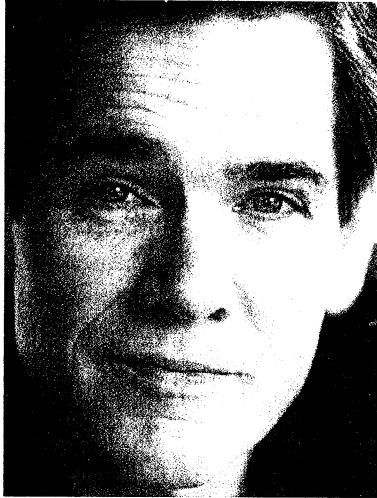


Bankruptcy

## The Impact of BAPCPA—An Overview

By Lawrence A. Young and Heather Heath McIntyre



**Lawrence A. Young** is a partner in the firm of Hughes Watters Askanase in Houston, Texas and is Chair Ex-Officio of the Governing Committee of the Conference on Consumer Finance Law. He is a fellow of both the American College of Consumer Financial Services Lawyers and the American College of Commercial Finance Lawyers. Larry is the Texas State Editor for both *CarLaw* and *HouseLaw* and is on the Advisory Board of the *Consumer Financial Services Law Report*. He is also the Texas Chair for the American Collectors Association's Members' Attorney Program (MAP). He is the former Editor of the *Consumer Finance Law Quarterly Report* and has authored or co-authored over 100 articles and seminar papers, a book, two plays and a screenplay on a variety of legal subjects in the consumer finance, commercial finance and bankruptcy fields.

Larry served on the Committee established by the Texas Consumer Credit Commissioner to draft plain language consumer contracts. He currently serves on the Manufactured Housing Institute Finance Lawyers Committee, the American Bar Association (ABA) Business Law Section Task Force on Insolvency and the Federal Court Structure, and the ABA Business Law Section Planning Committee. Larry is a past Chairman of the ABA Consumer Bankruptcy Committee, the ABA Consumer Financial Services Debt Collection Practices and Bankruptcy Subcommittee and the ABA Commercial Financial Services Interest and Usury Subcommittee.

Larry attended the University of Michigan Law School and is a former Marine officer.



**Heather Heath McIntyre** is an associate with Hughes Watters Askanase. Her practice focuses mainly on reorganizations and workouts for corporations and individuals, representation of secured creditors in and out of bankruptcy, and representation of bankruptcy trustees. She graduated from the University of Houston Law Center in 2003 and obtained a bachelor's degree from the University of Texas at Austin.

### I. Introduction

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA or the 2005 amendments) constituted the most dramatic revision of the United States Bankruptcy Code (the Bankruptcy Code)<sup>1</sup> in twenty-seven

years.<sup>2</sup> Most of the 2005 amendments have been in effect since October 17, 2005. Cases under the revised Bankruptcy Code continue to wind their way through the courts. This article addresses selected developments under the 2005 amendments.

### II. Homestead Exemptions

#### A. Increase of "Interest" in Homestead Due to Appreciation During 1215 Days Before Filing Does Not Trigger Section 522(p)

Section 522 of the Bankruptcy Code has long provided for the exemption of homestead interests from unsecured claims in bankruptcy. With the 2005 enactment of section 522(p), however, a debtor may no longer exempt a homestead interest acquired during the 1,215-day (approximately three and a half years) period before the bankruptcy petition date, if the aggregate value of the property exceeds \$125,000; however, this valuation limit does not include equity rolled over from a previous residence in the same state.<sup>3</sup>

Generally, courts appear to agree that the equity acquired normally by a debtor within the 1,215 days before bankruptcy does not trigger section 522(p). In *In re Blair*,<sup>4</sup> the court determined that the debtors' increased equity in their homestead

1. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (S. 256), Pub. L. No. 109-8 (April 20, 2005), amending the U.S. Code Title 11 (Bankruptcy Code), title 18 and Title 28. Section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.*

2. See, e.g., *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006) (noting that "the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), majde [sweeping changes to Title 11 of the United States Code]").

3. 11 U.S.C. § 522(p).

4. *In re Blair*, 334 B.R. 374 (Bankr. N.D. Tex. 2005).

acquired during the 1,215 days preceding the bankruptcy petition by way of their monthly mortgage payments did not trigger section 522(p). Thus, the debtor's equity in the house was exempt.

In *Blair*, the debtors purchased their home 1,773 days before filing bankruptcy, and scheduled equity in their homestead in the amount of \$688,606. The court stated that one does not "acquire" equity in a homestead. Rather, one acquires ownership of a home.<sup>5</sup> The debtors acquired their "interest" in the home as of the actual purchase, before the 1,215 day period. Thus, the exemption cap did not apply.

**B. When Exemption Planning is Fraud Reducing the Homestead Exemption**

Section 522(o) provides that, to the extent that a portion of the debtor's interest in the homestead is attributable to fraud, the debtor's homestead exemption is reduced by that amount. Fraud occurs if the debtor disposes of non-exempt property and re-invests in an exempt homestead in the ten-year period before the petition filing date with the intent to hinder, delay, or defraud a creditor.<sup>6</sup> According to one court:

The passage of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005 reflected a change in Congressional attitude toward exemption planning. As one court has noted: "Congress began to put the brakes on the freedom with which states could protect their state residents by providing generous homestead protection laws." *In re Maronde*, 332 B.R. 593, 598 (Bankr.D.Minn.). Specifically, BAPCPA added § 522(o). This subsection reduces the value of the debtor's exempt interest in a homestead to the extent attributable to any nonexempt property

that the debtor disposed of for the purpose of increasing the debtor's equity in the homestead. The look-back period for this subsection is ten years, and the objecting party has to show that the debtor disposed of the nonexempt property with the intent to hinder, delay, or defraud one or more creditors.<sup>7</sup>

Thus, to prevail under section 522(o), the movant must show that:

(1) the debtor disposed of property within 10 years preceding the bankruptcy filing; (2) the property that the debtor disposed of was nonexempt; (3) some of the proceeds from the sale of the nonexempt property were used to buy a new homestead, improve an existing homestead, or reduce the debt associated with an existing homestead, or, alternatively, to buy a new principal residence used by dependents of the debtor, improve an existing principal residence used by dependents of the debtor, or reduce the debt associated with a principal residence used by dependents of the debtor; and (4) the debtor disposed of the nonexempt property with the intent to hinder, delay, or defraud a creditor.<sup>8</sup>

In *Sissom*, the court found the first three elements easily met--shortly before bankruptcy, the debtor sold non-exempt stock and used some of the proceeds to buy a new house. In determining whether the debtor had the intent to hinder, delay or defraud a creditor, the court considered the traditional indicia of fraud, namely whether:

- the transfer or obligation was to an insider;

- the debtor retained possession or control of the property after the transfer;
- the transfer or obligation was concealed;
- before the transfer was made or obligation incurred, the debtor had been sued or threatened with suit;
- the transfer was of substantially all of the debtor's assets;
- the debtor absconded—*i.e.*, avoided service of process and/or concealed himself;
- the debtor removed or concealed assets;
- the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
- the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- the transfer occurred shortly before or shortly after a substantial debt was incurred;
- the transfer was done just prior to the filing of the debtor's bankruptcy petition;
- the debtor is unable to explain the disappearance of assets; and
- the debtor has engaged in a pattern of "sharp dealing" prior to bankruptcy.<sup>9</sup>

5. *Id.* at 376.

