

2006

Testing the Limits of Statutory Construction Doctrines: Deconstructing The 2005 Bankruptcy Act

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Recommended Citation

Rao, John. "Testing the Limits of Statutory Construction Doctrines: Deconstructing The 2005 Bankruptcy Act." American University Law Review 55, no.5 (June 2006):1427-1446.

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Testing the Limits of Statutory Construction Doctrines: Deconstructing The 2005 Bankruptcy Act

Keywords

Bankruptcy, Bankruptcy law, 2005 Bankruptcy Act

TESTING THE LIMITS OF STATUTORY CONSTRUCTION DOCTRINES: DECONSTRUCTING THE 2005 BANKRUPTCY ACT

JOHN RAO*

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INTRODUCTION

Most bankruptcy practitioners, scholars, and courts readily agree on one thing: the 2005 Bankruptcy Act¹ (“the 2005 Act”) is poorly drafted.

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One court has observed:

After reading the several hundred pages of text in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 . . . , one conclusion is inescapable. The new law is not a model of clarity. Implementing the changes will present a daunting challenge to judges, clerk's offices, attorneys and the parties who seek relief in the bankruptcy court after October 17, 2005, the date most of the provisions become effective.²

With only a handful of the new provisions addressed thus far in the initial decisions, it is already evident that courts face a significant challenge in deciding the extent to which the plain words of the statute should be given effect, particularly when the language produces an improbable result or is at odds with the statute's apparent intent. This task is made far more difficult by the lack of reliable legislative history for legislation that effectively spans seven Congresses (from the 103rd to the 109th Congress).³ Congress did not issue a formal conference report with the 2005 Act, and the section-by-section analysis and discussion in the House Report largely paraphrases the statute.⁴

This Article reviews the statutory construction approaches taken in the initial decisions and considers several provisions likely to generate controversy in the future. Given that Congress was repeatedly warned of the many potential drafting errors and their likely impact, courts may reasonably infer that Congress' choice of language was deliberate.⁵ Although admittedly not an easy task, courts should resist the temptation to reform what might appear to be a scrivener's error and search for some plausible, though perhaps not intended, construction of the plain words. As the Supreme Court stated in *Lamie v. U.S. Trustee*, "[t]here is a basic difference between filling a

1. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (2005) (to be codified at 11 U.S.C. §§ 101-1532).

2. *In re Kaplan*, 331 B.R. 483, 484 (Bankr. S.D. Fla. 2005).

3. See *In re McNabb*, 326 B.R. 785, 789 (Bankr. D. Ariz. 2005) (noting that "[l]egislative history is virtually useless as an aid to understanding the language and intent of BAPCPA"); see also Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485 (2005) (detailing the legislation's history).

4. H.R. REP. NO. 109-31, pt. 1 (2005), as reprinted in 2006 U.S.C.C.A.N. 88.

5. Kenneth N. Klee, law professor at the UCLA School of Law and a former congressional staffer who helped draft the 1978 Bankruptcy Code, stated that "even when we showed them pages and pages of grammatical and typographical errors," congressional staff "largely spurned the efforts . . . to work out linguistic issues." Justin Scheck, *Bankruptcy Rewrite Predicted to Bring a Flood of Appeals*, THE RECORDER, Feb. 8, 2006, available at <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1139306710471>.

gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."⁶

I. UNDEFINED TERMS

Several provisions of the 2005 Act use terms that are not defined or have not previously been found in bankruptcy legislation. Recent decisions of the Supreme Court have taught that the first (and often last) step should be to refer to the common dictionary for a definition of terms.⁷ Another accepted approach in construing undefined terms is to consider any common meaning the words have been given over time in judicial decisions, preferably by courts applying the Bankruptcy Code.⁸

