8th ed. 2004).

[65] *In Re* Seaman, 340 B.R. 698, 707-08 (Bankr. E.D.N.Y. 2006); *see In re* Ross, 338 B.R. 134, 138–39 (Bankr. N.D.Ga. 2006).

[66] 11 U.S.C.A. § 362(b)(21)(A).

[67] *Id.*

[68] *See id.* § 301(a).

[69] *In re* Elmendorf, 345 B.R. 486, 502 (Bankr. S.D.N.Y. 2006).

automatic stay for ineligible individuals by virtue of section 109(h) because no case is commenced by a bankruptcy filing in that regard; and no stay invoked thereby."[70] Unfortunately the court provided no citation and this commentator was unable to uncover the legislative history in support of Elmendorf's proposition. Without explaining what exactly in the legislative history of section 362 lead the court to its conclusion, the court's determination, while logical, is undermined by the lack of support and is conclusory at best. As such, the argument is unpersuasive. While the Elmendorf court attempted to resolve the Code's conflicting language: a court must "give effect, if possible, to every clause and word of a statute."[71] At this point in time it is impossible for the courts to carry out this mandate.

### *B. The language of the Code authorizes courts to strike the petition*

In defending their ability to strike petitions filed by ineligible debtors, some courts have pointed to the general and equitable powers afforded by 11 U.S.C. § 105.[72] Bankruptcy courts are considered to be essentially courts of equity[73] with the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions" of the Bankruptcy Code.[74] The court may act within its discretion as instructed by and limited by the Code.[75] The Code is silent on how to treat cases filed by ineligible debtors. Therefore, the Code does not limit or instruct a court's discretion. As Congress has not explicitly required courts to dismiss cases initiated by ineligible debtors, the bankruptcy court may act within its discretion pursuant to section 105 when determining how to dispose of the petition.[76]

A possible hitch in a bankruptcy judge's reliance upon section 105 is that various courts began to curb use of section 105 after the United States Supreme Court's ruling in Norwest Bank Worthington v. Ahlers.[77] The

[70] *Id.*

[71] *Id.* (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001) (quoting United States v. Menasche, 348 U.S. 528 (1955))).

[72] *See id.* at 503; Adams v. Finlay, Nos. 06 Civ. 6039(CLB), 06-6040, 06-6041, 06-6042, 06-6075, 06-6077, 2006 WL 3240522, at *5 (S.D.N.Y. 2006) (mem. op.) (unpublished).

[73] Pepper v. Litton, 308 U.S. 295, 304 (1939).

[74] 11 US.C.A. § 105(a) (West 2005).

[75] *Adams*, 2006 WL 3240522 at *5.

[76] *Elmendorf*, 345 B.R. at 503.

[77] Jeffrey W. Warren & Shane G. Ramsey, *Revisiting the Inherent Equitable Powers of the Bankruptcy Court Does Marrama v. Citizens Bank of Massachustetts a Return to Equity?*, ABI

Court in Ahlers explained, "whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code."[78] Circuit courts cited Ahlers when they held that bankruptcy courts do not have unfettered discretion and overturned the rulings of bankruptcy judges who cited section 105 when rendering decisions.[79]

Although Ahlers sparked a trend to limit the bankruptcy judges' inherent equitable powers, a recent United States Supreme Court case, Marrama v.Citizens Bank of Massachusetts,[80] indicates that bankruptcy judges do in fact have broad discretion to implement the provisions of the Code.[81] Marrama involved a debtor's right to convert his Chapter 7 case to a bankruptcy under Chapter 13.[82] Specifically, the issue considered whether a debtor who acted in bad faith prior to filing or fraudulently concealed assets while his Chapter 7 case was pending, had the right to convert his case to a Chapter 13 proceeding.[83] Marrama argued that he had an absolute right to convert his case from Chapter 7 to Chapter 13 despite the bankruptcy court's finding that he acted in bad faith.[84]

Section 706 governs conversions from Chapter 7 to Chapter 13.[85] Subsection (a) provides, "The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time . . . Any waiver of the right to convert a case under this subsection is unenforceable."[86] The Senate Committee Report for this provision states that subsection (a) gives

JOURNAL , Apr. 2007, at 22, 62.