6. 11 U.S.C. § 522(o).

7. *In re Sissom*, 366 B.R. 677, 678 (Bankr. S.D. Tex. 2007) (footnote omitted).

8. *Id.* at 688.

9. *Id.* at 692-93 (citing Tex. Bus. & Com. Code Ann. § 24.005(b); see also *In re Maronde*, 332 B.R. 593 (Bankr. D. Minn. 2005); *In re Agnew*, 355 B.R. 276, 283 (Bankr.D.Kan.2006); and *In re Lacounte*, 342 B.R. 809, 813 (Bankr.D.Mont.2005).

In *Sissom*, eleven of these thirteen badges of fraud were present, and the debtor's homestead exemption was denied.

Similarly, the Eighth Circuit U.S. Court of Appeals Bankruptcy Appellate Panel (BAP) affirmed a bankruptcy court's decision to sustain the trustee's objection to a debtor's homestead exemption because the debtor paid down his mortgage with non-exempt cash in an effort to thwart creditors.<sup>10</sup> In *Addison*, the debtor's business started failing and the bank began efforts to collect the debtor's personal guarantee of \$1.3 million. The bankruptcy court found that the payment on the residential mortgage was used to reduce the principal balance, not to protect the home from foreclosure by making payments then due, and that the steps the debtor took to convert nonexempt assets to exempt assets were taken with the intent to hinder, delay, and defraud his creditors.

### III. Credit Counseling

#### A. The Requirements

Under the 2005 amendments to the Bankruptcy Code, a person seeking bankruptcy relief must have completed a credit counseling course within the 180 days before filing a petition. Failure to file a credit counseling certificate results in dismissal in most cases.<sup>11</sup>

However, debtors may obtain temporary relief from the counseling requirement under section 109(h)(3), which requires an individual to file a certification with the court establishing that: (1) exigent circumstances merit a waiver of the requirement; (2) the debtor

requested counseling pre-petition, but was unable to receive counseling within five days of the request; and (3) the court is satisfied with the certification.<sup>12</sup>

The majority of courts are dismissing cases for failure to abide by these new requirements, however loathe they may be to do so.<sup>13</sup> The dismissal of bankruptcy cases for failing to follow the counseling requirements has a significant effect on the automatic stay in future bankruptcy cases, as discussed further below.

A few courts have refused to dismiss for failure to abide by the strict requirements of sections 109(h) and 521(b). In *In re Bricksin*,<sup>14</sup> the debtors obtained credit counseling more than 180 days prior to filing bankruptcy. They attempted to repay creditors through a plan developed by the credit counselor but eventually filed bankruptcy. The U.S. Trustee moved to dismiss because the credit counseling occurred more than 180 days prior to the date of filing. The court denied the motion to dismiss on multiple grounds:

(1) the debtors' performance represented their very best effort to comply with the Credit Counseling Requirements and was substantially in compliance with the spirit of the

intent of the Credit Counseling Requirements; (2) the debtors had received extensive pre-petition credit counseling and made substantial payments to creditors from the repayment plan; (3) the debtors' need for a bankruptcy filing was not and could not have been obviated by additional credit counseling, and the debtors were keenly aware of the implications of the bankruptcy filing; (4) by participating in credit counseling again after filing their petition, the debtors had now paid twice for credit counseling; and (5) it was inequitable to require the debtors to start over, pay a second \$299.00 filing fee, and be subject to potential limitations of the automatic stay.<sup>15</sup>

Most courts, however, find that they have no discretion when considering the section 109(h) eligibility requirements, e.g.: "The language of [section] 109(h) makes clear that absolute compliance is required to be an individual debtor under the Bankruptcy Code."<sup>16</sup> As noted below, some courts are concluding that even exigent circumstances do not save the case.

#### B. Exigent Circumstances

Debtors may obtain temporary relief from the counseling requirement under section 109(h)(3) which requires, among other things, a showing of exigent circumstances.<sup>17</sup> In *Davenport*, the debtor established exigent circumstances by showing that the secured creditor was actively seeking repossession of the debtor's sole means of transportation.<sup>18</sup> The creditor

10. *In re Addison*, 368 B.R. 791 (8th Cir. BAP 2007). *See also In re Keck*, 363 B.R. 193, 209 (Bankr. D. Kan. 2007) ("This is not a case where a debtor simply converted non-exempt property he already owned to exempt property in anticipation of filing for bankruptcy, as part of legitimate bankruptcy estate planning clearly allowed in this Circuit. Instead, this Debtor purposely incurred substantial debt on his unsecured credit cards in order to obtain the non-exempt property, which he then converted to his homestead—in other words, this Debtor borrowed unsecured cash to "create" equity, not to preserve assets he already owned. The Court finds that the Trustee has met her burden of showing that Debtor's homestead exemption should be reduced, pursuant to § 522(o).").

11. *See* 11 U.S.C. § 109(h).

12. *Id. See also In re Davenport*, 335 B.R. 218 (Bankr. M.D. Fla. 2005).

13. *See In re Sosa*, 336 B.R. 113 (Bankr. W.D. Tex. 2005) (following the statute and dismissing the case regardless of consequences); *In re Fuller*, No. 05-90048, 2005 WL 3454699 (Bankr. W.D. Pa. Dec. 16, 2005) (dismissing the case despite certification that the debtor had completed a financial management course prior to filing bankruptcy, because the statute requires credit counseling prior to filing bankruptcy and a financial management course after filing bankruptcy to receive a discharge); *In re Miller*, 336 B.R. 232 (Bankr. W.D. Pa. 2006) (finding that the debtor received the credit counseling required by § 109 but that a certificate had not been obtained; the court allowed the debtor time to obtain the actual certificate or compel the credit counseling agency to produce it—emergency nature of filing and proper reasons and requests justified the additional time to comply). *But see In re Hess*, 347 B.R. 489, 497 (Bankr. D. Vt. 2006) (concluding that the court "has authority to exercise discretion when determining whether to dismiss a case based upon a debtor's failure to meet the eligibility requirement of § 109(h) in cases where to decline to exercise discretion would result in manifest injustice, first, because judicial discretion is permitted under both other subsections of the eligibility statute and the statute that effectuates dismissal of chapter 7 cases and, second, because Congress has not specifically circumscribed judicial discretion in connection with the credit counseling requirements (as it has in other provisions of BAPCPA)."); *In re Henderson*, 364 B.R. 906 (Bankr. N.D. Tex. 2007) (allowing post-petition credit counseling under "narrow and unique facts" to prevent injustice).