A. When is a Case No Longer "Pending"?

The court in *In re Moore*⁹ used these two approaches to determine at what point a bankruptcy case is no longer "pending" for purposes of the new stay limitation provisions.¹⁰ If a prior case of the debtor was "pending within the preceding 1-year period but was dismissed," section 362(c)(3) provides that the automatic stay expires thirty days after the filing of the new case, unless extended by the court.¹¹ In *Moore*, the debtor's previous case was dismissed prior to the one-year period, but the case remained open after dismissal and was eventually closed by the court during the one-year period.¹² To determine whether section 362(c)(3) applied, the court had to construe the word "pending," which the Code does not define.¹³ The court turned to *Black's Law Dictionary*, which defines "pending" as "remaining undecided; awaiting decision."¹⁴ This definition, the court noted, suggests "that a case is no longer 'pending' after dismissal; once the

6. 540 U.S. 526, 538 (2004) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

7. *E.g.*, *Rousey v. Jacoway*, 544 U.S. 320, 326 (2005) (referring to dictionaries for the meaning of "on account of"); *Cohen v. de la Cruz*, 523 U.S. 213, 220 (1998) (citing dictionary definitions of "debt for").

8. *See* *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific.").

9. 337 B.R. 79 (Bankr. E.D.N.C. 2005).

10. *Id.* at 81; *see also In re Easthope*, No. 06-20366, 2006 WL 851829, at *2 (Bankr. D. Utah Mar. 28, 2006) (positing that a case is no longer "pending" when the court finally decides or settles the issues in the case).

11. 11 U.S.C.A. § 362(c)(3) (West 2004 & Supp. 2006).

12. *Moore*, 337 B.R. at 80.

13. *Id.*

14. *Id.* at 81 (citing BLACK'S LAW DICTIONARY 1169 (8th ed. 2004)).

case has been dismissed, there is nothing undecided remaining.”¹⁵ In addition, since the word “pending” is also used in section 109(g), the court referred to decisions that have counted the 180-day period in that section from the date of dismissal of the prior case, not the date in which the case is closed.¹⁶ Finally, the court found this construction to be consistent with the policy reasons supporting the stay limitations, since the automatic stay terminates in the prior case on the dismissal date.¹⁷

B. Form of “Certification” for Credit Counseling Waiver

The term “certification,” which had never been used in the Bankruptcy Code prior to 2005, appears in the 2005 Act on at least twenty-six occasions.¹⁸ No definition for the term was included in section 101, and the Rules Committee elected not to address the requirements of a certification in the Interim Bankruptcy Rules.¹⁹ A split in court opinions has developed regarding the term’s application in section 109.²⁰

In *In re Hubbard*,²¹ the debtor filed an unverified motion seeking a waiver of the credit counseling requirement.²² The court found that the motion was defective since it did not contain an affidavit, declaration, or certification.²³ In *Hubbard II*,²⁴ the court more explicitly described the form of waiver request by construing the word “certification” in section 109(h)(3) to mean the type of document referred to as a “certificate” in 28 U.S.C. § 1746.²⁵ Thus, the debtor must file a certification which is signed by the debtor in the form described in 28 U.S.C. § 1746, by using the language: “I

15. *Id.*

16. *Id.* (citing *In re Carty*, 149 B.R. 601 (B.A.P. 9th Cir. 1993) and *In re Richardson*, 217 B.R. 479 (Bankr. M.D. La. 1998)).

17. *See id.* at 82 (concluding that even if the stay limitation did apply, the stay should be extended under section 362(c)(3)(B) because the debtor showed that the case was filed in good faith based on changed circumstances).

18. 11 U.S.C.A. §§ 109, 362, 524, 707, 1228, and 1328 (West 2004 & Supp. 2006).

19. On August 22, 2005, the Judicial Conference of the United States released Interim Rules for use in bankruptcy cases from October 17, 2005 until final rules are promulgated under the regular Rules Enabling Act process.

20. *See infra* notes 21-35 and accompanying text (discussing courts’ various applications of the term “certification”).

21. (*Hubbard I*), 332 B.R. 285 (Bankr. S.D. Tex. 2005).

22. *Id.* at 289.

23. *See id.* (clarifying that the motion was defective since the debtor in this case failed to meet the requirements of section 109(h)(3)).

24. 333 B.R. 373, 376 (Bankr. S.D. Tex. 2005).

