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Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA's Credit Counseling Requirement

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NOTES

Good in Theory, Bad in Practice: The Unintended Consequences of BAPCPA's Credit Counseling Requirement

In re Gee[1]

I. INTRODUCTION

On April 20, 2005, after nearly a decade of lobbying by the credit industry, President Bush signed the Bankruptcy Abuse and Consumer Protection Act (BAPCPA).[2] The publicly stated goal of BAPCPA was to make bankruptcy less desirable so that debtors would stop abusing the protections of the Bankruptcy Code.[3] Although Congress was motivated by laudable intentions, it is clear that BAPCPA contains at least one good idea that does not work in practice — the credit counseling requirement.[4]

Under BAPCPA, a debtor must receive credit counseling before filing for bankruptcy.[5] Not only did Congress fail to instruct judges on the proper way to dispose of debtors who fail to meet the credit counseling requirement, it also failed to consider the best way to educate consumers about debt management. This Note focuses on a recent Missouri case, *In re Gee*, and concludes that BAPCPA's credit counseling requirement is severely harming debtors who, like Bertha Mae Gee, are unable to receive credit counseling and must forfeit the protections of the Bankruptcy Code.

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1. 332 B.R. 602 (Bankr. W.D. Mo. 2005).

2. *See* Press Release, The White House, President Signs Bankruptcy Abuse Prevention and Consumer Protection Act (Apr. 20, 2005), http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html (last visited Mar. 30, 2006).

3. *Id.*

4. 11 U.S.C. § 109(h) (Supp. V 2005).

5. *Id.*

II. FACTS AND HOLDING

On October 20, 2005, facing imminent foreclosure on her home, Bertha Mae Gee filed a Chapter 13 bankruptcy petition in the Western District of Missouri in an attempt to stop the foreclosure.[6] She also filed a Certification of Exigent Circumstances to Waive Debt Counseling Prior to Filing (the "Certification").[7]

The Certification stated that, prior to the foreclosure sale, she had struggled to pay an attorney who would file her bankruptcy petition.[8] Additionally, she described her difficulties in physically reaching her attorney's office and in communicating with her attorney.[9] Finally, Gee stated that she had contacted Consumer Credit Counseling ("CCC") of Springfield, Missouri on October 20, 2005, only to find out that CCC did not provide counseling on the first day that it was requested.[10] Four days after her initial request, CCC agreed to send Gee the paperwork she needed to complete the counseling.[11]

Ultimately, the bankruptcy court for the Western District of Missouri denied Gee's request for a waiver of the credit counseling requirement.[12] Gee then filed a motion to vacate the court's order denying the waiver, which the court also denied.[13] Despite admitting that Gee's circumstances were exigent, the court denied the motion, because Gee had failed to show that she was unable to obtain credit counseling within the five-day period after filing her bankruptcy petition.[14] Because Gee obtained neither the credit counseling nor the waiver, she was ineligible to be a debtor under the Bankruptcy Code; therefore, the court dismissed her case.[15]

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6. *In re* Gee, 332 B.R. 602, 603 (Bankr. W.D. Mo. 2005). As soon as a debtor files her bankruptcy petition, there is a stay of "all actions by creditors against debtors or their property." 11 U.S.C. § 362 (2000 & Supp. V 2005). Furthermore, a Chapter 13 bankruptcy proceeding allows a debtor to keep her home by including mortgage payments in her repayment plan. *See id.* § 1322(b).

7. *Gee*, 332 B.R. at 603.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 604.

14. *Id.*

15. *Id.* at 603.

III. LEGAL BACKGROUND

A. The History of Chapter 13

Consumers have been able to reorganize their debts under the protection of the bankruptcy courts since the Chandler Act of 1938.[16] Under the Chandler Act, the original Chapter XIII consisted of a debt repayment plan under the supervision of the bankruptcy court.[17] However, according to the legislative history of the 1978 Bankruptcy Act, the Chandler Act's Chapter XIII was "one of the least understood and most erratically applied of all federal statutes dealing with bankruptcy or social welfare."[18]

Because of this lack of understanding of Chapter XIII, debtors were often pushed into Chapter VII liquidation bankruptcies, even though the debtors may have preferred to repay their creditors.[19] Chapter XIII was only available to debtors when the debtor's bankruptcy judge was familiar with Chapter XIII and was interested in supervising a plan.[20] Additionally, it was unavailable to debtors without regular salary income.[21]

In 1978, as a result of increasing consumer bankruptcies, Congress amended the bankruptcy code by passing the Bankruptcy Reform Act of 1978 ("1978 Act").[22] The 1978 Act encouraged debtors to file Chapter 13[23] bankruptcy by providing for a broader discharge of debts and an increased ability to keep their homes and other assets.[24] The intended result was for debtors to repay more of their debts than in a Chapter 7 liquidation proceed-

16. ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 5 (4th ed. Supp. 2005).