14. 346 B.R. 497 (Bankr. N.D. Cal. 2006).

15. *In re Manalad*, 360 B.R. 288, 302 (Bankr. C.D. Cal. 2007) (footnotes omitted) (reviewing case law regarding § 109(h) and noting different conclusions between different courts). *But see In re Jones*, 352 B.R. 813, 816 (Bankr. S.D. Tex. 2006) (finding that "Congress allowed bankruptcy judges no discretion" in finding debtors ineligible for bankruptcy protection for failure to strictly follow § 109(h)).

16. *In re Giles*, 361 B.R. 212, 214 (Bankr. D. Utah 2007).

17. 11 U.S.C. § 109(h); *Davenport*, 335 B.R. 218. *See also supra* note 13.

18. *Davenport*, 335 B.R. at 218; *see also In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005) (finding that an immediate

had repossessed the debtor's other car the day before the bankruptcy filing. In addition, the debtor obtained the counseling two days after filing the bankruptcy.

However, because the debtor had not requested the counseling before filing bankruptcy, the court was compelled to dismiss the bankruptcy for failure to satisfy all elements of the statute. In addition, the court found it could not waive the request requirement in the name of equity.

One court concluded that the standard for "exigent circumstances" is not very high, particularly when the debtor is representing himself or herself.<sup>19</sup> According to *Henderson*, the debtor, at a minimum, should be able to show that he or she was "confronted with an urgent situation that rendered him or her unable to comply with the budget and credit counseling requirement before commencing his or her bankruptcy case."<sup>20</sup> The *Henderson* court held that the need to obtain legal advice prior to filing bankruptcy is not an urgent situation which can be characterized as an "exigent circumstance." However, because the assistance of legal counsel may enable the debtor to show that exigent circumstances did indeed exist, the court in *Henderson* gave the debtor ten days to seek legal advice and file an amended request for an extension to obtain budget and credit counseling.<sup>21</sup>

Foreclosure is normally not an exigent circumstance. Debtors have attempted to argue that an impending foreclosure of their house should be an "exigent circumstance" warranting a waiver of the pre-petition briefing requirement. Many courts have rejected this theory, noting that foreclosure is not an exigent circumstance because foreclosure typically requires a twenty day notice, and in the face of that much notice, a debtor should

not be able to wait until the last minute and then claim an exigent circumstance.<sup>22</sup>

In *In re Cleaver*,<sup>23</sup> however, the court determined that an impending foreclosure was an exigent circumstance. In *Cleaver*, the court found that even though the debtors received ample notice of foreclosure, "the common reality is that many debtors file at the last minute just before a foreclosure sale...."<sup>24</sup> In determining that the impending foreclosure was an exigent circumstance, the *Cleaver* court reasoned that any exigent circumstances related to a bankruptcy proceeding most likely involves "impending creditor action" because without such impending action, "there is no urgency affecting the timing of a bankruptcy filing."<sup>25</sup> This view greatly expands the concept of exigency.

The court in *In re Childs*<sup>26</sup> also found that an impending foreclosure and eviction was an exigent circumstance. The *Childs* court refused to "delve into the reasons why the exigent circumstances occurred," thereby implicitly rejecting the conclusion of some courts that imminent foreclosure is not an exigent circumstance because the debtor essentially created the circumstance by waiting until the last minute to take action.<sup>27</sup>

The showing of exigent circumstances alone does not provide temporary relief from the credit counseling requirement. Although the debtor in *Cleaver* persuaded the court that exigent circumstances were present, the court still dismissed the case because the debtor failed to submit a certification to the

court detailing that a request for credit counseling had been made and that the debtor was unable to receive counseling within five days of the request.<sup>28</sup>

The exigent circumstances required for exemption of pre-petition credit counseling need not be suffered by the debtor.<sup>29</sup> In *In re Hess*,<sup>30</sup> the court found that a medical emergency suffered by the debtor's attorney qualified as an exigent circumstance. The attorney in *Hess* suffered a life-threatening illness that caused her to be out of the office for several months. Because of this, the court also refused to dismiss the case despite the debtor's failure to submit certification to the court that the debtor in fact requested credit counseling prior to filing bankruptcy.

Other circumstances which courts have determined may warrant an exemption from credit counseling are: (1) under some circumstances, lack of sufficient resources to pay for credit counseling;<sup>31</sup> and (2) the inability of a debtor, who only spoke Creole, to find credit counseling conducted in Creole, coupled with the lack of resources to afford an interpreter.<sup>32</sup>

Finally, a permanent exemption from the credit counseling requirement may be warranted if the debtor is unable to

18. (Continued from previous page)

foreclosure of a family home or repossession of a car constituted "exigent circumstances").

19. *In re Henderson*, 339 B.R. 34, 39 (Bankr. E.D.N.Y. 2006).

20. *Id.*

21. *Id.* at 40.

22. See *In re Dixon*, 333 B.R. 383, 388 (8th Cir. B.A.P. 2006); see also *In re Wallert*, 332 B.R. 884, 889 (Bankr. D. Minn. 2005) (finding impending foreclosure "in isolation is exigent," but dismissing the case for failure to explain the inability to obtain pre-petition counseling); *In re Rodriguez*, 336 B.R. 462, 474-75 (Bankr. D. Idaho 2005); *In re DiPinto*, 336 B.R. 693, 696-97 (Bankr. E.D. Pa. 2006).

23. See *In re Cleaver*, 333 B.R. 430, 435 (Bankr. S.D. Ohio 2006).

24. *Id.* at 435.

25. *Id.*

26. *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2005).

27. See *Rodriguez*, 336 B.R. 462, 474-75 (noting that "[f]oreclosures do not come without a good deal of advance notice" and therefore "waiting...until the eve of creditor action before addressing the § 109(h) prerequisite for filing bankruptcy makes the exigency rather self-inflicted").

28. See *id.* at 436 ("Pursuant to the newly enacted changes to the Bankruptcy Code, an individual must receive credit briefing prior to filing for bankruptcy protection, or he must submit a certification to the court describing exigent circumstances and detailing the unavailability of the credit briefing during the five days after requesting it.").

29. See *In re Hess*, Nos. 06-10068, 06-10026, 2006 WL 2338040, at \*9 (Bankr. D. Vt. Aug. 14, 2006) ("The statute does not specify that it be the debtor who suffered the exigent circumstances which are the putative condition precedent for an exemption and extension under § 109(h); it requires only that the debtor submit a certification that describes exigent circumstances that merit a waiver of the pre-petition credit counseling requirement.").