[78] Norwest Bank Worthington v. Ahlers, 485 U.S. 197, 206 (1988).

[79] *See In re* Combustion Eng'g, Inc., 391 F.3d 190, 236 (3rd Cir. 2004) ("The general grant of equitable power contained in section 105(a) cannot trump specific provisions of the Bankruptcy Code, and must be exercised within the parameters of the Code itself."); *In re* Kmart Corp., 359 F.3d 866, 871 (7th Cir. 2004) ("Section 105 allows a bankruptcy court to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of' the Code. This does not create discretion to set aside the Code's rules about priority and distribution; the power conferred by section 105(a) is one to implement rather than override.").

[80] 127 S.Ct. 1105 (2007).

[81] Jeffrey W. Warren & Shane G. Ramsey, *Revisiting the Inherent Equitable Powers of the Bankruptcy Court Does Marrama v. Citizens Bank of Massachusetts a Return to Equity?*, ABI JOURNAL , Apr. 2007, at 22, 22.

[82] Marrama v. Citizens Bank of Mass., 127 S.Ct. 1105, 1108 (2007).

[83] *Id.* at 1107–08.

[84] *Id.* at 1109.

[85] 11 U.S.C.A. § 706 (West 2005).

[86] *Id.* § 706(a).

debtors a one-time absolute right of conversion.[87] However, the Court noted that the absolute right is limited because under subsection (d), the case cannot be converted unless the debtor may be a debtor under that Chapter.[88] Therefore, the Court considered whether Marrama could be a debtor under Chapter 13.[89]

Subsection 1307(c) provides for when a Chapter 13 proceeding may be dismissed or converted to a Chapter 7 proceeding "for cause" and contains a non-exclusive list of ten causes justifying that relief.[90] Noticeably absent from the list of causes is pre-petition bad faith conduct.[91] Nevertheless, bankruptcy courts repeatedly treat pre-petition bad faith as a cause for dismissal.[92] The Court interprets this interpretation by the bankruptcy courts as "tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13."[93] As such, the Court held that a debtor who acts in pre-petition bad faith or commits fraud while the action is pending does not have an absolute right to convert his case.[94]

In so holding, the Court noted that neither section 706 nor 1307(c) contained any language limiting the authority of the bankruptcy courts "to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor."[95] Rather, the bankruptcy courts could deny the conversion because of the broad authority granted to bankruptcy judges under section 105(a).[96] Thus, bankruptcy courts are authorized to deny the conversion of a bad faith or fraudulent debtor's Chapter 7 proceeding to a Chapter 13 proceeding because of the lack of an express prohibition on such action by the court and because of the bankruptcy court's broad section 105 powers.[97]

As of yet, the implications of Marrama are not entirely known. However, Marrama indicates that bankruptcy courts may utilize their

[87] *Marrama*, 127 S.Ct. at 1110.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 1110–1111.
[91] *Id.* at 1111.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 1112.
[95] *Id.* at 1111.
[96] *Id.*
[97] *See id.*

section 105 powers so long as they do not use the powers in a manner that is in direct conflict with the Code. A bankruptcy court's decision to strike the petition of an ineligible debtor is not in direct contravention of the law and as such, a bankruptcy court should be authorized to strike petitions pursuant to its section 105 powers.

## V. ARGUMENTS IN FAVOR OF DISMISSING THE PETITION

### *A. Ineligibility is cause for dismissal*

Under sections 707(a) and 1307(c), the court may dismiss a bankruptcy case for cause.[98] In both sections Congress provides a list of what constitutes cause to dismiss the bankruptcy.[99] Neither section lists ineligibility as a reason to dismiss the case.[100] However, the lists set forth in both sections are not exclusive.[101] According to these sections, "cause for dismissal includes the items enumerated therein."[102] Section 102 of the Code states that the words "'includes' and 'including' are not limiting."[103] Therefore, "cause" for dismissal under these sections is not limited to the enumerated statutory list.[104] Accordingly, an individual's ineligibility may be considered cause for dismissal.[105]

At least one court has argued that Congress intentionally left off ineligibility from the list of causes for dismissal. The Elmendorf court noted that the causes for dismissal in both subsection 707(a) and subsection 1307(c) make specific reference to paragraphs (1) and (2) of subsection 521(a), but not to subsection 521(b).[106] This distinction is relevant because subsection 521(b) sets forth the debtor's duty to file a certificate that he or she has obtained credit counseling.[107] The Elmendorf court reasoned that "Congress explicitly made failure to file certain documents pursuant to

[98] 11 U.S.C.A. §§ 707(a), 1307(c) (West 2005).