25. *See* 28 U.S.C. § 1746 (2000) (describing the necessary form for unsworn declarations made under penalty of perjury).

declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).”²⁶

Taking a different approach, the court in *In re Cleaver*²⁷ looked to the definitions of the word “certification” found in *Black’s* and *Webster’s* dictionaries.²⁸ Based on these definitions, the court found that the debtor’s certification at a minimum should be a “written statement that the signer affirms or attests to be true.”²⁹ A motion filed by the debtor’s counsel and also signed by the debtor, presumably to verify the facts alleged, was held to be a “certification.”³⁰

Refusing to follow *Hubbard II* and *LaPorta*, the court in *In re Talib*³¹ held that the form of the certification under section 109(h)(3) is not controlled by 28 U.S.C. § 1746 and that the certification need not be a document containing a declaration under penalty of perjury.³² Although a similar word is used in 28 U.S.C. § 1746 (“certificate”), the term “certification” is not one of the precise referenced terms in that statute.³³ In addition, the court noted that Bankruptcy Rule 1008 lists the documents in a bankruptcy case that must be verified or contain an unsworn declaration under penalty of perjury,³⁴ and Rule 1008 was not amended to include a certification under section 109(h)(3).³⁵ Thus, a certification is sufficient if it is signed by the debtor and contains the required information.

Another rationale (not discussed in these cases) for finding that a section 109(h)(3) certification need not be a sworn statement is that Congress provided in section 362(b)(23), added by BAPCPA, that a landlord’s “certification” relating to the automatic stay exception for illegal drug use and endangerment of the property must be “under penalty of perjury.”³⁶ The failure of Congress to include such

26. *In re Hubbard (Hubbard II)*, 333 B.R. at 376; *see also In re LaPorta*, 332 B.R. 879, 881 (Bankr. D. Minn. 2005) (clarifying that the debtor should sign his or her “certification” and attest that the statements contained in it are correct and true).

27. 333 B.R. 430 (Bankr. S.D. Ohio 2005).

28. Black’s Law Dictionary defines “certification” as: “1. The act of attesting. 2. The state of having been attested. 3. An attested statement.” BLACK’S LAW DICTIONARY 241 (8th ed. 2004). Webster’s Third New International Dictionary defines “certify” as: “to attest esp. authoritatively or formally.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 367 (2002).

29. *Cleaver*, 333 B.R. at 434.

30. *See id.* (warning that the certification in this case “marginally comes within [statutory requirements]”).

31. 335 B.R. 417 (Bankr. W.D. Mo. 2005).

32. *Id.* at 420-21.

33. *Id.*

34. *Id.* at 420; Fed. R. Bankr. P. 1008.

35. *Talib*, 335 B.R. at 420.

36. 11 U.S.C.A. § 362(b)(23) (West 2004 & Supp. 2006).

language in section 109(h)(3), when it did so in another provision enacted at the same time, suggests that Congress intended counseling waiver certifications to be unsworn statements.

II. INEXACT DEFINITIONS

A. “Debt Relief Agency”

A “debt relief agency” is defined as any person who provides bankruptcy assistance to an assisted person in return for compensation or who is a bankruptcy petition preparer as defined in section 110.³⁷ The statutory language is certainly broad enough to apply to attorneys.³⁸ However, a definition of “attorney” already exists in the Code,³⁹ and no amendment to that section or reference to the attorney definition has been made in the “debt relief agency” definition. Given that section 110 narrowly defines “bankruptcy petition preparer”⁴⁰ and that the Code defines attorneys separately,⁴¹ it is at least plausible, from a statutory construction perspective, that Congress intended “debt relief agency” to apply to nonattorneys who provide bankruptcy assistance, other than the preparation of documents for filing in a bankruptcy case. A bankruptcy court in Georgia found this inconsistency and lack of interplay in the definitions to be a basis for a standing order holding that the new debt relief agency provisions do not apply to attorneys.⁴²

The debtor in *In re McCartney*⁴³ asserted a similar argument that attorneys do not fall within the “debt relief agency” definition.⁴⁴ The

37. 11 U.S.C.A. § 101(12A) (West 2004 & Supp. 2006). “Bankruptcy assistance” is defined as “goods or services sold or otherwise provided to an assisted person” with the purpose of providing advice, document preparation, or representation in a bankruptcy case or proceeding, regardless of the chapter. *Id.* § 101(4A).