30. *Id.*

31. *In re Piontek*, 346 B.R. 126, 130 (Bankr. W.D. Pa. 2006) ("[A] debtor who lacks sufficient resources to pay for credit counseling may, under the right circumstances, have a de facto 'inability' to obtain pre-bankruptcy credit counseling for purposes of 11 U.S.C. § 109(h)(3)(A)(ii). Indeed, such 'inability' to pay for credit counseling may be a 'satisfactory' reason for the Court to grant a temporary waiver of the credit counseling requirements mandated by BAPCPA."). But see *In re Curington*, No. 05-38188, 2005 WL 3752229 at \*5 (Bankr. E.D. Tenn. Dec. 7, 2005) (noting that lack of funds to pay for counseling is not an exigent circumstance).

32. *In re Petit-Louis*, 344 B.R. 696, 700-02 (Bankr. S.D. Fla. 2006).

complete the requirement “because of incapacity, disability, or active duty.”<sup>33</sup>

### C. To Dismiss or to Strike the Case for Failure to Obtain Credit Counseling

An important issue in all of the credit counseling cases is whether the court should dismiss the case or whether the court decides the case should be stricken for failure to meet statutory requirements. Prior to the 2005 amendments, there was little distinction between having a case dismissed rather than stricken. Now, under the 2005 amendments however, “the distinction has meaningful consequences under sections 362(c)(3) and (c)(4).”<sup>34</sup> Having a case dismissed rather than stricken influences whether a debtor is entitled to an automatic stay in a subsequent filing. When a subsequent filing is made and the previous case was dismissed, the new filing counts as a second case, whereas if the previous case had been stricken, the new filing would be characterized as the first case.

This distinction is important because section 362(c)(3) terminates the automatic stay in a *second* case if the debtor had a case pending within the previous year.<sup>35</sup> The results are even more dramatic under section 362(c)(4)—when a debtor who had two or more cases pending within the previous year files a new case, the automatic stay would not apply at all to the new case unless the debtor can prove entitlement to the stay.<sup>36</sup> Therefore, debtors who wish to file again after failing to meet the credit counseling requirements prefer to have their case stricken rather than dismissed.

Most courts dismiss a case for failure to meet the section 109 requirements, but a few courts have stricken the case. For example, in *In re Rios*<sup>37</sup> the court agreed

with the debtor that the case should be stricken. The court concluded that the case should be stricken rather than dismissed because the benefits of the automatic stay under section 362 may not be available to a debtor who chooses to seek bankruptcy relief in the near future if the case is dismissed. In support of this conclusion, the court found that “Congress did not intend the credit-counseling requirement to limit the availability or extent of bankruptcy relief for debtors, which dismissal would accomplish, and thus, dismissal is inappropriate.”<sup>38</sup> The court in *In re Salazar* came to the same conclusion.<sup>39</sup> The *Salazar* court concluded that the “failure to obtain credit counseling is not a basis for dismissal.”<sup>40</sup>

While *Rios* used Congressional intent to argue in favor of striking rather than dismissing a case for failure to meet credit counseling requirements, the court in *In re Seaman*<sup>41</sup> used Congressional intent to argue in favor of dismissal. The *Seaman* court concluded that Congress enacted the 2005 amendments to discourage serial filings as evidenced by section 362’s provisions for multiple filers.<sup>42</sup> By dismissing rather than striking the case, debtors seeking the benefit of the automatic stay will be forced to face the more stringent provisions under section 362 when filing a second petition. According to *Seaman*, if filers are aware that they will be forced to reckon with section 362 in a subsequent filing if their case is dismissed, then filers will be more likely to comply with the Bankruptcy Code’s requirements the first time they file. Therefore, the *Seaman* court chose to dismiss rather than strike the debtor’s case for failure to meet the counseling requirements.<sup>43</sup>

When does the case commence? This is another important issue related to a court’s decision whether to dismiss or strike the case. Knowing when a case commences is important because it determines when the automatic stay goes into effect. Under *Rios*, a case does not commence when the debtor fails to obtain the required credit counseling.<sup>44</sup> Therefore, according to *Rios*, the debtor’s inability to obtain credit counseling determines whether the case, and therefore also the automatic stay, has commenced.

Unlike *Rios*, the court in *In re Tomco*<sup>45</sup> held that non-compliance with the credit counseling requirements does not have any effect on when a case commences. According to *Tomco*, commencement occurs when the petition is filed. Therefore, according to *Tomco*, the automatic stay goes into effect when the petition is filed, regardless of whether the debtor complied with the credit counseling requirement. Another court concluded that section 362(a) tends to support this conclusion because it “states unambiguously that the filing of a petition ‘operates as a stay.’”<sup>46</sup> In addition, whether the debtor is actually eligible to file the petition is not one of the exclusive exceptions to the automatic stay.<sup>47</sup>

However, as stated by another court:

Many of the courts that disagreed with the holding in the *Rios* decision, some quite eloquently, have cited to *In re Flores*, 291 B.R. 44 (Bankr.S.D.N.Y.2003) in support of the argument that the automatic stay should take effect upon the filing of a petition by an ineligible debtor.

\* \* \*

Section 362(b)(21) was obviously enacted to avoid the very result that

33. 11 U.S.C. § 109(h)(4).

34. *Salazar*, 339 B.R. at 633.

35. 11 U.S.C. § 362(c)(3).

36. *Id.* § 362(c)(4).

37. *In re Rios*, 336 B.R. 177, 180 (Bankr. S.D.N.Y. 2005).

38. *Rios*, 336 B.R. at 180.

39. *Salazar*, 339 B.R. 622, 633.

40. *Id.* at 630.

41. *In re Seaman*, 340 B.R. 698, 704 (Bankr. E.D.N.Y. 2006).

42. *Id.* (“[T]he legislative history of the credit counseling requirement established by BAPCPA suggests that Congress sought to discourage abuse of the bankruptcy system, and in particular, to address the situation of serial filings made to invoke the protections of the automatic stay....”).

43. *Id.* at 709.

44. *Rios*, 336 B.R. at 179.

45. *In re Tomco*, 339 B.R. 145, 159 (Bankr. W.D. Pa. 2006).

46. *In re Flores*, 291 B.R. 44, 55 (Bankr. S.D.N.Y. 2003); 11 U.S.C. § 362(a) (“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....”).

47. *Flores*, 291 B.R. at 55.

*Flores* created—the institution of the automatic stay upon the filing of a petition by an individual ineligible to be a debtor in an effort to forestall a secured creditor. If this Court were to adopt the reasoning espoused by the majority of courts that decide that dismissal for cause is appropriate in these cases, the same result achieved by the *Flores* decision could occur in cases filed without compliance with Section 109(h)—ineligible individual debtors could file bankruptcy petitions, perhaps with no intention of reorganizing, thereby invoking the protection of the automatic stay, [and] potentially delay matters for several months before a determination of eligibility is made, while secured creditors are forestalled from proceeding at a potentially great expense.

