JUDICIAL FOLLIES: IGNORING THE PLAIN MEANING OF BANKRUPTCY CODE § 109(g)(2)

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Although the Bankruptcy Code[1] never has been characterized as a masterpiece of clarity, the language of § 109(g)(2) is unambiguous.[2] It states:

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . . the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.[3]

Irrespective of the plain language of § 109(g)(2), its application has been the subject of four differing interpretations by federal judges nationwide. These approaches are: (1) the plain language of § 109(g)(2) is mandatory; (2) § 109(g)(2)

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1. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, *amended by* Pub. L. No. 109-08, 119 Stat. 23 (effective as to cases filed on or after Oct. 17, 2005, with certain specified exceptions) (to be codified at 11 U.S.C §§ 101–1532) [hereinafter Bankruptcy Code or Code].

2. 11 U.S.C. § 109(g)(2) (2000). This provision originally was enacted as § 109(f)(2) in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, and it was redesignated as § 109(g)(2) in the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088, 3105.

3. 11 U.S.C. § 109(g)(2). Once a bankruptcy petition has been filed, the automatic stay prohibits certain acts, including but not limited to the following: any act to commence or continue a legal, administrative, or other proceeding against the debtor for the purpose of recovering a prepetition claim; any act to obtain possession of or to exercise control over property of the estate; any act to obtain property from the estate; any act to enforce a lien against property of the estate; any act to enforce a lien against property of the debtor to the extent that it secures a prepetition claim; and any act to collect, assess, or recover a prepetition claim. *Id.* § 362(a).

is discretionary; (3) a causal connection is required between the motion for relief from the automatic stay and the voluntary dismissal; and (4) the motion for relief from the automatic stay must be pending or unresolved when the debtor requests and obtains a voluntary dismissal (hereinafter referred to as the pending approach). Consequently, there is great uncertainty (even within a single federal jurisdiction) for debtors' and creditors' attorneys, and bankruptcy trustees, as to how this provision will be construed.

This Article will show that the application of § 109(g)(2) is mandatory, and not discretionary, based upon a long-standing rule of statutory interpretation enunciated by the United States Supreme Court, as well as the legislative history to § 109(g)(2). It also will assert two novel legal theories and discuss the applicable provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[4] to demonstrate that the other views are clearly erroneous. More specifically, it will point out that the causal connection approach bases its reasoning on an incorrect characterization of the word *following* as a verb instead of a preposition, and it also requires a condition not intended by Congress. Similarly, the pending approach requires a condition not expressed in the statute or in the legislative history, and that condition defeats the purpose of § 109(g)(2) in certain circumstances. Finally, this will be the first law review article to suggest that if a motion for relief from the stay[5] has been withdrawn, dismissed, or denied, it should be treated under § 109(g)(2) as if it had not been filed, thereby not triggering the prohibition of § 109(g)(2).

PURPOSE OF § 109(g)(2)

The purpose of § 109(g)(2) is to curb the abuse of repetitive filings by debtors under the Bankruptcy Code.[6] In *In re Holder*, the court described a typical sequence of events that the Code provision is designed to prevent:

> Section 109(g)(2) deals with voluntary dismissals and subsequent refilings which effectively act to prevent creditors from acquiring relief from the automatic stay and pursuing foreclosure remedies in state court proceedings. Customarily in such cases, a debtor's bankruptcy petition is filed to forestall a threatened foreclosure. Once the foreclosure process is stopped, debtors either do not, or cannot, properly prosecute the case, or they move to dismiss the case after a motion for relief from stay has been filed. The purpose of the 180 day period in Section 109(g) is to allow creditors holding secured claims . . . a window of opportunity to exercise their rights under state law free of the constraints of the bankruptcy law. Otherwise, debtors could file and dismiss cases at will, free to interdict all foreclosure efforts, and having succeeded,

4. Pub. L. No. 109-8, 119 Stat. 23.

5. Hereinafter, the motion for relief from the automatic stay, which may be filed when any of the grounds for relief set forth in § 362(d) exist, sometimes will be referred to as the § 362 motion. 11 U.S.C. § 362(d).

6. 130 CONG. REC. 20,088 (1984) (statements of Sen. Hatch).

> thereafter to cease to prosecute their cases or to dismiss them and refile when foreclosure again threatens.[7]

Therefore, by restricting the ability of debtors to continually dismiss and refile their bankruptcy petition, § 109(g)(2) provides protection to creditors in the exercise of their rights.

Also, it is important to note that Bankruptcy Code § 109(g)(2) pertains only to a debtor's eligibility, not to the bankruptcy court's subject-matter jurisdiction,[8] which is derived from 28 U.S.C. §§ 1334 and 157.[9] Analogously, in cases involving the eligibility of a chapter 13 individual with regular income,[10] at least two appellate courts have held that eligibility under § 109 is not jurisdictional.[11]

CORRECT VIEW: THE PLAIN LANGUAGE OF § 109(g)(2) IS MANDATORY

There are four approaches concerning the application of § 109(g)(2),[12] and the majority view holds that the plain language of § 109(g)(2) is mandatory.[13]

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7. 151 B.R. 725, 727 (Bankr. D. Md. 1993).

8. *In re* Phillips, 844 F.2d 230, 235–36 n.2 (5th Cir. 1988); 2 COLLIER ON BANKRUPTCY ¶ 109.08, at 109-54 (Alan A. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005); Luis F. Chaves, *In Rem Bankruptcy Refiling Bars: Will They Stop Abuse of the Automatic Stay Against Mortgagees?*, 24 CAL. BANKR. J. 3, 12–13 (1998); Harry Wright, IV, *Must Courts Apply Section 109(g)(2) When Debtors Intend No Abuse in an Earlier Dismissal of Their Case?*, 7 BANKR. DEV. J. 103, 107–11 (1990); *see also In re* Flores, 291 B.R. 44, 52–53 (Bankr. S.D.N.Y. 2003). *Contra In re* Prud'Homme, 161 B.R. 747, 751 (Bankr. E.D.N.Y. 1993); *In re* Keziah, 46 B.R. 551, 554 (Bankr. W.D.N.C. 1985).

9. 28 U.S.C. § 1334 (2000); *id.* § 157; Rudd v. Laughlin, 866 F.2d 1040, 1041 (8th Cir. 1989); *Flores*, 291 B.R. at 46.

10. 11 U.S.C. § 109(e) (2000). *But see* 11 U.S.C.A. § 104 (West Supp. 2005) (effective Apr. 1, 2004) (amending dollar amounts).

11. *In re* Wenberg, 902 F.2d 768 (9th Cir. 1990), *aff'g* 94 B.R. 631, 637 (B.A.P. 9th Cir. 1988); *Rudd* , 866 F.2d at 1041–42; *see also* 2 COLLIER, *supra* note 8, ¶ 109.01[2], at 109-6.2 (characterizing § 109 as "a rule governing eligibility for relief" and stating that "it is clear that it is not jurisdictional" (citation omitted)).

12. *See In re* Richardson, 217 B.R. 479 (Bankr. M.D. La. 1998) (discussing all four approaches).

13. *In re* Hackett, 233 F.3d 574 (5th Cir. 2000), *aff'g* No. CIV A 98-3819, 1999 WL 294797, at *2 & n.1, *4 (E.D. La. May 10, 1999) (noting that the mandatory approach is the majority view; agreeing "generally" with the courts that adopt that view, and stating that "this approach is the most straightforward and natural reading of the language of the statute"; affirming the bankruptcy court's dismissal of the debtor's case under § 109(g)(2), but evaluating the application of the discretionary approach in the event it is adopted by the Fifth Circuit; and finding that, if a good faith exception exists, this debtor did not qualify); Bigalk v. Fed. Land Bank of St. Paul (*In re* Bigalk), 813 F.2d 189 (8th Cir. 1987); Andersson v. Security Fed. Sav. & Loan of Cleveland (*In re* Andersson), 209 B.R. 76 (B.A.P. 6th Cir. 1997); Hogan v. Marshall (*In re* Hogan), No. 04 C 5960, 2004 WL 2806206 (N.D. Ill. Dec. 3, 2004), *vacated and remanded* "with instructions to remand to the bankruptcy court for vacatur and dismissal as moot," 138 F. App'x 838, 839 (7th Cir. 2005); *In re* Munkwitz, 235 B.R. 766 (E.D. Pa. 1999); Chrysler Fin. Corp. v. Dickerson (*In re* Dickerson), 209 B.R. 703 (W.D. Tenn. 1997); Kuo v. Walton, 167 B.R. 677 (M.D. Fla.