38. In fact, it is so expansive as to potentially include attorneys who represent individual landlords, small businesses, and nondebtor spouses as creditors in bankruptcy cases, if they are “assisted persons” within the definition provided in section 101(3).

39. See 11 U.S.C.A. § 101(4) (West 2004 & Supp. 2006) (defining “attorney” as “attorney, professional law association, corporation, or partnership, authorized under applicable law to practice law”).

40. See 11 U.S.C.A. § 110 (defining “bankruptcy petition preparer” and delineating the general duties involved in that position).

41. See *supra* note 39 and accompanying text (citing 11 U.S.C.A. § 101(4), which provides the definition of “attorney”).

42. See *In re Attorneys at Law and Debt Relief Agencies*, 332 B.R. 66, 70 (Bankr. S.D. Ga. 2005) (concluding that if Congress had intended the debt agency provisions to include attorneys, it would have clearly stated so in the plain language of those provisions).

43. 336 B.R. 588 (Bankr. M.D. Ga. 2006).

44. See *id.* at 590 (pointing to the BAPCPA’s statutory construction and legislative history as the basis for such an argument).

McCartney court, however, held that it lacked jurisdiction to decide this question (as well as the question of whether the attorney provisions violate the attorney's First Amendment rights) because there was no case or controversy giving rise to constitutional standing.⁴⁵ The court found that no party had threatened to enforce the provisions against the attorney, and that the attorney had not "sustained any real, actual, or direct harm or injury" or shown that he was in "danger of sustaining any immediately impending harm or injury."⁴⁶

B. "Debtor's Principal Residence"

Section 1322(b)(2) of the Code permits modification of secured claims in Chapter 13 cases.⁴⁷ However, an exception to the general modification rule applies to claims "secured only by a security interest in real property that is the debtor's principal residence."⁴⁸ Before the 2005 Act, courts had held that a mobile home loan was not secured solely by real property that was the debtor's principal residence and could be modified under section 1322(b)(2), if the mobile home did not constitute real property under applicable nonbankruptcy law.⁴⁹

Congress added a new definition of "debtor's principal residence" that may have been intended to protect mobile home lenders. The Act defines a "debtor's principal residence" as a residential structure, without regard to whether it is attached to real property.⁵⁰ However, this new definition may not actually alter the treatment of mobile homes in this situation because no corresponding change was made to section 1322(b)(2), notably the failure to strike the "in real property" language. While a mobile home may be the debtor's principal residence under the new definition, it may still be personal property under applicable nonbankruptcy law. In that case, the debt would not be secured "only by a security interest *in real property*" that is

45. *Id.* at 592.

46. *Id.*

47. 11 U.S.C.A. § 1322(b)(2) (West 2004 & Supp. 2006).

48. See *Nobleman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993) (concluding that section 1322(b)(2) prohibits the modification of a secured lender's contractual rights when the lender's secured interest is in the debtor's principal residence).

49. E.g., *In re Thompson*, 217 B.R. 375, 378-79 (B.A.P. 2d Cir. 1998) (positing that Congress must have intended to exclude mobile homes in the section 1322(b)(2) exception since it chose to limit the exception only to "real property"); see also NATIONAL CONSUMER LAW CENTER, CONSUMER BANKRUPTCY LAW AND PRACTICE § 11.6.1.2.4 (7th ed. 2004) (discussing the limitations contained in section 1322(b)(2)).

50. 11 U.S.C.A. § 101(13A). The definition also explicitly states that it includes an individual condominium or cooperative unit, as well as a mobile or manufactured home, or a trailer. *Id.*

the debtor's principal residence. The limitations on modifications would therefore only apply if a mobile home or cooperative was considered real property under applicable nonbankruptcy law, even where the mobile home or cooperative is the debtor's principal residence. So far, no court has ruled on how the new definition should be applied in relation to the existing language in section 1322(b)(2), but the potential lack of parallelism should not provide grounds for deeming this to be a scrivener's error that would merit a rewriting of the statute by the courts.⁵¹