\* \* \*

The Court will not discount obvious Congressional intent in enacting Section 109(h)—that incurably ineligible debtors not be permitted to enjoy the protections of the automatic stay. The fact that Congress failed to include Section 109(h) within Section 362(b)(21) bolsters this Court’s opinion that Section 109(h) ineligibility is an incurable defect, given the legislative history behind Section 362(b)(21) which indicates that ineligibility pursuant to Section 109(g) may be cured. Congress obviously intended Section 109(h) ineligibility to have a preclusive effect; there was no need to provide an exception to the 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.<sup>48</sup>

Thus, some courts therefore find that the automatic stay goes into effect when the petition is filed, even if the debtor is ineligible, and other courts find that the automatic stay goes into effect only if it is clear that the filer has met all the requirements to be a debtor, including the credit counseling requirement.

Unfortunately, this variation among the courts may create uncertainty among creditors and consumers. Questions may arise concerning “the validity of an action against property taken by a creditor of a petitioner who appears ineligible to be a debtor but later is determined to be eligible.”<sup>49</sup> If the debtor is indeed ineligible because of the failure to complete credit counseling, then an action by a creditor against the debtor’s property after the filing would be considered a violation of the stay in some jurisdictions and not a violation in others. This is because, in jurisdictions that strike the case, the case and the automatic stay are deemed never to have commenced if the filer is later determined to be ineligible as a debtor (as when the filer fails to meet the credit counseling requirement).

Additionally, striking petitions for failure to meet the credit counseling requirement may create additional uncertainties, such as “whether filing fees should be returned to ineligible petitioners and whether Chapter 7 trustees may be compensated for work on cases that prove to be a nullity....”<sup>50</sup>

In summary, whether courts choose to strike or whether they choose to dismiss a case for failure to obtain credit counseling may affect when or whether the automatic stay goes into effect. For creditors, the uncertainty regarding the automatic stay in these situations can be problematic.

#### IV. The Automatic Stay

##### A. Automatic Termination

The automatic stay is not so automatic in certain cases under the 2005 amend-

ments to the Bankruptcy Code. For repeat bankruptcy filers, it is intended to be the *termination* of the stay that is automatic. This opens the door for secured creditors to repossess their collateral without the costs and delay of seeking relief from the stay when the stay automatically terminates under the new Bankruptcy Code. If a debtor files a bankruptcy case pending within the past year, the automatic stay terminates on the thirtieth day following the second bankruptcy filing unless the debtor successfully moves to extend the stay.<sup>51</sup> A debtor can extend the stay if: “(1) a motion is filed; (2) there is notice and a hearing; (3) the notice and hearing are completed before the expiration of the original 30 day stay; and (4) the debtor proves that the filing of the new case ‘is in good faith as to the creditors to be stayed.’”<sup>52</sup>

As to the fourth factor, a presumption of not filing in good faith arises if: (1) more than one previous case was on file within the preceding year; (2) a case within the previous year was dismissed for failure to amend as required by the court or statute, provide adequate protection as ordered by the court, or perform a confirmed plan; or (3) there has been no substantial change in the financial or personal situation of the debtor.<sup>53</sup>

If the presumption of not filing in good faith arises, the debtor may rebut it by clear and convincing evidence.<sup>54</sup> Factors determinative of good faith under section 362(c)(3)(C) have been discussed in a few cases and include:

- whether the extension is sought as to all creditors or a single creditor;
- the timing of the two cases;

<sup>48</sup>. *In re Elmendorf*, 345 B.R. 486, 500-02 (Bankr. S.D.N.Y. 2006).

<sup>49</sup>. *Seaman*, 340 B.R. 698, 707.

<sup>50</sup>. *Id.*

<sup>51</sup>. 11 U.S.C. § 362(e)(3)(A).

<sup>52</sup>. *In re Collins*, 335 B.R. 646, 650 (Bankr. S.D. Tex. 2005); 11 U.S.C. § 362(e)(3)(B).

<sup>53</sup>. 11 U.S.C. § 362(e)(3)(C).

<sup>54</sup>. *Id.*

- the reasons giving rise to a presumption that the petition was not filed in good faith;
- a change in the debtor's financial or personal affairs;
- the position taken by creditors opposing the extension;
- the likelihood that a new case will result in discharge;
- the nature of the debt held by the opposing creditor;
- the nature of the collateral held by the opposing creditor;
- any eve-of-bankruptcy purchases;
- the debtor's conduct in the new case;
- the debtor's reasons for seeking extension of the stay; and
- any unique facts or circumstances in the case.<sup>55</sup>

“[A] finding that the new case is unlikely to result in a discharge means that the case fails an objective good faith standard and ends the inquiry.”<sup>56</sup> If the opposing creditor does not agree to the extension and there is a likelihood of discharge, the totality of the circumstances is considered for determining subjective good faith.<sup>57</sup>

55. See *Collins*, 335 B.R. at 652; *In re Wilson*, 336 B.R. 338 (Bankr. E.D. Tenn. 2005).

56. *Collins*, 335 B.R. at 652. See also *In re Charles (Charles II)*, 334 B.R. 207 (Bankr. S.D. Tex. 2005).

57. See *In re Havner*, 336 B.R. 98 (Bankr. M.D.N.C. 2006) (discussing good faith factors); compare *In re Johnson*, 335 B.R. 805 (Bankr. W.D. Tenn. 2006) (finding that an order extending the stay would be superfluous because the plain language of § 362(c)(3)(A) applies only to the debtor or property of the debtor; thus, property of the estate is still protected by the automatic stay). See also *infra* Part IV.D.

### B. Substantial Change in Financial or Personal Condition

In *In re Warneck*,<sup>58</sup> the debtors had a case pending within a year prior to the case at hand. The court determined that the subsequent filing was in good faith because the debtors had not triggered the presumption of bad faith under section 362(c)(3)(C). In particular, the court found that the debtors' circumstances had substantially changed because their children could now afford to contribute to the monthly plan payments.<sup>59</sup> Thus, the court extended the automatic stay indefinitely as to all creditors.

### C. No Substantial Change and No Good Faith

In *Collins*,<sup>60</sup> the court found that the case was presumptively filed in bad faith because no significant change had occurred in the debtor's financial affairs. In *Collins*, two creditors objected to the debtor's motion to extend the stay--banks secured by the debtor's home and a vehicle with 85,000 miles on it. The debtor filed schedules, in his second bankruptcy within a year, that reflected a decrease of \$479.11 in income and a \$91 increase in expenses. The court determined that the debtor did not establish a substantial change in his personal or financial affairs by a preponderance of the evidence. The debtor had a burden to prove by clear and convincing evidence that the case was filed in good faith, and failed to meet this burden.

The *Collins* court also found that the debtor's testimony did not fully comport with his schedules and that, based on the schedules and evidence, the debtor could not propose a feasible plan. Thus, the debtor failed to show objective good faith. The court noted that the debtor worked two jobs, supported three children without child support,

58. *In re Warneck*, 336 B.R. 181 (Bankr. S.D.N.Y. 2006).