17. *Id.*

18. S. REP. NO. 95-989, at 12 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5798.

19. H.R. REP. NO. 95-595, at 117 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6077-78.

20. *Id.*

21. S. REP. NO. 95-989, at 13 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5799. To be eligible for Chapter XIII bankruptcy under the Chandler Act, a debtor was required to have regular income that came from wages, salary, or commissions. *Id.* As a result, this requirement eliminated small business owners and welfare recipients from Chapter XIII eligibility, even though such debtors had regular income. *Id.* To rectify this situation, the new Chapter 13 only required regular income sufficient to fund a repayment plan. *Id.*

22. Pub. L. No. 95-598, 92 Stat. 2549.

23. The Chandler Act used Roman numerals to denote different sections. *Id.* When Congress overhauled the bankruptcy laws in 1978, it chose to keep the same numbers but change the numbering from Roman numerals to Arabic numerals. WARREN & WESTBROOK, *supra* note 16, at 7.

24. S. REP. NO. 95-989, at 223-24. This broader discharge of debts included even fraud and intentional torts. *Id.*

ing.[25] These incentives worked temporarily, as Chapter 13 filings increased to about thirty percent of all bankruptcy filings in the years following the adoption of the 1978 Act.[26]

As part of the protections offered to a debtor choosing Chapter 13 bankruptcy, Congress included an automatic stay of "all actions by creditors against the debtor or his property."[27] The stay was designed to provide the debtor with a "breathing spell" to prepare for a Chapter 13 repayment plan.[28] Therefore, the stay took effect as soon as the debtor filed a bankruptcy petition, although creditors could petition the bankruptcy court for relief from the stay.[29] If a creditor chose to ignore the stay and continue its actions against a debtor, the creditor could be liable for both actual and punitive damages.[30] Finally, under the 1978 Act, the stay remained in effect until the case was closed or dismissed or until a discharge was granted.[31]

B. The 2005 Bankruptcy Amendments

In 2005, after several years of attempts by the credit industry to strengthen bankruptcy protections,[32] Congress passed BAPCPA.[33] In his

25. H.R. REP. NO. 95-595, at 118.

26. S. REP. NO. 95-989, at 224.

27. H.R. REP. NO. 95-595, at 121.

28. *Id.* The stay was designed to help the debtor prepare for a Chapter 13 repayment plan, not to provide a way for debtors to hide from their obligations. *Id.* at 122. To that end, Congress limited the stay to actions regarding consumer debts. *Id.* For example, some of the actions the stay does not affect include criminal prosecutions against the debtor, actions for paternity, and actions to modify domestic support obligations. 11 U.S.C. § 362(b) (2000 & Supp. V 2005).

29. For example, a creditor whose interest is not adequately protected can apply for relief from the stay, as can a creditor whose claim is secured by real property and who can show that the debtor was using bankruptcy in an attempt to defraud the creditor. 11 U.S.C. § 362(d).

30. 11 U.S.C. § 362(k) (Supp. V 2005).

31. *Id.* § 362(c)(2).

32. During House debate on an amendment to BAPCPA that would have afforded Chapter 13 debtors more flexibility in calculating their financial needs for purposes of establishing a repayment plan, Congressman Henry Hyde said "let me pay my respects to the creditor lobby. They are awesome." Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 528 (2005). The credit industry spent millions lobbying for changes to the bankruptcy code, but estimated that the industry would save millions more through BAPCPA. Jennifer Brooks, *Jury Is Still Out On New Bankruptcy Law*, ASBURY PARK PRESS, Feb. 12, 2006, http://www.app.com/apps/pbcs.dll/article?AID=/20060212/BUSINESS/602120357&SEARCHid=73236216474327 (last visited Mar. 28, 2006). MBNA, which was one of the companies leading the lobbying efforts, estimated in 2000 that proposed changes to the bankruptcy code would save MBNA more than $60 million a year. *Id.*

signing statement, President Bush summarized the rationale for BAPCPA: "If someone does not pay his or her debts, the rest of society ends up paying them. In recent years, too many people have abused the bankruptcy laws. They've walked away from debts even when they had the ability to repay them."[34]

One change BAPCPA made was to restrict the automatic stay in multiple-filing situations.[35] For example, in situations where the debtor had a bankruptcy case pending within the preceding year and had the earlier case dismissed, the automatic stay will terminate thirty days after the later case is filed "with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease."[36] Essentially, debtors with two or more cases pending in the preceding year do not receive the protection of an automatic stay.[37]

BAPCPA also established a credit counseling requirement. Banking and credit card industries lobbied for this provision in an attempt to encourage people with financial difficulties to choose options other than bankruptcy.[38] Proponents of the credit counseling requirement argued that credit

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33. Pub. L. No. 109-8, 119 Stat. 23 (2005). The Senate approved BAPCPA by a vote of 74 to 25, while the House of Representatives passed the bill by a vote of 302 to 126. *See* Jensen, *supra* note 32, at 565-66 (discussing the history of BAPCPA).