[99] *Id.*

[100] *See id.*

[101] *See In re* Tomco, 339 B.R. 145, 158 (Bankr. W.D.Pa. 2006).

[102] *Id.*

[103] 11 U.S.C.A. § 102(2).

[104] *Tomco*, 339 B.R. at 158.

[105] *Id.*

[106] *In re* Elmendorf, 345 B.R. 486, 503 (Bankr. S.D.N.Y. 2006)

[107] 11 U.S.C.A. § 521(b). Subsection 521(a)(1) and (2) provides that a debtor shall file a list of creditors, as well as schedules of assets and liabilities. *Id.* § 521(a)(1)–(2).

521(a)(1) and (2) 'cause' to dismiss; but did not explicitly include [filing a] credit counseling certificate among the enumerated causes."[108] Even though the language of the statutes uses the word "including", Congress chose not to include failure to abide by 521(b) as cause for dismissal.[109]

The Elmendorf court's argument is less than compelling and speculative at best. Use of the word including in a statute clearly indicates that Congress was listing only a few examples of what constitutes cause for dismissal. Simply because Congress chose to exemplify cause for dismissal with failure to abide by 521(a) does not necessarily mean that Congress intentionally excluded failure to abide by 521(b) from the section's language.[110] Congress cannot be expected to list every possible reason for why a court may dismiss a bankruptcy case. Furthermore, if in fact Congress explicitly did not intend for failure to abide by 521(b) to be cause for dismissal, Congress could just have easily included a section in the Code explicitly stating that failure to abide by section 521(b) was not cause for dismissal.

### *B. Courts have traditionally dismissed cases in which the petitioner was ineligible to be a debtor*

Courts have traditionally dismissed an ineligible debtor's bankruptcy.[111] Notably, Congress did not provide a different consequence for ineligibility under subsection 109(h) as opposed to ineligibility under other subsections of section 109.[112] Nor does the statutory language indicate Congress' intent to establish a new rule for petitions filed by ineligible debtors under subsection 109(h).[113] It follows then that ineligibility under subsection 109(h) should not be treated differently from ineligibility under any other subsection of section 109.[114] The case law overwhelmingly shows that the

[108] *Elmendorf*, 345 B.R. at 503.

[109] *Id.* at 502–03.

[110] *See* U.S. v. Amer, 110 F.3d 873, 885 (2d Cir. 1997) (interpreting the word "includes" as used in the federal sentencing guidelines to clearly indicate the subsequent listing of acts warranting the particular enhancement in sentencing was not exclusive); Puerto Rico Maritime Shipping Authority v. I.C.C., 645 F.2d 1102, 1112, n.26 (D.C. Cir. 1981) ("It is hornbook law that the use of the word "including" indicates that the specified list of carriers that follows is illustrative, not exclusive.").

[111] *See In Re* Seaman, 340 B.R. 698, 701 (Bankr. E.D.N.Y. 2006).

[112] *In re* Ross, 338 B.R. 134, 136 (Bankr. N.D.Ga. 2006).

[113] *Id.*

[114] *Id.*

courts have dismissed the cases of debtors who fail to meet the requirements of section 109's various subsections.[115]

While it is true that courts have traditionally dismissed ineligible debtor's petitions, the only cases that should have precedential value in this area are those that were decided post-BAPCPA. Prior to BAPCPA, there was no reason for a court to strike the petition as opposed to dismiss the case because both results carried the same consequences. A review of the case law indicates that most courts did not even consider a remedy other than dismissing the petition.[116] Therefore, the fact that courts have traditionally dismissed the cases of ineligible debtors should have no bearing on how a court, post-BAPCPA, should dispose of an ineligible debtors petition or case.