For example, in *Andersson v. Security Federal Savings and Loan of Cleveland (In re Andersson)* the debtor filed his first chapter 13 case to stop foreclosure proceedings against his home.[14] Then, approximately six months after the mortgagee's § 362 motion (which appeared to have been resolved), he requested and obtained a voluntary dismissal.[15] One hundred days later, he filed a new chapter 13 case to stay the second foreclosure initiated by the mortgagee.[16] The bankruptcy court followed the plain language of § 109(g)(2) and dismissed the case with sanctions not to refile for 180 days from the date of its order.[17] The Bankruptcy Appellate Panel for the Sixth Circuit affirmed the dismissal based on the mandatory interpretation of § 109(g)(2).[18]

In another case, the debtor or his wife filed a chapter 13 petition shortly prior to a scheduled foreclosure sale on three different occasions and, in each instance, sought and obtained a voluntary dismissal after the bank filed a § 362 motion.[19] Subsequent to the third dismissal, and after the foreclosure sale was rescheduled again, the debtor's wife filed the fourth case on behalf of the debtor two hours before the sale.[20] The bank moved for a dismissal, which the bankruptcy court granted, and the Eighth Circuit affirmed, holding that the language of § 109(g)(2) is clear.[21]

In an interesting case in the Seventh Circuit, the debtor obtained a voluntary dismissal of her chapter 13 case nearly three years and four months after the mortgagee's motion to modify the automatic stay.[22] Although she was current on the mortgage, the balance owed under her plan totaled $7755 of unsecured debt and the five-year plan was going to expire in approximately four months.[23] Inasmuch as § 1322(d) prohibited the court from approving a plan that was longer

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1994); *In re* Smith, 58 B.R. 603 (W.D. Pa. 1986); *In re* Winter, No. BKY 04-36330 (Bankr. E.D. Wis. Dec. 15, 2004); *In re* Byrd, No. 03-09697-8-ATS (Bankr. E.D.N.C. Jan. 13, 2004); *In re* Stuart, 297 B.R. 665 (Bankr. S.D. Ga. 2003); *In re* Rankin, 288 B.R. 201 (Bankr. E.D. Tenn. 2003); *In re* McAlister, No. C/A 1-6647-W, 2001 WL 1806037 (Bankr. D.S.C. Aug. 13, 2001); *In re* Rives, 260 B.R. 470 (Bankr. E.D. Mo. 2001); *In re* Richardson, 217 B.R. 479 (Bankr. M.D. La. 1998); *In re* Rist, 153 B.R. 79 (Bankr. M.D. Fla. 1993); *In re* Keul, 76 B.R. 79 (Bankr. E.D. Pa. 1987); *In re* Denson, 56 B.R. 543 (Bankr. N.D. Ala. 1986); *In re* Keziah, 46 B.R. 551 (Bankr. W.D.N.C. 1985).

14. 209 B.R. 76, 77 (B.A.P. 6th Cir. 1997).

15. *Id*.

16. *Id*.

17. *In re* Andersson, No. 96-11001, 1996 WL 417233, at *3 (Bankr. N.D. Ohio May 24, 1996).

18. *In re Andersson*, 209 B.R. at 78–79.

19. Bigalk v. Fed. Land Bank of St. Paul (*In re* Bigalk), 813 F.2d 189, 190 (8th Cir. 1987). This case was decided before 11 U.S.C. § 109(f)(2) was redesignated as § 109(g)(2). *See supra*, note 2.

20. *Bigalk*, 813 F.2d at 190.

21. *Id.*

22. Hogan v. Marshall (*In re* Hogan), No. 04 C 5960, 2004 WL 2806206, at *1 (N.D. Ill. Dec. 3, 2004), *vacated and remanded* "with instructions to remand to the bankruptcy court for vacatur and dismissal as moot," 138 F. App'x 838, 839 (7th Cir. 2005).

23. *Id.*

than five years,[24] the debtor chose to dismiss the first case and then refile five days later.[25] The bankruptcy court dismissed the second case, and the district court affirmed, offering the following rationale:

> In short, there is no contextual reading of the statute which supports the conclusion that Congress meant the 180-day rule to be discretionary. The only support for that position is the fact that the statute admittedly covers people who, like Ms. Hogan, are not refiling their bankruptcy cases to thwart creditors. The court, however, lacks the power to rewrite the statute to tailor it to cover only abusive debtors.[26]

Similarly, in another recent case, the bankruptcy court concluded "that Congress intended to make debtors who dismiss and refile in the face of a motion for relief [from stay] ineligible, regardless of their subjective state of mind or intent . . . ," and "[j]udicial interpretation of a statute outside its literal terms is appropriate only when a literal application of the statute would lead to an absurd or unconstitutional result."[27]

The United States Supreme Court has provided guidance concerning statutory interpretation as follows: "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[28] "It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'"[29] The Court consistently has instructed: "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'"[30]

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24. 11 U.S.C. § 1322(d) (2000).

25. *In re Hogan*, 2004 WL 2806206, at *1.

26. *Id.* at *4. Subsequently, the Seventh Circuit vacated the opinion of the district court for mootness because the 180-day bar had expired prior to the district court's decision. 138 F. App'x at 839. *See supra* note 22.

27. *In re* Stuart, 297 B.R. 665, 668 (Bankr. S.D. Ga. 2003) (citations omitted). The court set forth an example of an unconstitutional result (lack of due process) where the debtor was not served with the creditor's § 362 motion and did not know that it was pending when he requested the voluntary dismissal. *See In re* Murray, No. 486-00325 (Bankr. S.D. Ga. Aug. 21, 1986).

28. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (citations omitted).

29. Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) (internal quotation marks omitted)).

30. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); *see* United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) ("Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words." (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922) (internal citation omitted))).

When is a result *absurd*? According to the thorough analysis in the *Richardson* case, it is absurd when it is "unthinkable" or "bizarre,"[31] or when it is "demonstrably at odds with the intentions of its drafters."[32] When is a result *not absurd*? According to the *Richardson* court's analysis, "[i]t is not absurd if it is merely 'personally disagreeable,'[33] or 'mischievous' or 'objectionable.'"[34]

SECOND VIEW: § 109(g)(2) IS DISCRETIONARY

In discussing the second approach, the court in *Richardson* explained that some courts have held that § 109(g)(2) is not mandatory if the result would be absurd, inequitable, or unfair, while other courts have held that it is not mandatory when the literal language of the statute operates more inclusively than Congress intended.[35]

A good example is the case of *In re Hutchins*.[36] After filing her first chapter 13 case on January 18, 2002, the debtor failed to make the April mortgage payment on her home due to insufficient scholarship funds to cover her daughter's tuition expenses.[37] By September 2002, she had missed payments for three to four months, which she testified was due to her husband's failure to pay the agreed child support and because of additional expenses.[38] Both times, the mortgagee filed a motion for relief from stay, the parties settled, and the court entered an "Order Conditionally Denying Relief From the Automatic Stay."[39] The second order also contained a provision for automatic relief from the stay, without a separate order, if she defaulted.[40] By or before June 2003, the debtor had fallen behind on her mortgage payments again, and she received an acceleration notice from the mortgagee.[41] Unable to refinance her home to pay the accelerated balance of the mortgage,[42] and fearing an imminent foreclosure, she requested and obtained

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31. *In re* Richardson, 217 B.R. 479, 491 (Bankr. M.D. La. 1998) (quoting Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527 (1989) (Scalia, J., concurring)).