59. *Id.* at 186.

60. *Collins*, 335 B.R. 646. See *supra* this text at note 52.

and did not make luxury purchases or live an extravagant lifestyle. Nonetheless, the debtor did “not overcome the presumption that his case was not filed in good faith...,” and the court found that the debtor failed to “establish that this case was filed in good faith as to the creditors to be stayed pursuant to the statutory requirements.”<sup>61</sup> The stay terminated on the thirtieth day after the filing.

In *In re Charles (Charles II)*,<sup>62</sup> the court outlined the analysis a court would undertake when determining whether a bankruptcy petition was filed in good faith for purposes of extending the thirty day automatic stay. If the creditors agree that the new case was filed in good faith, then the court will not engage in any further inquiry and will extend the stay.<sup>63</sup> If the creditors do not agree that the debtor filed the new case in good faith, then the court will conduct an analysis to determine whether there was good faith.<sup>64</sup> Finally, even if the court's analysis reveals that there was indeed “good faith,” an extension of the stay is not guaranteed because the court still has discretion in deciding whether to grant relief.<sup>65</sup> “A movant must additionally demonstrate sufficient equitable factors to justify the court's exercise of its discretion.”<sup>66</sup>

The court in *Charles II* found that “good faith” is determined on an objective and subjective basis. Objective good faith depends on whether the case is likely to result in a discharge. Subjective good faith depends on a “totality of the circumstances” test in which the court analyzes several factors involving the “debtor's motives and...relationship with [the] creditors.”<sup>67</sup> Some of the items considered by the courts when applying

61. *Id.* at 654.

62. *Charles II*, 334 B.R. 207. See *supra* note 56.

63. *Charles II*, 334 B.R. at 219.

64. *Id.* at 220 (“[W]hen a creditor has not stipulated that the case was filed in good faith as to that creditor, the Court must independently consider good faith as to that creditor”).

65. *Id.* at 223-24; see also *In re Charles (Charles I)*, 332 B.R. 538, 542-43 (Bankr. S.D. Tex. 2005).

66. *Charles I*, 332 B.R. at 542-43.

67. *Charles II*, 334 B.R. at 218.

the “totality of the circumstances” test for subjective good faith are: “(1) the nature of the debts; (2) the nature of any collateral; (3) eve of bankruptcy purchases; (4) the debtor’s conduct in the present case; (5) reasons why the debtor wishes to extend the stay; and (6) any other circumstances that weigh on the wisdom of an extension.”<sup>68</sup>

In *Charles II*, the court determined that the objective test for good faith was satisfied because the bankruptcy case was likely to result in a discharge. In reaching this conclusion, the court focused on the fact that the proposed plan appeared to satisfy all of the confirmation requirements and the debtor was likely to perform under the plan.

Under the subjective test, the court also found that good faith was present. The subjective test involved analyzing the factors under the “totality of the circumstances” test. The following factors weighed in favor of a good faith finding: (1) the nature of the debt--the debt arose out of the purchase of necessities of life; (2) the nature of the collateral--the creditor was secured by a necessity such as the debtor’s homestead or sole source of transportation; (3) eve of bankruptcy purchases--there was no evidence of recent purchases by the debtor; (4) the debtor’s conduct--the debtor’s conduct indicated a “bona fide effort to obtain a discharge” because the debtor “promptly filed her plan, sought to make her payments with an automated clearinghouse deduction from her bank account, and timely filed her schedules and statements”; and (5) unique circumstances--the debtor’s first case was dismissed in order to allow for negotiations with her home mortgage lender.<sup>69</sup> The following factor militated against a finding of good faith: the reason for wanting to extend the stay--“the essential purpose of the new case cannot have been to impose an automatic stay in order to delay a foreclosure, a lawsuit, or other collection activity.”<sup>70</sup> Based on

these factors, the court found that, under the totality of the circumstances test, the new case was filed in good faith.

Despite this finding of good faith, however, the court emphasized that the inquiry does not end there, because the court has discretion to also consider additional equitable factors. In *Charles II*, the court found that equitable considerations favored an extension of the stay because no creditor opposed the extension of the stay and because the evidence indicated that all creditors would be paid not less than they would be paid in a Chapter 7 liquidation. Therefore, because the new case was filed in good faith, and equitable factors favored extending the stay, the court determined that the automatic stay should be extended.

**D. But Does the Stay Terminate as to Property of the Estate?**

Under the BAPCPA amendments at section 362(c)(3)(A), when a debtor had a bankruptcy case pending within the preceding year, and the debtor files for bankruptcy again, the automatic stay will terminate “with respect to the debtor” on the thirtieth day after the new filing.<sup>71</sup> This is regarded as problematic by some courts because, under section 541, the debtor’s pre-petition property becomes property of the estate (and is no longer property of the debtor) as of the petition date. Although the intent seems clear, some courts have indicated their disappointment with the drafting of section 362(c)(3), finding the section to be “virtually incoherent.”<sup>72</sup> Because of the “poorly written” language in section 362(c)(3)(A), these courts are not in agreement on the

extent of the termination of the stay.<sup>73</sup> Pursuant to section 362(c)(3)(A), the automatic stay plainly terminates “with respect to the debtor.”<sup>74</sup> But some courts are in disagreement over whether the language “with respect to the debtor” includes property of the debtor’s estate.

A number of courts have held that under section 362(c)(3)(A) the stay does not terminate with respect to property of the debtor’s estate, even though that was obviously the intent of Congress (inasmuch as no other interpretation makes any sense).<sup>75</sup> The court in *In re Jones*,<sup>76</sup> “warily, and with pruning shears in hand, [entered] the briar patch that is section 362(c)(3)(A)” in order to determine the extent of the stay. The *Jones* court found that “the words ‘with respect to the debtor’ encompass actions taken against the debtor, against property of the debtor, but do not include actions taken against property of the estate.”<sup>77</sup> The court’s conclusion was largely based on the fact that other sections of the Bankruptcy Code distinguish between “property of the estate” and “property of the debtor.”<sup>78</sup>

Because section 362(c)(3)(A) refers only to the debtor, and not to property of the estate, the *Jones* court reasoned that the termination of the stay under section 362(c)(3)(A) does not apply to property

68. *Id.* at 219.

69. *Id.* at 221-24.

70. *Id.* at 222.

71. 11 U.S.C. § 362(c)(3)(A). The court may extend the stay after holding a hearing on a motion by any party in interest. 11 U.S.C. § 362(c)(3)(B) (emphasis added).