34. Press Release, The White House, President Signs Bankruptcy Abuse Prevention and Consumer Protection Act (Apr. 20, 2005), http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html (last visited Mar. 30, 2006). This view that debtors were abusing protections offered under the Bankruptcy Code was not limited to Republicans. For example, Representative Rich Boucher, a Virginia Democrat, said in a news release that "debtors treat bankruptcy as merely another financial planning tool and file for bankruptcy for simple convenience. These practices are permitted under the current bankruptcy law which allows debtors to walk away from their debts regardless of whether they have the ability to pay any portion of what they owe." Press Release, House Judiciary Comm., House Approves Bankruptcy Reform Legislation (Apr. 14, 2005), http://judiciary.house.gov/newscenter.aspx?A=475 (last visited Apr. 7, 2006).

35. 11 U.S.C. § 362(c) (Supp. V 2005); *see* Lisa A. Napoli, *The Not-So-Automatic Stay: Legislative Changes to the Automatic Stay in a Case Filed By or Against an Individual Debtor*, 17 AM. BANKR. L.J. 749 (2005) (thoroughly discussing BAPCPA's changes to the automatic stay).

36. 11 U.S.C. § 362(c)(3)(A). If the case is a Chapter 7 case that is being refilled under Chapter 13, this restriction does not apply. *Id.* The provision's scope is somewhat unclear, however, so the stay may remain in effect for some types of actions. Napoli, *supra* note 35, at 767. Additionally, the statute does not define what it means for a case to be "pending." *Id.* at 766.

37. 11 U.S.C. § 362(c)(4). In cases where the debtor falls within the provisions of *id.* § 362(c) a "party in interest" may petition the bankruptcy court for relief within thirty days of the filing of the later case, provided the later case is filed in "good faith." *Id.*

38. Michelle Singeltary, *The Color of Money*, WASH. POST, Feb. 26, 2006, at F01.

counseling would show potential bankruptcy claimants that they could repay all (or most) of their debts without filing for bankruptcy.[39] These arguments were supported by a study from the Credit Research Center which found that approximately one quarter of Chapter 7 debtors could have repaid "at least 30 percent of their non-housing debts over a 5-year repayment plan, after accounting for monthly expenses and housing payments."[40]

The credit counseling requirement is in the definition section of BAPCPA and applies to all consumer debtors.41 Unless they fall within an exception to the credit counseling requirement, debtors must receive credit counseling from an approved credit counseling agency within the 180-day period prior to filing their bankruptcy petitions.[42] The United States trustee is responsible for approving credit counseling agencies, and the clerk is required to make a list of approved credit counseling agencies publicly available.[43] Individuals who fail to meet the credit counseling requirement and who are not exempted from the credit counseling requirement are ineligible to be debtors under the Bankruptcy Code.[44]

There are three exceptions to the credit counseling requirement, the first of which applies to debtors who live in districts without an approved credit counseling agency.[45] The second exception to the credit counseling requirement is a waiver of credit counseling that is granted by the bankruptcy court.[46] The bankruptcy court can grant a waiver when the debtor demonstrates that he or she is burdened by exigent circumstances, and that he or she requested, but was unable to receive counseling within five days of making the request.[47] Finally, the third exemption applies to debtors who suffer from incapacity or disability, and to debtors who are active military members serving in a military combat zone.[48]

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39. *Id.* This argument for the changes to the bankruptcy law is reflected in the statements President Bush made when he signed BAPCPA. *See supra* note 34 and accompanying text.

40. This study examined 3800 debtors who filed for bankruptcy in 1996, and was funded by a grant from Visa and MasterCard. Jensen, *supra* note 32, at 520-21. The study was featured during the 105th Congress's hearings on bankruptcy reform. *Id.* at 519-20. On the other hand, a study funded by the American Bankruptcy Institute found that only 3.6 percent of Chapter 7 debtors would be able to pay their debts. *Id.* at 521.

41. 11 U.S.C. § 109(h) (Supp. V 2005).