32. *Id.* at 490 (quoting *Griffin*, 458 U.S. at 571).

33. *Id.* at 491 (quoting Johnson v. Sawyer, 120 F.3d 1307, 1319 (5th Cir. 1997)).

34. *Id.* (quoting *Griffin*, 458 U.S. at 575).

35. *Id.* at 482; *see, e.g.*, Home Savs. of Am. v. Luna (*In re* Luna), 122 B.R. 575 (B.A.P. 9th Cir. 1991); *In re* Howard, 311 B.R. 230 (Bankr. E.D. Wis. 2004); *In re* Hutchins, 303 B.R. 503 (Bankr. N.D. Ala. 2003); *In re* Santana, 110 B.R. 819 (Bankr. W.D. Mich. 1990); *see also* Tooke v. Sunshine Trust Mortgage Trust No. 86-225, 149 B.R. 687, 693–95 (M.D. Fla. 1992) (granting the debtors' Emergency Motion for Stay Pending Appeal, upon a finding that the debtors were "likely to prevail on the merits of their appeal" because the bankruptcy court's mandatory application of § 109(g)(2) in dismissing the debtor's case would produce an absurd result; and subsequently terminating the stay pending appeal because of the debtors' noncompliance with a condition in the court's order granting the stay).

36. 303 B.R. 503 (Bankr. N.D. Ala. 2003).

37. *Id.* at 505.

38. *Id.*

39. *Id.* at 505 & nn.11, 13.

40. *Id.* at 506.

41. *Id.*

42. Brief for Debtor at 7, *In re* Hutchins, 303 B.R. 503 (Bankr. N.D. Ala. 2003) (No. 03-05484-TOM-13).

a voluntary dismissal and two days later filed a second chapter 13 case.[43] The mortgagee then filed a motion to dismiss the second case based on § 109(g)(2).[44]

In applying the discretionary approach, the court explained that, in the second case, the debtor was current on the mortgage payments and on her other payments under the chapter 13 plan; that she had "substantial equity in her home"; that the chapter 13 plan proposed 100 percent payment of all claims in both cases; that she had been working at State Farm Insurance for six years and also expected to begin a part-time job at Wal-Mart; and that she expected to receive monthly child support payments from her estranged husband (irrespective of past inconsistencies) as well as monthly financial assistance from her father.[45] Under these circumstances, the court refused to apply a strict application of the mandatory language in § 109(g)(2) because it determined that such an application would lead to an absurd result. Therefore, it denied the mortgagee's motion to dismiss on December 23, 2003.[46]

Similarly, in another recent case, the court applied the discretionary approach in the following circumstances. The mortgagee of the chapter 13 debtors (husband and wife) filed a motion for relief from stay, after which the debtors filed a motion to voluntarily dismiss the case.[47] Their stated intention was to refile immediately under chapter 7 for the purpose of discharging medical expenses incurred during the first case.[48] The debtors had paid the mortgagee post-petition arrearages of more than $2000 and desired to surrender the house because the husband's injury and illness prevented him from being able to work.[49] They sought to discharge, under chapter 7, the medical bills and any deficiency on the mortgage.[50] The chapter 13 trustee objected to the "abrogation of 11 U.S.C. § 109(g)(2)" but did not object to the dismissal.[51]

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43. *In re Hutchins*, 303 B.R. at 505–06.

44. *Id.* at 505.

45. *Id.* at 506, 509. The court also cited authority "not[ing] the value for a Debtor in preserving her home in a Chapter 13." *Id.* at 509 n.36 (citing Green Tree Acceptance, Inc. v. Hoggle (*In re* Hoggle), 12 F.3d 1008 (11th Cir. 1994)). The issue in that case, however, was not an eligibility question under § 109(g)(2); rather it was whether a chapter 13 plan could be modified to cure a postconfirmation default. *In re Hoggle*, 12 F.3d at 1009.

46. *In re Hutchins*, 303 B.R. at 509–10. Subsequent to this decision, the mortgagee filed a motion for relief from stay alleging that the debtor again was in arrears (this time, for three payments for December 2003 through February 2004), the court entered a conditional order of denial on the consent of both parties and, as of the time of the writing of this Article, the debtor was current on her payments under that order.

47. *In re* Howard, 311 B.R. 230, 231 (Bankr. E.D. Wis. 2004).

48. *Id.* Inasmuch as the debtors had been granted a chapter 7 discharge in a prior case filed within six years before the commencement of the present case, conversion to chapter 7 was not an option. 11 U.S.C. § 727(a)(8) (2000); *see In re Howard*, 311 B.R. at 231 n.1. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 312(1), changed the time bar of § 727(a)(8) from six years to eight years. Pub. L. No. 109-8, 119 Stat. 86–87 (amending 11 U.S.C. § 727(a)(8)).

49. *In re Howard*, 311 B.R. at 231.

50. *Id.*

51. *Id.*

The court stated that the mortgagee would not be prejudiced and that applying § 109(g)(2) to these facts would lead "to absurd results that could not have been intended by Congress."[52] Therefore, it held that, after a showing of proof by the debtors that the house has been surrendered to the mortgagee, the court would enter an order granting the debtors' voluntary dismissal, "without the bar to re-filing of § 109(g)(2)."[53]

This case is a good example of how Congress, by its plain language in § 109(g)(2), has set limits on the goal of providing an honest debtor with a fresh start in bankruptcy. It is clear that the husband's illness, injury, and inability to work, as well as the medical expenses incurred during the chapter 13 case, were the reasons that the debtors sought to obtain a voluntary dismissal and then refile under chapter 7. Statistical research shows that health problems and unaffordable medical expenses frequently result in bankruptcy.[54] However, in these circumstances, the debtors had been granted a prior chapter 7 discharge and were within § 727(a)(8)'s six-year bar[55] (which Congress recently extended to eight years[56]), thereby eliminating the option of converting their case to chapter 7.[57] Also, § 109(g)(2) on its face prohibits a new filing for 180 days after the voluntary dismissal. Thus, it appears that, although the debtors' plight was that of honest debtors and was beyond their control, it was clearly outside the boundaries of the fresh start intended by Congress unless a mandatory application of § 109(g)(2) would lead to an absurd result under the *Richardson* analysis. In other words, was it "unthinkable," "bizarre," or "demonstrably at odds with the intentions of [the Code's] drafters"?[58] Or was it simply "personally disagreeable," "mischievous," or "objectionable"?[59]

Another case in which the court used the discretionary approach not to apply § 109(g)(2) was *In re Luna*.[60] There, the court granted the mortgagee's motion for relief from stay, with a direction not to advertise a foreclosure sale on the debtor's home until the mortgagee provided the debtor with a statement of funds required to reinstate and pay off the mortgage.[61] Subsequently, the debtor requested and obtained a voluntary dismissal of her chapter 13 case and, approximately one month later, filed a second case under chapter 13.[62] In the

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52. *Id*. at 232.

53. *Id*.

54. A recent study at Harvard University revealed that "medical problems contribute to about half of all bankruptcies." David U. Himmelstein, Elizabeth Warren, Deborah Thorne, & Steffie Woolhandler, *Market Watch: Illness and Injury as Contributors to Bankruptcy*, HEALTH AFFAIRS: THE POLICY JOURNAL OF THE HEALTH SPHERE, W5-63, W5-70 (Feb. 2, 2005), *available at* http://content.healthaffairs.org/cgi/reprintframed/hlthaff.w5.63v1.

55. 11 U.S.C. § 727(a)(8) (2000).

56. *See supra* note 48.

57. *In re Howard*, 311 B.R. at 231 n.1.

58. *See supra* text accompanying notes 31–32.

59. *See supra* text accompanying notes 33–34.