72. *Charles I*, 332 B.R. 538, 541; see also *In re Jupiter*, 344 B.R. 754, 761 (Bankr. D.S.C. 2006) (“Evident in this process of analyzing the language of § 362(c)(3)(A) is that this new subsection is imperfectly drafted, may be subject to multiple interpretations, and therefore considered ambiguous, and... inconsistent with other provisions of § 362.”); *In re Paschal*, 337 B.R. 274, 276-78 (Bankr. E.D.N.C. 2006); *In re Baldassaro*, 338 B.R. 178, 182 (Bankr. D.N.H. 2006). See also *Johnson*, 335 B.R. 805 (noted *supra* at note 57). Other courts have indicated that the matter does not seem that difficult. See, e.g., *infra* note 75 and accompanying text; *infra* notes 81-84.

73. See, e.g., *Baldassaro*, 338 B.R. at 182 (stating that “the language in new § 362(c)(3) is very poorly written”). “The Court finds it difficult to believe that lawyers retained by either the private interests that lobbied for the passage of BAPCPA or any staff attorneys for the various Congressional committees with oversight over BAPCPA could actually produce such a bad work product.” *Id.* at 182 n.4.

74. 11 U.S.C. § 362(c)(3)(A).

75. See *In re Brandon*, 349 B.R. 130, at 130 (Bankr. M.D.N.C. 2006); see also *In re Gillerese*, 346 B.R. 373, 373 (Bankr. W.D. Pa. 2006); *Baldassaro*, 338 B.R. 178, 182; *In re Moon*, 339 B.R. 668, 672 (Bankr. N.D. Oh. 2006); *In re Jones*, 339 B.R. 360, 364 (Bankr. E.D.N.C. 2006); *Johnson*, 335 B.R. 805, 807. Nonetheless, the intent of Congress cannot be doubted: as of the filing of the bankruptcy petition, the debtor has no property other than the bankruptcy estate. See 11 U.S.C. § 541. Thus, distinctions between property of the debtor and property of the estate, relevant in other contexts, do not apply here.

76. *Jones*, 339 B.R. 360, 364.

77. *Id.*

78. *Id.* at 363-64 (noting that “[w]here Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”) (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)). But see *supra* note 75.

of the estate.<sup>79</sup> Finally, as a policy matter, the court asserted that protecting property of the estate by way of the automatic stay is of great benefit to creditors.<sup>80</sup> According to the *Jones* court, this is especially true in Chapter 7 and Chapter 13 cases because a trustee is present and is charged with the duty to administer the assets of the bankruptcy estate.

Despite the reasoning of cases like *Jones*, other courts hold that under section 362(c)(3)(A) the stay terminates with respect to property of the estate.<sup>81</sup> *In re Jumpp*, for example, held that the automatic stay also terminated with respect to property of the estate.<sup>82</sup> The court's conclusion interprets the language of the statute by reference to the context and is based largely on Congress' apparent intent and purpose in enacting the changes to the Bankruptcy Code. The *Jumpp* court focused on Congress' intent in limiting the "so-called 'repeat filer.'"<sup>83</sup> A repeat filer is limited by the 2005 amendments in the sense that the repeat filer must bear the burden of showing why the stay should be extended. According to *Jumpp*, if the goal of Congress was to limit the repeat filer, then "read[ing] section 362(c)(3)(A) as only terminating the automatic stay as to property of the debtor frustrates this goal."<sup>84</sup>

The different interpretations of section 362(c)(3) may foreshadow continuing disagreements among bankruptcy courts—some courts may choose to look at the language of the 2005 amendments in isolation, even when the result makes no sense, and other courts will choose

to interpret the 2005 amendments in a context that is consistent with Congress' obvious intent, even if doing so runs counter to an alternative reading.

### E. Notice Requirement

For a debtor to continue the stay in effect, past the first thirty days after commencement of a bankruptcy case, when a bankruptcy case was pending within the previous year, section 362(c)(3)(B) requires "notice and a hearing" within the thirty days.<sup>85</sup>

In *Taylor* and *Collins*, two separate courts determined that mailing the motion for the extension eight days before the hearing did not provide creditors with "a meaningful opportunity to advocate denying the relief to these debtors."<sup>86</sup> The *Taylor* court suggested following local rules which required motions to be filed and delivered at least ten days or mailed at least fourteen days before a hearing.<sup>87</sup>

### F. Multiple Re-filers

If a debtor has had more than one bankruptcy case pending within the year prior to filing, the automatic stay does not go into effect at all.<sup>88</sup> Section 362(c)(4)(B) allows the court to impose the automatic stay if requested within thirty days. There is no requirement under section 362(c)(4)(B) that the hearing occur or that an order imposing the stay be entered within the thirty days.<sup>89</sup> For example, the issue in *Toro-Arcila* was:

whether the hearing contemplated by § 362(c)(4)(B) can only oc-

cur for a multiple repeat filer or whether the hearing can also occur for a first-time repeat filer. If the § 362(c)(4)(B) hearing applies only to § 362(c)(4)(A) cases—*i.e.* multiple repeat filers—then the bulk of § 362(c)(4)(D) would be rendered meaningless. Conversely, if § 362(c)(4)(B) also applies in a single-repeat filer case, then the reference to "the later case" cannot refer only to a later case of the type described in § 362(c)(4)(A), which is the apparent reference at first blush.<sup>90</sup>

In *Toro-Arcila*, the debtor had only one case pending within the previous year. The debtor requested an extension of the automatic stay by filing a motion on the thirtieth day after his case was filed. Thus, the court was unable to conduct a properly noticed hearing under section 362(c)(3)(B), which applies to first time re-filers, within the thirty days after the case was filed.

The debtor also requested relief under section 362(c)(4)(B), which allows multiple re-filers to impose the stay and does not require that the hearing take place within the first thirty days after the filing.

Although the debtor in *Toro-Arcila* had only one case pending within the year prior to filing bankruptcy again, the court concluded that the debtor could obtain a hearing under the multiple re-filer provision and that, pending such consideration, the stay was not in effect.<sup>91</sup> Presumably, the same factors considered in determining whether to extend the stay under section 362(c)(3)(B) (for a first time repeat filer) would apply to determining whether to impose the stay under section 362(c)(4)(B) (for a multiple repeat filer). The *Toro-Arcila* court directed the debtor to its opinion in *In re Charles*,<sup>92</sup> which sets forth requirements to extend the stay.<sup>93</sup>

79. *Id.*

80. No doubt many secured creditors would be surprised by this assertion. *See, e.g.*, Michael W. Dunnagan, *The impact of Chapter 13 Bankruptcies on Car Creditors*, 59 Consumer Fin. L.Q. Rep. 172 (2005).

81. *See In re Jumpp*, 344 B.R. 21 (Bankr. D. Mass. 2006); *see also Jupiter*, 344 B.R. 754.

82. *See Jumpp*, 344 B.R. at 26 ("With due respect to those courts finding that the language of § 362(c)(3)(A) only terminates the automatic stay as to property of the debtor, this Court finds that the language of the section, even when read in isolation, is less than clear.")

83. *Id.*

84. *Id.* at 27. *See also supra* this text at note 72, and *supra* note 75.