42. *Id.*

43. *Id.* § 111(a)-(b) (2000 & Supp. V 2005). The list of approved credit counseling agencies is also available on the United States Trustee Program's website at http://www.usdoj.gov/ust/eo/bapcpa/ccde/cc_approved.htm.

44. 11 U.S.C. § 109(h).

45. *Id.* § 109(h)(2).

46. *Id.* § 109(h)(3).

47. *Id.*

48. *Id.* § 109(h)(4). An "incapacitated" debtor is one "impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making

Three months after BAPCPA went into effect, the *Washington Post* ran a story discussing the new credit counseling requirement.[49] The credit counseling agencies quoted in the story reported seeing debtors for whom bankruptcy truly was the best option, rather than the so-called "can-pay" debtors, whom BAPCPA's supporters believed were abusing the bankruptcy laws.[50] In February, 2006, the National Association of Consumer Bankruptcy Attorneys (NACBA) issued a report on BAPCPA, which included the results of NACBA's survey of ten credit counseling agencies.[51] The survey included the following four questions:

> 1. How many debtors have you served since the new bankruptcy law took effect on October 17, 2005?
>
> 2. Of those, what percentage would you estimate qualified for a debt management plan, as opposed to filing for bankruptcy?
>
> 3. What percentage of people contacting you would you estimate arrive as referrals from bankruptcy attorneys?
>
> 4. Roughly what percentage of people contacting you would you say fall into the following categories:
>
> * Circumstances beyond their control (e.g., loss of a job, medical expenses, death, divorce or other change in marital status, increased minimum payments on credit cards, predatory lending, and so on)?

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rational decisions with respect to his financial responsibilities" while a "disabled" debtor is one who is "so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing." *Id.*

49. Caroline E. Mayer, *Bankruptcy Counseling Law Doesn't Deter Filings*, WASH. POST, Jan. 17, 2006, at A01.

50. *Id.* Several of the debtors mentioned in the story were facing imminent foreclosure of their homes, while one debtor was a 60-year old disabled man with no income or assets. *Id.* One counseling agency reported seeing so many debtors in such dire financial straits that it waived the counseling fee in 60 percent of cases, while another agency reported reducing the fee in half of the cases. *Id.*

51. NAT'L ASS'N OF CONSUMER BANKR. ATTORNEYS, BANKRUPTCY REFORM'S IMPACT: WHERE ARE ALL THE "DEADBEATS"? 2 (2006), *available at* http://nacba.com/files/main_page/022206NACBAbankruptcyreformstudy.pdf [hereinafter BANKRUPTCY] (providing an analysis by the National Association of Consumer Bankruptcy Attorneys). Of the ten agencies NACBA contacted, six responded. *Id.*

* Circumstances within their control (e.g., reckless spending or outright refusal to pay legitimate debts)?[52]

The survey found that nearly ninety-seven percent of the over 60,000 debtors served by the six credit counseling agencies were not eligible for a debt management plan.[53] Furthermore, only twenty-one percent of debtors were seeking bankruptcy protection for circumstances within their control.[54] While the above statistics suggest the ineffectiveness of the credit counseling requirement in reducing bankruptcies, recent bankruptcy court decisions reveal the effects of the credit counseling requirement on individual debtors.

C. Stricken or Dismissed?

Although BAPCPA requires an individual to receive credit counseling prior to filing in order to be an eligible debtor, the Bankruptcy Code does not specify how bankruptcy judges are supposed to treat a petition that is filed by an ineligible debtor. As a result of this lack of clear legislative intent, courts have split as to the proper way to treat individuals who file bankruptcy petitions before receiving credit counseling. Some judges have decided to dismiss these debtors' bankruptcy petitions, while others have opted to "strike" the petitions to prevent BAPCPA's restrictions on the automatic stay from taking effect.

In the Minnesota bankruptcy case *In re LaPorta*, the judge reached the same result as the *Gee* decision regarding the proper treatment of an ineligible debtor.[55] In *LaPorta*, a debtor who had filed for Chapter 7 bankruptcy failed to obtain credit counseling prior to filing her bankruptcy petition.[56] The judge stated that the statute required "cause" for dismissal and that failure to obtain credit counseling was sufficient cause to warrant dismissal of the debtor's bankruptcy case.[57] Although the judge acknowledged the

52. *Id.* at 5-6.

53. *Id.* at 2. This means that of the 60,000 debtors served by the responding credit counseling agencies, just over 3 percent fell within the intent of the credit counseling requirement which was to show individuals with the means to repay their debts that filing for bankruptcy was unnecessary. *Id.*

54. *Id.* Two of the agencies reported that this category might be too broad, as "consumers might have avoided debt but 'got in over their heads' over a period of time without intending to do so." *Id.* at 6.