III. AMBIGUOUS PHRASES

A. "Action Taken"

If an individual debtor has another bankruptcy case pending but dismissed within one year of the present case, section 362(c)(3)(A) provides that the automatic stay terminates "with respect to any action taken" within thirty days after filing.⁵² In *In re Paschal*,⁵³ the court engaged in a thorough analysis of Congress' use of the word "act" in section 362,⁵⁴ and compared that to its use of the word "action."⁵⁵ This analysis, combined with several doctrines of statutory construction, led the court to conclude that Congress must have intended a different and more limited meaning for the words "action taken."⁵⁶ The court held that section 362(c)(3)(A) terminates the automatic stay only for creditors who have taken a specific action against the debtor, which must be some "formal judicial, administrative or similar undertaking."⁵⁷ In addition, since the word "taken" is used, meaning "an action in the past," the creditor's formal action that is stayed under the new provision must have occurred prior to the filing of the petition.⁵⁸

51. See *Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent. It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result." (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring))).

52. 11 U.S.C.A. § 362(c)(3)(A) (West 2004 & Supp. 2006).

53. 337 B.R. 274 (Bankr. E.D.N.C. 2006).

54. The word "act" is located in the following subsections and subparagraphs: 11 U.S.C.A. § 362(a)(3), (a)(4), (a)(5), and (a)(6).

55. The word "action" is located in the following subsections and subparagraphs: 11 U.S.C.A. § 362(b)(1), (b)(2)(A), (b)(4), (b)(14), (b)(16), (b)(25)(A) and (B), and 362(c)(3)(C)(ii).

56. *Paschal*, 337 B.R. at 279-81.

57. *Id.* at 280.

58. *Id.*

B. “With Respect to the Debtor”

Among the many ways in which section 362(c)(3) is virtually indecipherable, the phrase “with respect to” appears four times within the same sentence in subparagraph (A).⁵⁹ In his third look at the confusing stay termination language, Judge Small in *In re Jones*⁶⁰ considered the last use of the phrase in subparagraph (a), “with respect to the debtor.”⁶¹ The court in *Jones* appropriately began its analysis with the following introduction: “Once again, warily, and with pruning shears in hand, the court re-enters the briar patch that is § 362(c)(3)(A). Having been here before is of some help, in that at least the thorns and thickets have a certain familiarity.”⁶²

Employing a now familiar approach, Judge Small compared the plain words of the phrase with examples in section 362, and in other sections of the Code, in which Congress distinguishes between property of the debtor and property of the estate.⁶³ As in *Paschal*, the court also gave considerable significance to the fact that Congress used different language in the parallel stay termination provision in section 362(c)(4)(i), relying upon the statutory construction doctrine 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.”⁶⁴ This led the court to conclude that the stay terminates under section 362(c)(3) only with respect to actions taken against the debtor and property of the debtor, but not against property of the estate.⁶⁵ Because the court found the language to be

59. 11 U.S.C.A. § 362(c)(3)(A).

60. 339 B.R. 360 (Bankr. E.D.N.C. 2006).

61. *Id.* at 361.

62. *Id.* at 363.

63. For example, the *Jones* court noted:

[s]ection 362(a)(1) stays actions or proceedings ‘against the debtor;’ § 362(a)(2) stays enforcement of a judgment ‘against the debtor or against property of the estate;’ § 362(a)(3) stays ‘any act to obtain possession of property of the estate or of property from the estate;’ § 362(a)(4) stays ‘any act to create, perfect, or enforce any lien against property of the estate;’ § 362(a)(5) stays ‘any act to create, perfect, or enforce against property of the debtor any lien’ to the extent it secures a prepetition claim; and § 362(a)(6) stays ‘any act to collect, assess, or recover a claim against the debtor . . .’

Id. at 363-64. Finally, the court noted that section 521(a)(6) requires the termination of an automatic stay “with respect to the personal property of the estate or of the debtor” if the debtor does not timely reaffirm or redeem property. *Id.* at 364.

64. *Id.* at 364 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal quotation marks and alterations omitted)).