60. Home Sav. of Am. v. Luna (*In re* Luna), 122 B.R. 575 (B.A.P. 9th Cir. 1991).

61. *Id.* at 576.

62. *Id.*

interim, a controversy had arisen between the parties as to whether the mortgagee had sent the court-ordered loan statement to the debtor.[63] Knowing that the debtor had filed the second petition, which invoked the automatic stay,[64] and also knowing of the debtor's offer of $10,000 to cancel the foreclosure sale, the mortgagee went forward with the sale anyway.[65] The debtor objected to the sale as an alleged violation of the stay, and the mortgagee moved for a dismissal under § 109(g)(2).[66] The court stated that a "[m]echanical application of section 109(g)(2) would reward [the mortgagee] for acting in bad faith and punish Luna for acting in good faith."[67] Thus, it denied the mortgagee's motion to dismiss because it "would have produced an illogical and unjust result."[68]

Disagreeing with *Luna*, other courts have retorted that refusing to apply § 109(g)(2), which is designed to prevent multiple abusive filings, is not an effective means of punishing a creditor for violating the automatic stay. Instead, these courts have found that holding the creditor in contempt and ordering damages or sanctions are more appropriate.[69] In *In re Dickerson*, the court noted that "the *Luna* court misapplied the statute" because § 109(g)(2) was intended to prevent the debtor's misconduct, not the creditor's misconduct.[70]

Analyzing the divergence of judicial authority concerning the "mandatory versus discretionary" application of this provision, the *Richardson* court's discussion of the scant legislative history concerning § 109(g)(2) is quite telling. It says, in part:

> The other bit of legislative history is a comment offered by Professor Frank Kennedy, a bankruptcy professor at the University of Michigan. He informed the members of the Senate that he and Professor Countryman agreed that the statute was not needed, and that the courts already had "ample powers to dismiss or abstain . . . . It is better for the courts to deal with the kinds of situations proscribed by the statute under existing authority than to impose a flat proscription as the proposed amendment does." Hearings S. 333, at p. 326. Professors Kennedy and Countryman opposed the enactment of the statute. They read it, as this Court does, to create a "flat proscription." They preferred the existing law, which left such matters in the court's discretion. They lost. The Senate amended the statute anyway.
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> The above statements [referring to the entire footnote] comprise the legislative history of this statute. This Court fails to see how anyone could seriously contend that these statements indicate

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63. *Id*.
64. 11 U.S.C. § 362(a) (2000).
65. *In re Luna*, 122 B.R. at 576.
66. *Id*.
67. *Id*. at 577.
68. *Id*.
69. *In re* Richardson, 217 B.R. 479, 492 (Bankr. M.D. La. 1998); *see In re* Dickerson, 209 B.R. 703, 707 (W.D. Tenn. 1997). For a discussion of sanctions, see *infra* text accompanying notes 130–38.
70. *In re Dickerson*, 209 B.R. at 707.

> that Congress intended the courts to have discretion in this matter. The only clear statement regarding the purpose of the statute is made by a law professor, and he thinks *the statute is designed to eliminate discretion.*[71]

In evaluating the discretionary approach, it must be acknowledged that in some instances the mandatory approach will be overly inclusive and will not always produce the preferred result. In that regard, the Supreme Court has stated the following: "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.'"[72]

Finally, consider the following practical question: Will the discretionary approach have the effect of opening a Pandora's box and inviting debtors to argue, almost as a matter of course, that the literal application of § 109(g)(2) leads to an absurd result in his or her case? What a nightmare this could be for the adjudication of bankruptcy cases!

THIRD VIEW: A CAUSAL CONNECTION IS REQUIRED

Some courts, holding that § 109(g)(2) requires a causal connection between the creditor's motion for relief from stay and the debtor's subsequent motion for and obtaining of a voluntary dismissal, have denied a creditor's or a trustee's motion to dismiss the case under this section.[73] Adopting this approach, the court in *In re Sole* construed the word *following* in § 109(g)(2)[74] as requiring a

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71. *In re Richardson*, 217 B.R. at 488 n.15 (emphasis added). The *Richardson* court also stated the following:

> In fact, it appears to this Court that Congress may have intended to avoid case-by-case adjudication when it drafted § 109(g)(2). Congress may have concluded that some debtors would be capable of convincing a bankruptcy court such as this one that their motives were pure, when in fact they were not. Alternatively, Congress may have determined that it wasn't worth the bankruptcy courts' time or effort to decide which debtors were attempting to abuse the system.
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> . . . .
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> . . . It is not within the power of the bankruptcy courts, themselves creatures of Congressional act, to question the wisdom of a Congressional act that determines who may be a debtor in bankruptcy, through the conjuring maneuver of decrying, as absurd, consequences which are (to some) *felt* to be unfortunate.

Id. at 493.

72. Lamie v. U.S. Tr., 540 U.S. 526, 542 (2004) (quoting United States v. Granderson, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring)).

73. *In re* Sole, 233 B.R. 347 (Bankr. E.D. Va. 1998); *In re* Duncan, 182 B.R. 156 (Bankr. W.D. Va. 1995); *In re* Copman, 161 B.R. 821 (Bankr. E.D. Mo. 1993); *see In re* Roland, 224 B.R. 401 (Bankr. E.D. Mo. 1997) (dismissing the case where a causal connection existed); *In re* Ramos, 212 B.R. 29 (Bankr. D. P.R. 1997) (same).

74. 11 U.S.C. § 109(g)(2) (2000) states:

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if . . .

causal connection between the creditor's § 362 motion and the debtors' voluntary dismissal.[75] The court explained that if a debtor's motion to dismiss is motivated by a reason other than an attempt to thwart a creditor from validly exercising his rights, then § 109(g)(2) is not invoked.[76] However, if a debtor's voluntary dismissal is in response to a creditor's § 362 motion, then the debtor is ineligible under this Code provision.[77] In *Sole*, the debtors' voluntary dismissal occurred twenty months after the creditor's motion for relief from stay, and thus the court, finding no causal connection, denied the chapter 13 trustee's motion to dismiss under § 109(g)(2).[78]

It is interesting to note that the debtors' second chapter 13 case was filed three days after the voluntary dismissal.[79] The court's opinion is silent concerning the reason for the refiling. However, it does state as a fact that subsequent to the creditor's motion for relief from stay, the parties had resolved the matter by a consent order modifying the stay, and the debtors began making payments accordingly.[80] It is not an uncommon occurrence in chapter 13 cases for the debtor to fall behind in payments under a consent order or a settlement agreement. Possibly such a default is the reason that the debtors, fearing an imminent foreclosure on their home, requested and obtained a voluntary dismissal and then refiled three days later.[81] If this were the reason, it seems to constitute exactly the kind of abuse that § 109(g)(2) was designed to bar. In this instance, the debtors had one swing when they filed the first case, a second swing when they resolved the § 362 motion with the consent order, and a third swing when they voluntarily obtained a dismissal and refiled. Section 109(g)(2) says, "For the next 180 days, you're out!"

> the debtor requested and obtained the voluntary dismissal of the case *following* the filing of a request for relief from the automatic stay provided by section 362 of this title. (emphasis added).

75. *In re Sole*, 233 B.R. at 349–50.

76. *Id*. at 350.

77. *Id*.

78. *Id*. Collier suggests a similar analysis:

> [W]hen the dismissal of the first case is remote in time from the motion for stay relief—perhaps, years after it was filed—section 109(g) should not be automatically applied. Quite arguably, Congress's use of the word "following" in section 109(g), rather than "after," indicates its intent that there be some causal relationship between the motion for relief and the dismissal. Certainly, the purpose of preventing abusive refilings is not served when the motion for relief and the dismissal are totally unrelated.

2 COLLIER, *supra* note 8, ¶ 109.08, at 109-54 (citation omitted).

79. *In re Sole*, 233 B.R. at 350.

80. *Id*. at 347.