55. *In re* LaPorta, 332 B.R. 879, 882-83 (Bankr. D. Minn. 2005).

56. *Id.* at 882. Chapter 7 debtors are subject to the same credit counseling requirement as Chapter 13 debtors. *Id.* at 881; *see* 11 U.S.C. § 109(h)(1) (Supp. V 2005).

57. *LaPorta*, 332 B.R. at 883-84.

harshness of this result he stated that because the statute was clear on its face he lacked discretion to do anything but order dismissal.[58]

Shortly after issuing the *Gee* opinion, the same court issued a decision regarding another debtor's eligibility under 11 U.S.C. § 109(h).[59] This second case, *In re Talib*, touched on the implications of the debtor's ineligibility.[60] Citing *LaPorta*, the court said that the debtor's failure to meet the credit counseling requirement constituted cause for dismissal of the case.[61] While he acknowledged that dismissal was a harsh result, he said that it was the "only appropriate remedy given that the Debtor's failure to comply with the provisions of § 109(h) cannot be cured subsequent to the filing."[62]

Although the decisions in *LaPorta* and *Talib* noted that a dismissal for failure to meet the credit counseling requirement could have harsh results, both judges failed to specify either what that result would be or how it could be avoided. In contrast to these two decisions is the decision in *In re Valdez*, a Chapter 13 case filed in the Southern District of Florida.[63] In *Valdez*, the bankruptcy judge dismissed a debtor's *pro se* bankruptcy petition for failure to meet the credit counseling requirement.[64] However, unlike other similar dismissals, Judge Cristol said that "the Court will not consider this a dismissed case in which the individual was the debtor, for purposes of denying the imposition of the automatic stay in a subsequently filed case pursuant to 11 U.S.C. § 362."[65] Thus, even though the court dismissed the bankruptcy petition, instead of striking it, the court's dismissal was intended to have the effect of a stricken petition for the purposes of a subsequently filed case.

This approach was similar to the approach taken by Judge Monroe in *In re Sosa*.[66] In *Sosa*, the court dismissed a Chapter 13 case because of the debtor's failure to obtain credit counseling prior to filing.[67] Judge Monroe asked whether "any rational human being [could] make a cogent argument that this makes any sense at all?"[68] Even so, Judge Monroe said that the court's "hands [we]re tied" because the statute mandated dismissal of the debtor's case.[69]

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58. *Id.* at 884.
59. *In re* Talib, 335 B.R. 417 (Bankr. W.D. Mo. 2005).
60. *Id.* at 424.
61. *Id.*
62. *Id.*
63. *In re* Valdez, 335 B.R. 801 (Bankr. S.D. Fla. 2005).
64. *Id.* at 802-03.
65. *Id.* at 803.
66. *In re* Sosa, 336 B.R. 113 (Bankr. W.D. Tex. 2005).
67. *Id.* at 115.
68. *Id.* The bankruptcy judge was specifically concerned with the fact that, should the debtor meet the eligibility requirements and re-file his case within a year, the debtor might not receive the full protection of the automatic stay. *Id.*
69. *Id.*

Of the courts considering whether an ineligible debtor's case should be dismissed or stricken for failure to complete credit counseling, two have chosen to strike the ineligible debtor's bankruptcy petition. One of the cases where the judge ordered that a debtor's petition be stricken was filed in the Southern District of Texas. In *In re Hubbard*, a bankruptcy judge held that five debtors who failed to obtain counseling before filing and who were ineligible for waivers were to have their cases stricken rather than dismissed.[70] The judge reasoned that, while bankruptcy courts had previously dismissed cases where debtors were ineligible, dismissal under BAPCPA may have more serious implications for the debtor than under the former act.[71] Because the putative debtors in *Hubbard* were ineligible to be debtors under BAPCPA, they never filed a case.[72] Because no case was commenced, no case could be dismissed.[73]

Finally, in *In re Rios*, a debtor's bankruptcy case was stricken by the Southern District of New York.[74] The *Rios* court agreed with *Hubbard* and concluded that no bankruptcy can be commenced by an ineligible debtor.[75] In so holding, the court discussed the implications of dismissing an ineligible debtor's case as opposed to striking the case.[76] One implication of dismissing a debtor's case is that if the debtor later becomes eligible for bankruptcy and files a subsequent bankruptcy petition, the debtor will not receive the full protection of the automatic stay.[77]

D. Judicial Criticism of the Credit Counseling Requirement

Several recent cases have involved debtors facing imminent foreclosure.[78] In these cases, individuals were trying to file Chapter 13 bankruptcies to stop foreclosure sales of their homes.[79] In some of these cases, judges have voiced their opinions on the credit counseling requirement.