85. 11 U.S.C. § 362(c)(3)(B).

86. *In re Taylor*, 334 B.R. 660, 663 (Bankr. D. Minn. 2005); *Collins*, 335 B.R. 646.

87. *Taylor*, 334 B.R. at 663. *See also In re Collins*, 334 B.R. 655, 657 (Bankr. D. Minn. 2005) (failure to serve individual creditors resulted in denial of motion seeking extension of stay without reaching the merits, for failure to give notice under § 362(c)(3)(B)).

88. 11 U.S.C. § 362(c)(4)(A).

89. 11 U.S.C. § 362(c)(4)(B); *In re Toro-Arcila*, 334 B.R. 224, 226 (Bankr. S.D. Tex. 2005). Section 362(c)(3)(B) requires that the request and hearing occur within 30 days of filing. Section 362(c)(4)(B) requires only that the request made within 30 days of filing.

90. *Toro-Arcila*, 334 B.R. at 226.

91. *Id.* at 229.

92. *Charles I.*, 332 B.R. 538, 541.

93. *Toro-Arcila*, 334 B.R. at 229.

**V. Secured Creditor /Debtor Communications**

The 2005 amendments partially codified cases<sup>94</sup> allowing post-discharge communication between secured creditors and discharged debtors regarding mortgages on the debtor’s principal residence, as long as: (1) the creditor retains a security interest in real property that is the principal residence of the debtor; (2) the creditor’s act or communication is in the ordinary course of business between the creditor and the debtor; and (3) the act or communication is limited to seeking or obtaining periodic payments associated with satisfaction of a valid security interest in lieu of pursuit of *in rem* relief to enforce the lien. If these requirements are met, the creditor’s communication with the debtor does not violate the discharge injunction.<sup>95</sup> However, this safe harbor does not appear to have been well-tested, as evidenced by the lack of reported decisions interpreting section 524(j).

**VI. Cross-Border Insolvency Cases**

The BAPCPA inserted a new Chapter 15 into the Bankruptcy Code, 11 U.S.C. sections 1501 *et seq.*, “intended to encourage cooperation between the United States and foreign countries with respect to transnational insolvency cases” and “to provide for the fair and efficient administration of cross-border insolvencies....”<sup>96</sup> In effect, this allows a proceeding in U.S. bankruptcy court in conjunction with a foreign insolvency case. For individuals finding themselves subject to a Chapter 15 proceeding filed to create a bankruptcy estate in the United States, the initial analysis involves whether the foreign proceeding for which recognition is sought is a “foreign main” or “foreign nonmain” proceeding.

Chapter 15 incorporates the Model Law on Cross-Border Insolvency, to provide an effective mechanism for handling cross-border insolvency cases.<sup>97</sup> A foreign representative may commence a case under Chapter 15 by filing a petition for recognition of a foreign proceeding under section 1515.<sup>98</sup> The court is directed to enter an order recognizing the foreign proceeding if three Chapter 15 requirements are met.<sup>99</sup> One of the requirements is that the “foreign proceeding for which recognition is sought [must be] a foreign main proceeding or foreign non-main proceeding within the meaning of [section] 1502....”<sup>100</sup> Section 1502 states:

“foreign main proceeding” means a foreign proceeding pending in the country where the debtor has the center of its main interests....

“foreign nonmain proceeding” means a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment.<sup>101</sup>

“If the foreign proceeding is not pending in a country where the debtor has its center of main interests (COMI) or where it has an establishment, then the foreign proceeding is simply not eligible for recognition under Chapter 15.”<sup>102</sup> The answer to whether a proceeding is entitled to recognition as a “foreign main proceeding” depends on the situs of the alleged debtor’s COMI, which term is “not defined and requires a fact-based inquiry....”<sup>103</sup> Thus, the

inquiry into the COMI is objective, rather than subjective, in nature.<sup>104</sup>

A court must determine whether a foreign proceeding meets the definitional requirements of section 1502, regardless of the nature of the foreign proceeding. “No flexible, subjective considerations should apply to the decision to enter or decline an order of recognition.”<sup>105</sup> The legislative history of section 1517 supports this premise:

The decision to grant recognition is not dependent upon any findings about the nature of the foreign proceedings of the sort previously mandated by [section] 304(c) of the Bankruptcy Code. The requirements of this [section] [1517], which incorporates the definitions in [section] 1502 and [section] 101(23) and (24), are all that must be fulfilled to attain recognition.<sup>106</sup>

In *United States v. J.A. Jones Construction Group, LLC*,<sup>107</sup> a receiver in a Canadian bankruptcy case requested a stay of an action pending in the United States in accordance with Canadian bankruptcy law. The court determined that relief under Chapter 15 of the Bankruptcy Code is available only if the foreign representative “commences an ancillary proceeding for recognition of a foreign proceeding before a bankruptcy court.”<sup>108</sup> In *J.A. Jones*,<sup>109</sup> an ancillary U.S. proceeding had not been commenced, but in the interest of comity, the court stayed the action for sixty days to give the Canadian authorities an opportunity to seek the appropriate relief under Chapter 15.

94. *See, e.g., Garske v. Arcadia Fin., Ltd. (In re Garske)*, 287 B.R. 537 (9th Cir. BAP 2002).

95. 11 U.S.C. § 524(j).

96. H.R. Rep. No. 109-31 at 105 (2005), U.S. Code Cong. & Admin. News 88, 169 (2005). In large measure, this codifies the substance of prior case law. *See, e.g., Robin E. Phelan & Scott W. Everett, The Wretched Refuse—Leading the Foreign Corporation to a Fresh Start in the United States*, 59 Consumer Fin. L.Q. Rep. 23 (2005).

97. 11 U.S.C. § 1501(a).

98. *Id.* §§ 1504 and 1509(a).

99. *Id.* § 1517(a).

100. *Id.* § 1517(a)(1) (emphasis added).

101. *Id.* § 1502(4) and (5) (emphasis added), respectively.

102. Daniel M. Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, XXV Am. Bankr. Inst. Journal No. 10, at 44, 45 (Dec./Jan. 2007).

103. *In re Tri-Continental Exchange, Ltd.*, 349 B.R. 627, 629 (Bankr. E.D. Cal. 2006).

104. Bob Wessels, “International Jurisdiction to Open Insolvency Proceedings in Europe, in Particular Against (Groups of) Companies,” Inst. For Law and Finance, Working Paper Series No. 17, at 8.

105. Glosband, *supra* note 102, at 85.

106. H.R. Rep. No. 31(1), at 114 (2005) reprinted in 2005 U.S. Code Cong. & Admin. News 88, 2005 WL 832198.

107. *United States v. J.A. Jones Const. Group, LLC*, 333 B.R. 637 (E.D.N.Y. 2005).

108. *Id.* at 638; 11 U.S.C. § 1504.

109. *J.A. Jones Const. Group*, 333 B.R. at 639.