81. It is unclear from the case whether the consent order, entitled "Amended Order Granting Modification of the Stay," contained a provision that called for granting automatic relief from the stay (i.e., without a separate order) in the event of a future default. *Id.* For an example of such a provision, see *supra* notes 36–44 and accompanying text (discussing *In re* Hutchins, 303 B.R. 503, 506 (Bankr. N.D. Ala. 2003)).

The court in *Duncan* also focused on the word *following* and construed it to mean "[t]o be the result of . . . ."[82] It relied on the fifth definition of the transitive form of the verb from *Webster's Dictionary*[83] even though the first definition from that source is "[t]o come or go after . . . ."[84] Similarly, the *Richardson* court treated *following* as a verb but concluded that its ordinary and primary meaning clearly is "after" because, in that court's dictionary, the first definition of the transitive verb *following* is "to come after," and the eighth definition is "to result from."[85]

Actually, both courts are in error because *following* is not used as a verb in § 109(g)(2), but rather as a **preposition**, the object of which is *filing*. The only meaning for the preposition *following* in the most recent edition of *Webster's* is "subsequent to,"[86] and it is not defined in *Black's Law Dictionary*.[87] Moreover, § 109(g)(2) contains no mention, whatsoever, of the words *cause* or *because*.[88] If Congress had intended to require a causal connection, it would not have used *following*, and the clause would have read: "[T]he debtor requested and obtained the voluntary dismissal of the case *because of* the filing of a request for relief from the automatic stay . . . ."[89] Thus, it is clear that Congress intended *following* to mean "subsequent to" and not "because of."

Lending support to this conclusion is the following analysis by the district court in the *Hogan* case:

> [Section] 109(g)(2) does not temporally limit the word "following." Thus, the fact that the motion to modify the stay and to dismiss were filed 3 years apart is irrelevant. Just as February 15th and Halloween both follow Valentine's Day, a motion to dismiss filed the day after a motion to modify the stay is filed and a motion to dismiss filed three years later both postdate, and thus follow, the filing of the motion to modify the stay.[90]

Likewise, the district court in *Munkwitz* reasoned: "While causality—'to be the result of'—is a subsidiary dictionary definition, given the statutory wording and context, that interpretation would be incongruous."[91] Also agreeing, the

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82. *In re* Duncan, 182 B.R. 156, 159 (Bankr. W.D. Va. 1995).

83. *Id*. (quoting WEBSTER'S II NEW RIVERSIDE UNIV. DICTIONARY 493 (1988)).

84. *Id*.

85. *In re* Richardson, 217 B.R. 479, 486–87 (Bankr. M.D. La. 1998) (quoting WEBSTER'S NEW WORLD DICTIONARY 524 (3rd College Ed. 1988)); *accord In re* Munkwitz, 235 B.R. 766, 768 (E.D. Pa. 1999) (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 551 (Unabridged ed. 1983)).

86. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 486 (11th ed. 2003).

87. BLACK'S LAW DICTIONARY (8th ed. 2004).

88. 11 U.S.C. § 109(g)(2) (2000).

89. *Id*. (emphasis added).

90. Hogan v. Marshall (*In re* Hogan), No. 04 C 5960, 2004 WL 2806206, at *4 (N.D. Ill. Dec. 3, 2004), *vacated and remanded* "with instructions to remand to the bankruptcy court for vacatur and dismissal as moot," 138 F. App'x 838, 839 (7th Cir. 2005).

91. *In re* Munkwitz, 235 B.R. 766, 768 (E.D. Pa. 1999).

district court in *Dickerson* noted that "there is nothing in the language of § 109(g)(2) or in the legislative history to support such a requirement."[92]

Before concluding the analysis of whether a causal connection is required, it is important to consider the following related issue: whether the debtor is ineligible under § 109(g)(2) if the creditor who requests a dismissal under this section is not the creditor who filed the motion for relief from stay in the prior case. Under these circumstances, some courts have refused to dismiss the subsequent case because the creditor, having not filed the § 362 motion in the prior case, is not prejudiced,[93] or because there is no causal connection.[94]

The better rule is that it does not matter if a different creditor filed the § 362 motion in the prior case. Either way, the debtor is not eligible, and the facts of *In re Stuart*[95] provide a good example. In that case, the debtor filed a chapter 13 petition, and subsequently the bank filed a motion for relief from stay.[96] While the motion was pending, the debtor voluntarily requested and obtained a dismissal without stating a reason.[97] Three weeks later, the debtor's landlord obtained a state court judgment against the debtor, and fifty-two minutes after the judgment, the debtor filed a chapter 7 case.[98] The landlord then filed a motion to dismiss, which the court granted, holding that § 109(g)(2) disqualified the debtor from being a debtor in the second case.[99] In agreeing with this view, *Collier* explains: "[B]ecause the statute focuses on the debtor's behavior, the party seeking dismissal of the subsequent case need not be the party that sought relief from the automatic stay in the prior case."[100]

FOURTH VIEW: THE MOTION FOR RELIEF MUST BE PENDING

The fourth approach requires that, for § 109(g)(2) to apply, the § 362 motion must be pending or unresolved at the time the debtor requests and obtains a voluntary dismissal.[101] Under this view, if the motion for relief from stay has been withdrawn, dismissed, granted, denied, or settled (for example, by a consent order) when the debtor requests and obtains a dismissal of the case, § 109(g)(2) does not apply.

In the case of *In re Milton*, the debtors and a creditor, who had filed two motions for relief from stay, reached an oral settlement agreement under which, among other stipulations, the debtors would continue making their regular

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92. *In re* Dickerson, 209 B.R. 703, 707 (W.D. Tenn. 1997).

93. Tooke v. Sunshine Trust Mortgage Trust No. 86-225, 149 B.R. 687, 693 (M.D. Fla. 1992) (decided on other grounds); *In re* Santana, 110 B.R. 819, 821–22 (Bankr. W.D. Mich. 1990).

94. *In re* Copman, 161 B.R. 821, 824 (Bankr. E.D. Mo. 1993).

95. *In re* Stuart, 297 B.R. 665 (Bankr. S.D. Ga. 2003).

96. *Id.* at 667.

97. *Id*.

98. *Id*.

99. *Id.* at 670.

100. 2 COLLIER, *supra* note 8, ¶ 109.08, at 109-54.

101. *In re* Jones, 99 B.R. 412 (Bankr. E.D. Ark. 1989); *In re* Milton, 82 B.R. 637 (Bankr. S.D. Ga. 1988) (requiring that the § 362 motion be pending as of the date of the debtor's subsequent refiling); *In re* Patton, 49 B.R. 587 (Bankr. M.D. Ga. 1985).

mortgage payments directly to the creditor, rather than through the chapter 13 trustee.[102] When the debtors subsequently requested and obtained a voluntarily dismissal of the case, the debtors' counsel, in good faith, thought that the agreement remained in effect whether or not the debtors were still debtors in a chapter 13 case.[103] On the other hand, the creditor's attorney believed in good faith that the agreement had been violated because of the dismissal.[104] The creditor initiated nonjudicial foreclosure proceedings, after which the debtors filed their second chapter 13 case, at least partly to stop the foreclosure from being finalized.[105] The creditor then sought to have the automatic stay voided ab initio under § 109(g)(2), and the court denied the creditor's motion.[106] It ruled that, because "the parties in good faith believed they had settled and resolved the issues raised by both of the previous motions for relief from stay," there was no unresolved § 362 motion when the debtors filed the second case.[107] Therefore, it held that the debtors were not in violation of § 109(g)(2).[108]

In *In re Patton*, the court granted the electric company's § 362 motion seeking permission to terminate the debtors' electric service, which it proceeded to do.[109] On the same day that relief from the stay was granted, the debtors requested and obtained a voluntary dismissal of their chapter 13 case, and two weeks later they refiled under chapter 7.[110] The electric company filed a motion to dismiss, and the court ruled that the electric company was not prejudiced because it had obtained all the relief that it sought by its § 362 motion in the prior case.[111] Thus, ignoring the plain language of the statute, the court held that there was no abusive repetitive filing under § 109(g)(2), and it denied the electric company's motion to dismiss.[112]

It should be noted, however, that the language of § 109(g)(2) includes neither *harm* nor *prejudice*. Simply put, when the debtors voluntarily and knowingly dismissed[113] their chapter 13 case following the filing of the electric

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102. *In re Milton*, 82 B.R. at 638–39.