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70. *In re* Hubbard, 333 B.R. 377, 388 (Bankr. S.D. Tex. 2005).
71. *Id.*
72. *Id.*
73. *Id.*
74. *In re* Rios, 336 B.R. 177 (Bankr. S.D.N.Y 2005).
75. *Id.* at 179.
76. *Id.* at 180.
77. *Id.*
78. *In re* Gee, 332 B.R. 602 (Bankr. W.D. Mo. 2005); *In re* Valdez, 335 B.R. 801 (Bankr. S.D. Fla. 2005); *In re* Sosa, 336 B.R. 113 (Bankr. W.D. Tex. 2005).
79. When Congress created Chapter 13 bankruptcy, the ability to save one's house from a foreclosure sale was supposed to entice a debtor to choose Chapter 13 bankruptcy over a Chapter 7 liquidation proceeding. H.R. REP. NO. 95-595, at 118 (1978), *as reprinted in* 1977 U.S.C.C.A.N. 5963, 6079. Congressional intent was that more debtors would choose a Chapter 13 repayment plan so that they could stop foreclosure. *See supra* notes 22-26 and accompanying text. The debtors in *Gee*, *Valdez*, and *Sosa*, however, were unable to file a Chapter 13 bankruptcy petition because of

In one such case, Judge Cristol of the Southern District of Florida dismissed a pro se debtor's Chapter 13 petition because of her failure to meet the credit counseling requirement.[80] With respect to the credit counseling requirement, Judge Cristol stated:

> The Court wonders what exactly was intended by Congress in regard to this Code section. Is it the intent of Congress that poor, ignorant persons who do not know the law and cannot afford to obtain the advice of counsel are to be denied protection and assistance of the Bankruptcy Code which is available to more affluent and better educated persons? Or, is it the intent of Congress that decent, honest, hardworking persons who have suffered financial misfortune or tragedy, be educated by budget and credit counseling services to help them determine if there is a more appropriate way to deal with their financial problems? Sadly, the language in the Code does not clearly reveal Congress'[s] intent; either the Code was inartfully drafted or the congressional intent was indeed the former less compassionate, harsher result, rather than the latter.[81]

In this case, the credit counseling requirement prevented the debtor from stopping a foreclosure sale by filing a Chapter 13 petition.[82]

In *In re Sosa*, Judge Monroe of the Western District of Texas was just as direct.[83] *Sosa* was another example of an individual attempting to stop a foreclosure by filing a Chapter 13 bankruptcy petition.[84] Judge Monroe asserted that, "to call the Act a 'consumer protection' Act is the grossest of misnomers," and he called "inane" the provision that prohibited a person who had not received credit counseling from being a debtor "no matter how dire the circumstances."[85]

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the credit counseling requirement. If the foreclosure sales are not stopped and these debtors lose their homes, what incentive remains for these debtors to choose Chapter 13 bankruptcy if they are eligible to file Chapter 7 bankruptcy petitions?

80. *Valdez*, 335 B.R. at 801.

81. *Id.* at 803.

82. It is important to remember that one of the ways the 1978 Act tried to entice individuals into using Chapter 13 bankruptcy was by promising debtors they could keep their homes. H.R. REP. NO. 95-595, at 118 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6079.

83. *In re* Sosa, 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005).

84. *Id.* Judge Monroe also wrote that those who pushed for the passage of the act "had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country." *Id.* at 114.

85. *Id.* Judge Monroe also said

[i]t should be obvious to the reader at this point how truly concerned Congress is for the individual consumers of this country. Apparently, it is not the individual consum-

IV. INSTANT DECISION

In *Gee*, the Bankruptcy court for the Western District of Missouri denied Bertha Mae Gee's request to waive the credit counseling requirement.[86] The court found that even if exigent circumstances were present, a request for a waiver of the credit counseling requirement was insufficient unless, prior to filing the petition, the debtor had requested credit counseling services and was unable to get them within five days.[87] The court reached this conclusion by looking to the plain language of 11 U.S.C. § 109(h), the Bankruptcy Code's credit counseling provision.[88]

The court said that, for a debtor to be eligible for a waiver, (1) exigent circumstances must exist, (2) the debtor must have requested credit counseling services prior to filing bankruptcy and been unable to receive credit counseling within five days of making the initial request, and (3) the certification must be satisfactory to the court.[89]

The court recognized that all three requirements must be met by the debtor in order for the court to grant a waiver of the credit counseling requirement.[90] Despite finding that Gee's circumstances were exigent, the court held that she did not meet the second requirement because she was able to receive credit counseling within five days of requesting it.[91] As a result, the court found that Gee was ineligible to be a debtor under the Bankruptcy Code.[92]

V. COMMENT

In re Gee was decided on October 26, 2005, nine days after BAPCPA took effect.[93] Because it was among the first debtor eligibility cases decided under BAPCPA, *Gee* provided early insight into some of the issues that bankruptcy judges will face under BAPCPA.