## VI. DISMISSAL IS THE APPROPRIATE REMEDY

Although the consequences of dismissing the case may seem unfair, dismissal is probably the best way to dispose of a petition filed by an ineligible debtor. The main factor in favor of dismissal is that the consequences of striking a petition are simply too uncertain and will lead to too much uncertainty.[117] In addition, it appears that the real reason that courts opt to strike the petition is to protect the ineligible debtors from the consequences of dismissing the petition, namely the 30-day limitation to the automatic stay. As previously mentioned, if the case is dismissed and the debtor re-files for bankruptcy within one year, the automatic stay in the subsequent case will be limited to thirty days unless the court rules otherwise.[118] Furthermore, a dismissed bankruptcy will be reflected in the

[115] *See* Dillon v. Texas Comm'n on Envtl. Quality, 138 Fed.Appx. 609, 612 (5th Cir. 2005) (dismissal of case was proper where debtor was ineligible); *In re* Mazzeo, 131 F.3d 295 (2d Cir. 1997) (affirming dismissal of case where debtor's unsecured debt exceeded the Section 109(e) limit); *In re* C-TC 9th Ave. P'ship, 113 F.3d 1304 (2d Cir. 1997) (dismissing bankruptcy case of partnership in dissolution that was ineligible to be a Chapter 11 debtor under 11 U.S.C. § 109(d)); *Seaman*, 340 B.R. at 702; *In re* Westville Distribution & Transp., 293 B.R. 101 (Bankr. D.Conn. 2003) (dismissing bankruptcy case under 11 U.S.C. §§ 109(a), (b), and (d) where entity on whose behalf a petition was filed had no legal corporate existence); *In re* Rifkin, 124 B.R. 626, 629 (Bankr. E.D.N.Y. 1991) ("Whether the debtor is eligible to proceed under Chapter 13 is in essence a motion to dismiss.").

[116] *See supra* Part I and note 20.

[117] *See In re* Ross, 338 B.R. 134, 140–41 (Bankr. N.D.Ga. 2006).

[118] *See supra* Part III.

individual's credit rating.[119] A stricken petition, however, will not affect the individuals credit score because there never was a bankruptcy proceeding. While a judge may think he or she is protecting the ineligible debtor by striking the petition, he or she may actually cause more harm to the debtor.

If, as this author believes, the automatic stay is not imposed by a stricken petition, then the individual will be afforded no protection after he or she files the petition. One of the main reasons people file for bankruptcy is to protect themselves from an impending foreclosure. Debtors want the automatic stay to apply because it gives them time to breathe. Although the stay may be lifted for cause,[120] if and until the stay is lifted, the creditors may not attempt to seize the debtor's assets.[121] If the appropriate remedy is to strike an ineligible debtor's petition, then the creditors are not barred from foreclosing on the debtor's house. Therefore, by striking the petition the courts are possibly doing more harm than good to the debtors.[122]

Another reason that courts should not strike petitions is because this practice could easily lead to abuse of the bankruptcy system. At this point in time, we know that the Code does not directly impose any negative consequences when the court strikes a petition. Specifically, the automatic stay in your next bankruptcy proceeding will not be limited. In addition, a lack of solidarity amongst courts on the issue of whether the automatic stay will apply leaves creditors guessing as to whether or not the stay has been implemented. Creditors probably do not want to violate the stay and as a result they will probably not even attempt to seize an ineligible debtor's assets. Therefore, the knowingly ineligible debtor can repeatedly file for bankruptcy to ward off his or her creditors without any consequences for purposefully attempting to dodge his or her creditors. Not only will the creditors suffer from serial filings, but the court's docket will suffer from those who have found a way to abuse the system.

The consequences of dismissing the petition are not as draconian as they first appear.[123] Upon a showing of good faith, the court may extend the stay

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[119] H.R. Rep. 109-31(I), at 104 (2005), U.S.Code Cong. & Admin.News 2005, pp. 88, 89.