103. Debtor's counsel also represented to the court that the debtors were making the required payments to him and that they were being held in his escrow account. *Id.* at 639.

104. *Id*.

105. *Id*.

106. *Id*. at 639–40.

107. *Id.* at 639.

108. *Id*. at 639–40. Note that this court found that there was no § 362 motion pending as of the *refiling* date. Most of the cases discussing this approach look to see if there was a § 362 motion pending at the time the debtor *requested the voluntary dismissal*. *See In re* Richardson, 217 B.R. 479, 484 (Bankr. M.D. La. 1998).

109. *In re* Patton, 49 B.R. 587, 588 (Bankr. M.D. Ga. 1985).

110. *Id*.

111. *Id*.

112. *Id*. at 589. This case was decided before 11 U.S.C. § 109(f)(2) was redesignated as § 109(g)(2). *See supra* note 2.

113. It is not clear why the debtors did not convert the case to chapter 7 instead of dismissing their chapter 13 case and then refiling under chapter 7. Possibly, as in *In re Howard*, the debtors were barred by § 727(a)(8) from receiving a chapter 7 discharge because of a prior discharge in a case commenced within six years of the filing of the

company's § 362 motion, they forfeited the right to file a subsequent bankruptcy case for 180 days.

Not surprisingly, some courts have disagreed with the fourth approach.[114] For example, in *Kuo v. Walton*, the court clearly stated that the outcome of the § 362 motion is not to be considered in determining whether § 109(g)(2) applies.[115] Similarly, in *Byrd*, where the debtors' payment was only two days late under a consent order in the prior case, resulting in automatic termination of the stay, the court ruled as follows:

> This court has previously held that "[t]he clear language of the statute . . . does not contemplate the result of the motion, only whether or not a request for relief has been filed." Accordingly, even if the Byrds had not defaulted on the terms of the consent order, once they dismissed their case, they were barred from refiling for 180 days.[116]

In *In re Jarboe*, a creditor filed a motion for relief from stay to foreclose on the debtor's investment property, mistakenly alleging that the debtor had not made certain post-petition payments in his chapter 13 case.[117] When learning that the payments actually had been made timely, the creditor withdrew the motion, and approximately one month later the debtor requested a voluntary dismissal.[118] The court dismissed the case with prejudice and prohibited the debtor from filing another case for 180 days.[119] One week later, the debtor filed a motion to amend the dismissal order to preserve the debtor's right to refile under chapter 13 or chapter 11, in the event that the workout then being negotiated failed.[120] The court held: "It is uncontradicted that the debtor requested and obtained dismissal of the case following the filing of [the creditor's] motion. The statute read literally permits no other decision than denial of the instant motion."[121]

The holding in *Jarboe* is a poor decision because creditors sometimes unintentionally fail to properly record a debtor's timely payments, erroneously file a motion for relief from stay, and when learning of the mistake, withdraw the motion. In such circumstances, the motion should be treated as if it had not been filed. Similarly, if the § 362 motion has been dismissed, such as for want of prosecution, it should be treated as if it had not been filed. Thus, if the debtor

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chapter 13 case that was dismissed. *See supra* text accompanying notes 55–57. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 § 312(1), changed the time bar of § 727(a)(8) from six years to eight years. Pub. L. No. 109-8, 119 Stat. 86–87 (amending 11 U.S.C. § 727(a)(8) (2000)).

114. Kuo v. Walton, 167 B.R. 677 (M.D. Fla. 1994); *In re* Byrd, No. 03-09697-8-ATS (Bankr. E.D.N.C. Jan. 13, 2004); *In re* Jarboe, 177 B.R. 242 (Bankr. D. Md. 1995).

115. *Kuo*, 167 B.R. at 679.

116. *In re Byrd*, No. 03-09697-8-ATS, slip op. at 2 (quoting *In re* Taylor, No. 03-01544-5-ATS (Bankr. E.D.N.C. July 16, 2003)).

117. *In re Jarboe*, 177 B.R. at 243–44.

118. *Id*. at 244.

119. *Id*.

120. *Id*.

121. *Id*. at 245.

subsequently requests and obtains a voluntary dismissal, and later refiles a new bankruptcy case, § 109(g)(2) will not apply.

A more difficult question arises when a motion for relief from stay has been denied, either because it was filed based on erroneous information or recordkeeping, or because it was otherwise without merit. This Article suggests that a motion for relief from stay that has been denied should be treated, *solely for the purpose of determining eligibility under § 109(g)(2)*, as if it had not been filed.[122] Congress could not possibly have intended to penalize the debtor for a creditor's motion that was filed in error or that lacks merit, and a subsequent dismissal and refiling surely would not be abusive. Therefore, when a motion for relief from stay has been denied, § 109(g)(2) should not apply if the debtor subsequently requests and obtains a voluntary dismissal, and later files a new bankruptcy case.[123]

In agreement, *Collier* states that "in light of its purpose, [§ 109(g)(2)] should not be applicable if the debtor successfully defended against . . . the motion for relief from the stay . . . ."[124] However, *Collier* stops short of reconciling the purpose of the provision with its language. This Article bridges that gap by treating a § 362 motion that has been denied as if it had not been filed, thereby reconciling the language of § 109(g)(2) with its purpose.

Under the approach suggested by this Article, the result will be the same as under the pending approach if the motion for relief from stay has been withdrawn, dismissed, or denied. However, the rationale differs significantly. By treating a § 362 motion that has been withdrawn, dismissed, or denied as if it had not been filed, this approach does not alter the wording of the statute, and Congress's intent is effectuated. On the other hand, the pending approach adds a condition to § 109(g)(2) that the motion be pending or unresolved, which Congress neither expressed nor intended. In disagreeing with the pending approach, the court in *Dickerson* noted that, when a motion for relief from stay has been withdrawn or denied, "there is no rational basis to assume that the debtor voluntarily dismissed and then refiled in order to frustrate a creditor's attempt to recover [property] because the creditor clearly had no such right."[125]

In some instances, a creditor's motion for relief from stay will be settled by an agreement between the parties and a consent order, under which the debtor later defaults,[126] and then requests and obtains a voluntary dismissal before filing a

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122. However, for all other purposes, the § 362 motion should be treated as if it had been filed. For example, if a motion for relief from stay was filed for an improper purpose, such as harassing the debtor, or with knowledge that the allegations or factual contentions contained therein were false, sanctions may be imposed under Rule 9011 of the Federal Rules of Bankruptcy Procedure. FED. R. BANKR. P. 9011.

123. As a practical matter, the debtor's attorney might request that the creditor withdraw the motion in lieu of a court order denying it.

124. 2 COLLIER, *supra* note 8, ¶ 109.08, at 109-54.

125. *In re* Dickerson, 209 B.R. 703, 707 n.1 (W.D. Tenn. 1997).

126. As seen earlier, a consent order might contain a provision that automatically grants relief from the stay (i.e., without a separate order) in the event of a future default. *See*

new case. Under these circumstances, as well as when a motion for relief from stay has been granted, courts holding that § 109(g)(2) does not apply because the motion for relief was not pending when the debtor obtained a voluntary dismissal misconstrue the statute. Section 109(g)(2) reads, in part, "following the *filing* of a request for relief from the automatic stay."[127] Thus, if the motion has been settled or granted, the filing of a § 362 motion clearly has occurred, and therefore the prohibition of § 109(g)(2) applies if the debtor subsequently requests and obtains a voluntary dismissal and then refiles. Consequently, courts adopting the pending approach will reach the wrong conclusion when the motion has been settled or granted.[128] The flaw is that, instead of applying the plain language of the statute and ascertaining whether a motion for relief from stay has been filed, these courts focus on whether the motion is pending, even though no such requirement is found in § 109(g)(2).