In his decision denying Gee's request for a waiver of the credit counseling requirement, Judge Dow followed the plain text of the statute. The

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ers of this country that make the donations to the members of Congress that allow them to be elected and re-elected and re-elected and re-elected,
and ended his decision by noting "Congress must surely be pleased." *Id.* at 115.

86. *In re* Gee, 332 B.R. 602, 604 (Bankr. W.D. Mo. 2005).

87. *Id.*

88. *Id.*

89. *Id.* Each of these requirements must be detailed in the certification filed with the bankruptcy petition. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. 332 B.R. 602 (Bankr. W.D. Mo. 2005).

statute clearly states that to be eligible for a waiver, a debtor must first demonstrate that his or her circumstances are exigent. Additionally, the debtor must prove that he or she requested credit counseling, but was unable to receive it within five days of the request.[94] Because Gee could have received credit counseling within five days of making her request, she was clearly ineligible to be a debtor.[95] Thus, *Gee* was fairly unremarkable in its ultimate result.

However, this case is noteworthy because it illustrates two fundamental questions raised by the credit counseling requirement. First, when debtors fail to receive credit counseling prior to filing their bankruptcy petitions, should the bankruptcy strike their petitions or dismiss them? Second, is the credit counseling requirement achieving the result Congress intended, or is it harming debtors like Bertha Mae Gee who are unable to receive counseling within the requisite time and are therefore forced to forgo the various benefits of the bankruptcy code? This section analyzes these questions and concludes that the credit counseling requirement is not having the desired effect.

A. Stricken or Dismissed?

In *Gee*, the bankruptcy court ordered the debtor's case dismissed, without any discussion of the implications of dismissal under BAPCPA.[96] At first glance, the "stricken" or "dismissed" terminology seems insignificant; however, in situations where an ineligible debtor becomes an eligible debtor and files a second bankruptcy petition, this terminology may have a huge impact on the debtor's second bankruptcy case. BAPCPA changed the automatic stay provisions so that in situations where a debtor had a case pending within the previous year and had the previously pending case dismissed, the debtor would not receive the full automatic stay.[97]

The decisions discussed earlier demonstrate the different ways bankruptcy judges have decided to interpret 11 U.S.C. § 109(h)'s credit counseling requirement. Even among courts that dismissed ineligible debtors' petitions, there is disagreement as to what a judge can do to mitigate the potentially harsh results of a dismissal.[98] However, the full impact of these deci-

94. 11 U.S.C. § 109(h) (Supp. V 2005).

95. *Id.*

96. *Gee*, 332 B.R. at 603.

97. *See supra* notes 35-37 and accompanying text.

98. Even the two cases that were most critical of the credit counseling requirements and its harsh effects differed in how to approach the requirement. In *In re Sosa*, Judge Monroe discussed the effect a dismissal would have on a later-filed bankruptcy petition, but concluded that his "hands are tied." 336 B.R. 113, 115 (Bankr. W.D. Tex. 2005). *Cf. In re* Valdez, 335 B.R. 801 (Bankr. S.D. Fla. 2005) (holding that dismissal was not to count against the debtor for purposes of limiting the automatic stay in a later-filed case).

sions will not be known unless these (or similarly situated) ineligible debtors become eligible debtors in a bankruptcy case filed within one year of their previously filed cases. When this occurs, bankruptcy judges will be forced to interpret the automatic stay provisions under 11 U.S.C. § 362(c).[99]

In these situations, some judges may conclude that because the later-filed petition was filed in good faith, the debtor should receive relief from the automatic stay restrictions. If judges grant relief as a matter of course, then the debate over whether an ineligible debtor's petition should be "stricken" or "dismissed" will be moot.[100] On the other hand, if bankruptcy judges fail to freely grant relief from the limitations imposed on the automatic stay, then whether a petition should be "stricken" or "dismissed" will take on greater importance. Because the statute states that a pending case must have been "dismissed" for the automatic stay restrictions to apply, a strict construction of the statute would mean that "stricken" petitions would not fall within the statute, and would not be subject to § 362(c)'s restrictions on the automatic stay.

B. The Credit Counseling Requirement

While the goal of the credit counseling requirement—encouraging individuals with the means to repay their debts to refrain from filing bankruptcy—is certainly laudable, BAPCPA's drafters did not seem to consider the possibility that credit counseling might not make a difference for a substantial number of debtors.