65. *Id.* at 365. See also *In re Moon*, 339 B.R. 668, 671 (Bankr. N.D. Ohio 2006) (“Had the drafters of this provision intended that the whole of the automatic stay would terminate, they could have easily just referenced § 362(a) as they did in

clear, it did not consider legislative history that might have suggested a different result.⁶⁶ And as the final element of the court's analysis, it noted that there were policy arguments supporting this construction, such as preserving property of the estate, which is often essential for the success of debtors' Chapter 13 plans and for the protection of creditors in Chapter 7 cases.⁶⁷

C. "Exigent Circumstances"

To be eligible under section 109(h)(3) for a waiver of the prepetition credit counseling requirement, each of the following three requirements must be satisfied: (1) the debtor's certification must describe exigent circumstances that merit a waiver; (2) the certification must state that the debtor requested credit counseling services from an approved agency, but the debtor was not able to obtain the services during the five-day period beginning on the date of the request; and (3) the certification must be satisfactory to the court.⁶⁸ Several initial decisions have sought to construe the "exigent circumstances" language.

In *In re Cleaver*,⁶⁹ the debtor filed a motion indicating that his bankruptcy had been filed on an emergency basis because of a pending sheriff's sale of his home that was "scheduled for tomorrow."⁷⁰ The court initially noted that although several of the waiver requirements in section 109(h)(3) were clear, the statute was ambiguous on the scope of "exigent circumstances."⁷¹ Finding no definition in the Bankruptcy Code, the court referred to *Black's Law Dictionary*, which defines the phrase as "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures"⁷² Although the debtor may have had sufficient opportunity to obtain counseling and seek bankruptcy relief before the sale, given that judicial foreclosures in Ohio take many months to complete, the court nevertheless found that the imminent sale satisfied the "exigent circumstances" requirement:

It can be argued that the exigency in this case is self-created. After all, foreclosures in Ohio follow a lengthy judicial process, typically

§ 362(c)(4)(A) ('the stay under subsection (a) shall not go into effect upon the filing of the later case').").

66. See *Moon*, 339 B.R. at 672 (noting the regrettable absence of legislative history pertaining to Congress's intent regarding the meaning of section 362(c)(3)).

67. *Id.*

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

69. 333 B.R. 430 (Bankr. S.D. Ohio 2005).

70. *Id.* at 434.

71. *Id.* at 435.

72. BLACK'S LAW DICTIONARY 260 (8th ed. 2004).

lasting several months before the gavel finally falls at a sheriff's sale. Mr. Cleaver might have filed his bankruptcy a week, two weeks, or even a month earlier thus allowing sufficient time to obtain the briefing. However, the common reality is that many debtors file at the last minute just before a foreclosure sale or the loss of their money or possessions to creditors. Furthermore, it is difficult to conceive of any exigent circumstances related to bankruptcy that would not involve impending creditor action. Absent some sort of immediate collection activity, there is no urgency affecting the timing of a bankruptcy filing. Consequently, the immediacy of the foreclosure sale in this case appears to be exactly the sort of exigent circumstance contemplated by the statute.⁷³

The *pro se* debtor in *In re LaPorta*⁷⁴ filed a statement with her petition noting that she had checked the U.S. Trustee's website to locate a counseling agency and determined that "what [was] listed was way beyond the territory [she could] afford to travel for time and distance, and gas prices."⁷⁵ She filed a separate document stating that her automobile was "up for repossession."⁷⁶ The court held that the debtor was not entitled to a waiver under section 109(h)(3) because she never actually made a request for services to an approved agency.⁷⁷ In a more troubling finding, the court questioned whether the debtor had established exigent circumstances because her Chapter 7 filing would only "defer the enforcement" of the automobile lien, predicting that the lender would eventually obtain stay relief.⁷⁸ The court suggested that there would need to be some showing by the debtor that the automobile lender was willing to make "significant concessions" on the loan arrearage, since otherwise "there is nothing to support a conclusion that the Debtor must file now to gain some permanent benefit"⁷⁹ Requiring the debtor to prove some "permanent benefit" resulting from the bankruptcy filing or forecast the post-petition treatment of a secured creditor goes well beyond the plain meaning of "exigent circumstances" and surely is not contemplated by section 109(h)(3).⁸⁰

73. Cleaver, 333 B.R. at 435; *see also In re Hubbard (Hubbard III)*, 333 B.R. 377, 384 (Bankr. S.D. Tex. 2005) (discussing that while automobile repossession and pending foreclosure sale are deemed sufficient exigent circumstances, an "upcoming sequestration hearing" involving an automobile where debtor failed to allege specific facts describing emergency is not).