The following analysis by the *Dickerson* court is especially helpful:

> [This] Court notes that such a restrictive reading of § 109(g)(2) would eviscerate the underlying policy rationale for the rule . . . . By restricting the application of § 109(g)(2) to those cases where there is a pending, unresolved motion for relief from stay at the time of the voluntary dismissal, these courts ignore the reality of these proceedings. In fact, a literal interpretation of these cases would allow a debtor to refile continuously, thereby obtaining the protection of the automatic stay, so long as it did not dismiss the previous action while the motion for relief from stay was pending before the court. Thus, in cases where the relief from stay is granted prior to the voluntary dismissal, the debtor would be able to use the [B]ankruptcy [C]ode to frustrate the ability of a creditor to regain its property—the exact result that § 109(g)(2) is designed to prevent.[129]

Therefore, the pending approach is misguided and should not be applied.

SANCTIONS

If a case is filed in violation of § 109(g)(2), sanctions may be imposed under Bankruptcy Rule 9011, thereby adding teeth to § 109(g)(2) consistent with Congress's intent to curb the abuse of repetitive filings by debtors or their attorneys.[130] For example, the Fifth Circuit upheld sanctions imposed against the debtor's attorney for a creditor's costs and attorney's fees where, following the creditor's motion for relief from stay, the debtor had requested and obtained a voluntary dismissal of his chapter 13 case and had refiled under chapter 7 less than

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supra note 40 and accompanying text (discussing *In re* Hutchins, 303 B.R. 503, 506 (Bankr. N.D. Ala. 2003)).

127. 11 U.S.C. § 109(g)(2) (2000) (emphasis added).

128. The *Richardson* court stated: "A motion which has been granted is no longer pending, so the 'pending' courts would not apply § 109(g)(2) if the motion for relief in the previous case had been granted. However, that is exactly the sort of situation that the statute is designed to prevent, and it is the situation before this Court." *In re* Richardson, 217 B.R. 479, 485 (Bankr. M.D. La. 1998).

129. *In re* Dickerson, 209 B.R. 703, 707 (W.D. Tenn. 1997) (footnote omitted).

130. FED. R. BANKR. P. 9011.

two months later, in part to prevent the creditor's collection efforts.[131] In another case, sanctions in the amount of $4977 for attorney's fees were imposed against the debtor's attorney under circumstances in which the court found that the debtor had filed three successive cases within a four-month period to thwart the bank's foreclosure efforts.[132] The third bankruptcy petition was filed thirty days after the debtor requested and obtained a voluntary dismissal of the second case following the bank's motion for relief from stay.[133]

Also, some courts, citing as authority Code § 105(a)[134] and/or § 349(a),[135] have prohibited repetitive filers from commencing future bankruptcy cases for more than the 180 days specified in § 109(g)(2).[136] This appears to be the majority view;[137] however, there is appellate authority holding to the contrary.[138]

BANKRUPTCY LEGISLATION IN 2005

Recently, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.[139] It constitutes a massive reform of the Bankruptcy Code, and one of its main purposes is to curb alleged abuses of the bankruptcy laws by debtors.[140] Significantly, irrespective of the varying judicial

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131. Moran v. Frisard (*In re* Ulmer), 19 F.3d 234, 235 n.5, 238 (5th Cir. 1994) (citing 28 U.S.C. § 1927 (2000); FED. R. CIV. P. 11; FED. R. BANKR. P. 9011). The debtor's attorney acknowledged this partial purpose on appeal. *Id.* at 235.

132. *In re* Rankin, 288 B.R. 201 (Bankr. E.D. Tenn. 2003) (ordering a show cause hearing and subsequently imposing the sanctions by an order entered on March 4, 2003).

133. *Id*. at 203.

134. Section 105(a), authorizing the court's powers, states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a) (2000).

135. Section 349(a), setting forth the effects of the dismissal of a bankruptcy case, states:

> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; *nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title*.

Id. § 349(a) (emphasis added).

136. *Id.* § 109(g)(2); *In re* Casse, 198 F.3d 327 (2d Cir. 1999).

137. *In re Casse*, 198 F.3d at 341.

138. *In re* Frieouf, 938 F.2d 1099, 1104 (10th Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992) (holding that "[t]he bankruptcy court's denial of all access to bankruptcy court for more than 180 days was beyond the authority conferred under section 349(a) and, consequently, cannot stand").

139. Pub. L. No. 109-8, 119 Stat. 23.

140. "The legislation we have before us is an effort . . . to improve on the system today where too many people, frankly, have abused that system." 151 CONG. REC. S2415-16 (daily ed. Mar. 10, 2005) (statement of Sen. Carper). During the 2004 calendar year,

approaches to § 109(g)(2), Congress chose not to amend this provision in any respect. However, it did amend neighboring § 109(b)(3) concerning the eligibility of foreign insurance companies, banks, etc.,[141] and it added § 109(h), which requires an individual debtor to receive a briefing from an approved nonprofit budget and credit counseling agency within 180 days before filing a bankruptcy petition.[142] Therefore, the obvious presumption is that Congress said in § 109(g)(2) what it intended, and intended in § 109(g)(2) what it said there (paraphrasing the Supreme Court),[143] and, *a fortiori*, that Congress still means what it said there. Thus, the plain language of the statute must be applied.

Additional support for this conclusion inferentially can be found in a few of Congress's recent amendments to Code § 362.[144] For example, in targeting debtor abuse, Congress created a new exception to the automatic stay for any act to enforce a lien against, or a security interest in, real property if the debtor is rendered ineligible under § 109(g).[145]

Congress also amended § 362(c) and (d) of the Code by provisions of the new Act entitled "Discouraging Bad Faith Repeat Filings" and "Curbing Abusive Filings," respectively.[146] More specifically, new § 362(c)(3)(A) provides that, in a case filed by or against an individual debtor under chapter 7, 11, or 13, if the debtor had another case pending in the preceding year that was dismissed (with one exception),[147] the automatic stay will terminate thirty days after the later case

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1,597,462 bankruptcy cases were filed, according to the online report prepared by the American Bankruptcy Institute, http://www.abiworld.org/ContentManagement/ContentDisplay.cfm?ContentID=17627 (Mar. 1, 2005) (citing statistics obtained from the Administrative Office of the U.S. Courts).

141. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 802(d)(1), 119 Stat. 146 (amending 11 U.S.C. §109(b)(3), to read as follows: "A person may be a debtor under chapter 7 of this title only if such person is not . . . (3)(A) a foreign insurance company, engaged in such business in the United States; or (B) a foreign bank, savings bank, cooperative bank, savings and loan association, building and loan association, or credit union, that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States.").

142. *Id.* § 106(a), 119 Stat. at 37–38 (amending 11 U.S.C. § 109 by adding (h) (with certain exceptions)).

143. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (internal citations omitted); *see supra* text accompanying note 28.

144. 11 U.S.C. § 362 (2000).

145. Bankruptcy Abuse Prevention and Consumer Protection Act § 303(b), 119 Stat. at 78 (amending 11 U.S.C § 362(b) by adding (21)(A)). This new exception to the automatic stay also covers any act to enforce a lien against or a security interest in real property if the case was filed in violation of a bankruptcy court order in a prior case prohibiting the debtor from filing another bankruptcy case. *Id.* (amending 11 U.S.C. § 362(b) by adding (21)(B)).

146. *Id.* §§ 302, 303(a), 119 Stat. at 75–77, 77–78 (amending 11 U.S.C § 362(c), (d) by adding (3) and (4) to (c), and (4) to (d)).