Supporters of the credit counseling requirement contend that cases such as *Valdez* and *Sosa* will prove to be outliers. They argue that, because those who filed for bankruptcy after BAPCPA took effect are "the poorest of the poor," they are "not a fully representative sample of the filers."[101] Furthermore, even if individuals currently filing for bankruptcy turn out to be a representative sample of future debtors, the credit industry argues that

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99. 11 U.S.C. § 362(c) (Supp. V 2005) restricts the length of the automatic stay in situations where a debtor had a bankruptcy case pending within the previous year that was dismissed.

100. However, even if bankruptcy judges freely grant debtors relief from the restrictions in § 362(c), it might not help debtors such as Mirielys Valdez who was too poor to obtain counsel in filing her first bankruptcy petition. *In re* Valdez, 335 B.R. 801, 803 (Bankr. S.D. Fla. 2005). Ms. Valdez failed to meet the credit counseling requirement because she was unaware of the credit counseling requirement. *Id.* at 802. It is not hard to imagine that debtors such as Ms. Valdez, who become eligible after learning the hard way about a credit counseling requirement, might still lack the funds or the knowledge to file a motion for relief from § 362(c) and therefore might not receive the protection of the automatic stay.

101. Philip S. Corwin, expert for American Banker's Association, *quoted in* Caroline E. Mayer, *Bankruptcy Counseling Law Doesn't Deter Filings*, WASH. POST, Jan. 17, 2006, at A01.

the counseling requirement is beneficial because "an informed consumer is a better consumer."[102]

As with the "stricken" versus "dismissed" discussion earlier, only time will tell whether Judge Monroe or the credit industry is correct regarding the credit counseling requirement. However, even if the credit industry is correct in its assertion that most debtors benefit from a pre-bankruptcy credit counseling requirement, this benefit is not substantial enough to justify the effects on debtors for whom credit counseling has no benefit. For debtors facing imminent foreclosure, like the debtors in *Sosa* and *Valdez*, credit counseling will not be beneficial. There will always be people who will wait until the last possible moment to attempt to stop a foreclosure sale by filing a Chapter 13 bankruptcy petition. Therefore, instead of helping debtors, the credit counseling requirement acts as a bar to Chapter 13 bankruptcy and keeps these debtors from saving their homes from foreclosure. This is in direct contrast to the original intent of Chapter 13, which was to make it more attractive by permitting debtors to stop a foreclosure sale.[103]

Additionally, the credit counseling requirement will harm innocent victims of natural disasters. For example, bankruptcy filing rates for hurricane-affected areas tend to increase twelve to thirty-six months after the hurricane.[104] A credit counseling session, designed to help individuals find ways to live within their means and control their spending, will not help someone whose home was destroyed by a natural disaster. While there is no question that consumer credit education can be a useful tool, requiring credit counseling prior to filing for bankruptcy seems to be doing more harm than good. A less harmful way of achieving the good intention of the credit counseling requirement would be to focus on educating consumers after they file for bankruptcy. This way, debtors facing imminent foreclosure could still save their homes through a Chapter 13 bankruptcy and receive the education to become financially solvent after receiving the fresh start that bankruptcy should provide. Additionally, concerns about debtors abusing the bankruptcy system could be met by strengthening penalties for debtors who clearly abuse the bankruptcy system. This two-pronged approach would best serve the underlying goal of the Bankruptcy Code.

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102. Steve Bartlett, president of Financial Services Roundtable, *quoted in* Mayer, *supra* note 101.

103. *See supra* notes 22-26 and accompanying text. The counter-argument is that debtors who are facing foreclosure had plenty of time before foreclosure to obtain credit counseling if they wanted to file Chapter 13 bankruptcy petitions and thus, Chapter 13 is still as an attractive an option as it was prior to BAPCPA.

104. Robert M. Lawless, *Bankruptcy Filing Rates After a Major Hurricane*, 6 NEV. L.J. 7, 15 (2005).

VI. CONCLUSION

In her testimony before the Senate Judiciary Committee, Elizabeth Warren told Congress "I think you will find that most debtors are filing for bankruptcy not because they had too many Rolex watches and Gameboys, but because they had no choice. You have a choice. It's a choice that you're making for the American people."[105]

Although judges may attempt to find ways around the harshest outcomes of BAPCPA, Congress must choose to change the credit counseling requirement. This requirement has the potential to be a useful part of the bankruptcy proceedings, but Congress should amend the Code to make the credit counseling requirement work. Until Congress makes this choice, the credit counseling requirement will continue to have the unintended consequence of working against the main purpose of the Bankruptcy Code.

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105. BANKRUPTCY, *supra* note 51, at 3.