74. 332 B.R. 879 (Bankr. D. Minn. 2005).

75. *Id.* at 880.

76. *Id.*

77. *See id.* at 883 (noting that Congress expressly stated that individuals who did not follow these procedures could not be considered debtors).

78. *Id.* at 882.

79. *Id.*

80. *See In re LaPorta*, 332 B.R. 879, 883 (Bankr. D. Minn. 2005) (clarifying that

Unlike the “exigent circumstances” language, courts have found the balance of the waiver section provisions to be clear and have felt compelled to enforce them as written.⁸¹ In *In re Gee*,⁸² the debtor filed a Chapter 13 petition and certification requesting a temporary waiver of the counseling requirement based on a foreclosure sale of the debtor’s home scheduled for 2:00 p.m. on the filing date.⁸³ Although the court easily found that exigent circumstances existed, the debtor’s certification was fatally defective in that it failed to state that counseling services were requested but were unable to be obtained within a five-day period.⁸⁴

The debtor in *In re Davenport*⁸⁵ argued that her failure to satisfy the strict requirements of the statute could be excused on equitable grounds.⁸⁶ The debtor established that exigent circumstances existed at the time the petition was filed, by showing that a creditor was attempting to repossess the family’s automobile and only means of transportation.⁸⁷ However, the debtor did not certify that she had requested credit counseling before filing.⁸⁸ Instead, the debtor urged the court to use its equitable powers to waive the requirement, arguing that she had actually completed the counseling after the case was filed.⁸⁹ The court held that it could not disregard the three requirements in section 109(h)(3) and dismissed the case.⁹⁰

The court reached a similar result when the debtor in a Chapter 11 case argued, after his request for a waiver under section 109(h)(3) had been rejected for failure to request counseling services pre-petition, that the counseling requirement was unconstitutional. The

although a court may waive the requirement that a debtor obtain credit counseling pre-petition, it is still necessary that the debtor meet the requirements of section 109(h)(3)(A) “in their exacting detail”).

81. See *In re Hubbard (Hubbard I)*, 332 B.R. 285, 288 (Bankr. S.D. Tex. 2005) (“The Court sees no ambiguity in the statute.”).

82. 332 B.R. 602 (Bankr. W.D. Mo. 2005).

83. *Id.* at 603.

84. *Id.* at 603-04 (declining to ignore or relax the requirements stated in section 109). Accord *In re Cleaver*, 333 B.R. 430, 435 (Bankr. S.D. Ohio 2005); *In re Talib*, 335 B.R. 417, 420 (Bankr. W.D. Mo. 2005); *In re Wallert*, 332 B.R. 884, 887-88 (Bankr. D. Minn. 2005); *In re Warden*, No. 05-23750, 2005 WL 3207630, at *2 (Bankr. W.D. Mo. Nov. 22, 2005); *In re Randolph*, No. 05-15752-3P7, 2005 WL 3408043, at *1 (Bankr. M.D. Fla. Dec. 2, 2005).

85. 335 B.R. 218 (Bankr. M.D. Fla. 2005).

86. See *id.* at 221 (declining to disregard statutory requirements despite the debtor’s arguments based in equity).

87. *Id.*

88. *Id.*

89. *Id.*

90. See *id.* (pointing to the “emerging view” that a bankruptcy court may only excuse compliance based on the three requirements of section 109(h)(3)).

debtor in *In re Watson*⁹¹ contended that the counseling requirement denied equal protection of the law to individuals like him who operate businesses as sole proprietorships rather than as corporations.⁹² Finding that an individual operating a business was not a suspect class and that a rational basis existed for Congress's enactment of the counseling requirement, the court rejected the equal protection argument.⁹³