[120] 11 U.S.C.A. § 362(d) (West 2005).

[121] *See id.* § 362(a).

[122] *Ross*, 338 B.R. at 139 ("To be sure, dismissing the case as void *ab initio* keeps the case from counting as a prior pending case for purposes of § 362(c)'s limitations on stays in successive cases. But such 'protection' will be a pyrrhic victory if, in the meantime, a creditor has completed a repossession or foreclosure because of the absence of a stay in the void case.").

[123] *In re* Seaman, 340 B.R. 698, 706 (Bankr. E.D.N.Y. 2006).

in a subsequently filed case.[124] Therefore, so long as the debtor can prove that he or she filed the subsequent case in good faith, the court may extend the automatic stay pursuant to subsection 362(c)(3)(B).[125] As one court has noted, establishing good faith is not an onerous burden because a dismissal under section 109(h) does not indicate that the debtor re-filed in bad faith.[126] Requiring the debtor to prove he or she filed a subsequent petition in good faith is an appropriate measure by Congress to keep debtors from abusing the system.[127] A debtor who was deemed ineligible in the first filing should not be afforded one of the most powerful protections of the Code if he or she filed the second petition in bad faith.

## VII. CONCLUSION

Before an individual debtor may be eligible for bankruptcy relief, he or she must have complied with the credit-counseling requirements set forth in subsection 109(h). Failure to abide by subsection 109(h) will result in the court having no choice but to dispose of the individual's bankruptcy in some manner.[128] As the Bankruptcy Code fails to explicitly provide for how courts should dispose of the matter, the courts are left to their own devices when deciding how to dispose of the case. Most courts have opted to dismiss the case, while others have chosen to strike the petition.

At first blush, striking the petition seems to be the more forgiving remedy. The individual debtor will suffer no consequences when he or she re-files for bankruptcy and the previous filing will not be reflected on his or her credit record. However, the harm to the debtor may be greater than originally perceived. If an ineligible debtor's filed petition does not

[124] *Id.* (citing *In re* Taylor, No. 05-35381DM, 2006 WL 4043357, at *6 (Bankr. N.D.Ca. Mar. 9, 2006).

[125] 11 U.S.C.A. § 362(c)(3)(B)

[126] *In re* Taylor, No. 05-35381DM, 2006 WL 4043357, at *6 (Bankr. N.D.Ca. 2006).

[127] One could argue that requiring the debtors to prove good faith will crowd the bankruptcy courts' dockets because a court may only extend the stay upon notice and a hearing. *See* 11 U.S.C.A. § 362(c)(3)(B). Yet, nothing in subsection 362(c)(3) requires good faith to be proved by live testimony, which would necessarily consume more of the court's time. *See id.* § 362(c)(3). The court could just as easily render an order by reviewing party affidavits. In addition, as time passes and bankruptcy attorneys become more familiar with the section 109(h) requirements, there should be fewer debtors filing petitions before complying with section 109(h). As a result, fewer debtors will have their cases dismissed for ineligibility thereby reducing the number of hearings regarding the debtor's good faith in a subsequent filing.

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

commence a case and thereby fails to invoke an automatic stay, the debtor will be entirely unprotected from his or he creditors. Therefore, although the ineligible debtor filed for bankruptcy, creditors are not precluded from seizing the ineligible debtor's assets. In addition to possibly being a more harmful remedy, striking the petitions could lead to a gross abuse of the system by repeat filers.

The more appropriate manner by which to dispose of an ineligible debtor's bankruptcy is to dismiss the case. While dismissal can result in negative consequences, an ineligible debtor who can prove that he or she filed a subsequent bankruptcy petition in good faith will not suffer any adverse penalties. Therefore, dismissing the petition is not as harsh of a result as it initially seems. Additionally, courts that opt to dismiss the case generally operate under the belief that a bankruptcy was commenced. As a result, the automatic stay applies while the case is pending. Thus, dismissing the case offers more protection to ineligible debtors while the case is pending than striking the petition. Because dismissal offers ineligible debtors more protection and is a better means of curbing abuse of the bankruptcy system, courts should dismiss an ineligible debtor's bankruptcy case.