147. This provision does not include "a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)." Under new § 707(b), a case filed by an individual debtor with primarily consumer debts may be dismissed if the court finds that granting relief would be an abuse of chapter 7. The new Act has amended § 707(b) to include a means test for determining a debtor's eligibility under chapter 7 by creating a

was filed with respect to any action taken concerning a debt or property securing the debt, or concerning any lease.[148] The new provision contains a good faith exception allowing the court to extend the stay as to any or all creditors,[149] but there is a rebuttable presumption that the case was not filed in good faith if, for example, the debtor had more than one previous case pending under chapter 7, 11, or 13 during the one-year period.[150] Also, new § 362(c)(4) provides, in part, that in a case filed by or against an individual debtor under any chapter of the Code, if the debtor had two or more single or joint cases pending in the preceding year that were dismissed (other than one refiled under § 707(b)), the automatic stay will not become effective when the later case is filed.[151] However, the court may order the stay to take effect (as to any or all creditors) if the debtor makes that request within thirty days after the later case was filed and also demonstrates, by clear and convincing evidence, that the later case was filed in good faith.[152]

Additionally, new § 362(d)(4) provides an alternative ground for obtaining relief from the stay of an act against real property that secures a creditor's claim. More specifically, after notice and a hearing, the court must grant the creditor's motion for relief from the stay if it finds that filing the bankruptcy case "was part of a scheme to delay, hinder, and defraud creditors" involving either (1) a transfer of an ownership or other interest in the real property without the secured creditor's consent or the court's approval, or (2) "multiple bankruptcy filings affecting such real property."[153]

These are only a few of the changes among the plethora of new amendments to the Bankruptcy Code, many of which are designed to prevent debtor abuse. The changes to § 362 discussed above reiterate and strengthen the same purpose as that of § 109(g)(2), which is to prevent bad faith repetitive filings and abusive filings. These amendments appear to be more consistent with the mandatory approach because it implements § 109(g)(2) according to its literal terms without adding conditions or exceptions not expressed or intended by Congress. If Congress intended for § 109(g)(2) to be interpreted in a manner suggested by the discretionary, causal connection, or pending approach, it certainly

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presumption of abuse if the debtor does not satisfy the means test standard. *Id.* § 102(a), 119 Stat. at 27–32 (amending 11 U.S.C. § 707(b)). "[T]he presumption of abuse may only be rebutted by demonstrating special circumstances . . . ." 11 U.S.C.A. § 707(b)(2)(B) (West Supp. 2005).

148. Bankruptcy Abuse Prevention and Consumer Protection Act § 302, 119 Stat. at 75–76 (amending 11 U.S.C. § 362(c) by adding (3)(A)). This provision also applies to a joint case filed by or against an individual and his or her spouse.

149. *Id.* (amending 11 U.S.C. § 362(c) by adding (3)(B)).

150. *Id.* § 302 (amending 11 U.S.C. § 362(c) by adding (3)(C)(i)(I)).

151. *Id.* § 302, 119 Stat. at 76–77 (amending 11 U.S.C. § 362(c) by adding (4)(A)(i)).

152. *Id.* § 302, 119 Stat. at 77 (amending 11 U.S.C. § 362(c) by adding (4)(B), (C), (D)(i)(I)).

153. *Id.* § 303(a), 119 Stat. at 77–78 (amending 11 U.S.C. § 362(d) by adding (4)). Did Congress intend to say "part of a scheme to delay, hinder, [or] defraud creditors"? See also a corresponding new exception to the automatic stay for a two-year period following the entry of an order under § 362(d)(4) in a prior case. *Id.* § 303(b), 119 Stat. at 78 (amending 11 U.S.C. § 362(b) by adding (20)).

would have availed itself of the opportunity to express its true intent as it has done pervasively, and with great specificity, throughout the Code. Congress could have amended § 109(g)(2) by adding "unless the court, in its discretion, orders otherwise" at the end of paragraph (2); or it could have substituted *because of* for *following*; or it could have added, at the end of the paragraph, "that was pending or unresolved at the time the debtor requested and obtained the voluntary dismissal." Inasmuch as Congress elected not to amend § 109(g)(2), it is readily apparent that it intended that the plain language of this provision be applied mandatorily except in extraordinary circumstances in which a mandatory application would "produce a result demonstrably at odds with the intentions of its drafters."[154]

ANALOGY TO ELIGIBILITY UNDER § 109(e)

In concluding that § 109(g)(2) is mandatory, one other pertinent observation is persuasive. Code § 109(e) is also an eligibility provision, and it provides the eligibility requirements for a chapter 13 debtor.[155] It requires that the debtor be an individual with regular income,[156] and it limits eligibility to debtors who owe less than $307,675 of unsecured debts and less than $922,975 of secured debts, and who are not stockbrokers or commodity brokers.[157]

Consider the following hypothetical case. Debtor files a chapter 13 petition in hopes of saving her home from foreclosure. She is an individual with substantial regular income from her position as the chief executive officer of a company in good financial standing. She proposes a chapter 13 plan to repay all creditors in full, and to cure the arrearage on her home mortgage within a reasonable time and maintain the payments under § 1322(b)(5).[158] She satisfies all the requirements for eligibility and confirmation[159] except that she owes $350,000 of unsecured debts. Debtor's petition will be dismissed because she is ineligible under § 109(e).[160]

It truly defies logic to treat eligibility under § 109(g)(2) any differently than eligibility under § 109(e). Both provisions are in the same section of the

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154. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)) (explaining under what circumstances the plain language of a statute would not be applied).

155. 11 U.S.C. § 109(e) (2000). *But see* 11 U.S.C.A. § 104 (West Supp. 2005) (effective Apr. 1, 2004) (amending dollar amounts).

156. An individual with regular income is "[an] individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title, other than a stockbroker or a commodity broker." 11 U.S.C. § 101(30).

157. *Id.* § 109(e). *But see* 11 U.S.C.A. § 104 (amending dollar amounts). The effective date of the most recent adjustments to the dollar amounts in this provision was April 1, 2004.

158. 11 U.S.C. § 1322(b)(5).

159. The requirements for confirmation are set forth in 11 U.S.C. § 1325. One of the requirements is that the plan comply with the provisions of chapter 13 and the other applicable provisions of the Code, which include the eligibility provision in § 109(e). *Id.* § 1325(a)(1).

160. *Id.* § 109(e). *But see* 11 U.S.C.A. § 104 (effective Apr. 1, 2004) (amending dollar amounts).

Code, and debtors who do not satisfy the requirements under either provision simply are not eligible for relief. Both provisions are mandatory and should be applied according to the unambiguous language of the statute.

MANDATORY APPROACH REVISITED: A NOVEL INTERPRETATION

In reasoning that § 109(g)(2) is mandatory, this Article also proposes to treat a motion for relief from stay that has been withdrawn, dismissed, or denied, as if it had not been filed. As explained earlier, this interpretation reconciles the purpose of § 109(g)(2) with its language,[161] without adding an exception for the court's discretion, and without adding a condition that there be a causal connection or that the motion be pending. It effectively construes *filing* in a way that is both equitable and consistent with the intent of Congress.

CONCLUSION

Section 109(g)(2) addresses the ineligibility of debtors in precisely described circumstances—when the debtor voluntarily dismisses a bankruptcy case after the filing of a motion for relief from the stay. When these circumstances are present, the bankruptcy court has no discretion, just as, by analogy, it has no discretion when a debtor filing under chapter 13 exceeds the debt limitations of § 109(e). Cases applying the discretionary, causal connection, or pending approach are erroneous because they fail to apply the unambiguous language of the statute. Instead, they either impute Congressional intent that is not supported by the historical record or by more recent enactments, or mischaracterize a part of speech in the provision. Although occasional instances might arise when the provision operates more inclusively than Congress envisioned, it is Congress, and not the courts, that can rewrite § 109(g)(2), and Congress has elected not to do so. The conclusion is that the mandatory approach is the correct view and that the plain meaning of § 109(g)(2) must be applied.

161. *See supra* text following note 121 through text accompanying note 125.