Finally, the court in *Hubbard III*⁹⁴ applied the plain language doctrine of statutory construction to another provision in section 109(h)(3). The United States Trustee argued that the debtor must personally make the request for counseling services before seeking a waiver under section 109(h)(3).⁹⁵ The court found no support for this position in the statute and held that an attorney may make the request as the debtor's agent, provided that it is made on behalf of the debtor in the case and is not simply a general inquiry.⁹⁶ The U.S. Trustee also argued that the debtor may not contact only one counseling agency, suggesting that the debtor would have been able to obtain pre-petition counseling had he contacted more of the seven approved agencies in the district.⁹⁷ The court also rejected this argument based on the plain wording of the statute, noting that section 109(h)(3)(A)(ii) simply requires that the debtor have "requested credit counseling services from *an* approved . . . agency," and therefore does not require a debtor to "scour the field before determining that credit counseling is unavailable."⁹⁸

D. "Any Amount Of Interest That Was Acquired"

Section 522(p)(1) provides that the debtor may not exempt "any amount of interest that was acquired" in homestead property during the 1215-day period before the filing of the petition that exceeds the amount of \$125,000.⁹⁹ Although the facts of the case are not clearly

91. 332 B.R. 740 (Bankr. E.D. Va. 2005).

92. *See id.* at 744 (arguing that the debtor should not have to obtain credit counseling before filing a petition simply because he chose to structure his business as a sole proprietorship rather than a corporation, which does not need to obtain credit counseling).

93. *Id.* at 746 (further arguing that a mere counseling requirement does not "burden a fundamental right").

94. *In re Hubbard (Hubbard III)*, 333 B.R. 377 (Bankr. S.D. Tex. 2005).

95. *Id.* at 385.

96. *Id.*

97. *See id.* (noting, however, that a court may challenge the trustee's determination that adequate credit counseling was available to the debtor).

98. *Id.* at 387.

99. 11 U.S.C.A. § 522(p)(1) (West 2004 & Supp. 2006).

stated in the opinion, there was no dispute in *In re Blair*¹⁰⁰ that the debtors had acquired title to their homestead before the 1215-day period.¹⁰¹ The issue before the court, based on an objection to the debtors' homestead filed by an unsecured creditor, was whether the debtors were subject to the \$125,000 cap because they "continued to make regular payments and build equity in the property during the 1215 day period."¹⁰² The court initially noted: "one does not actually 'acquire' equity in a home. One acquires title to a home."¹⁰³ Applying this construction of the statutory language, the court held that the increase in value of the equity in the debtors' homestead during the 1215-day period was not subject to the \$125,000 cap in section 522(p).¹⁰⁴ To bolster the statutory construction position, the court found its holding to be consistent with the legislative history, noting that section 522(p) was intended to restrict the "mansion loophole."¹⁰⁵

E. "Previous Principal Residence"

The \$125,000 cap imposed by section 522(p)(1) does not apply to any interest transferred from a debtor's "previous principal residence" to the debtor's current principal residence if the debtor's previous residence was acquired before the 1215-day period and both the previous and current residences are located in the same state.¹⁰⁶ The question in *In re Wayrynen*¹⁰⁷ was whether this "safe harbor" provision applies only to the most recent previous residence.¹⁰⁸ The debtor purchased his first home prior to the 1215-day period.¹⁰⁹ That home was later sold and the debtor purchased a second home 966

100. 334 B.R. 374 (Bankr. N.D. Tex. 2005).

101. *Id.* at 376-77.

102. *Id.* at 375.

103. *Id.* at 376.

104. *Id.* at 378.

105. *Id.* at 377. The House Report on the 2005 Act, in referring to the change in the domiciliary requirement in section 522(b)(3)(A), states:

Under current bankruptcy law, debtors living in certain states can shield from their creditors virtually all of the equity in their homes. In light of this, some debtors actually relocate to these states just to take advantage of their 'mansion loophole' laws. S.256 [BAPCPA] closes this loophole for abuse by requiring a debtor to be a domiciliary in the state for at least two years before he or she can claim that state's homestead exemption; the current requirement can be as little as 91 days.

H.R. REP. NO. 109-31, pt.1, at 15-16 (2005).

106. 11 U.S.C.A. § 522(p)(2)(B) (West 2004 & Supp. 2006).

107. 332 B.R. 479 (Bankr. S.D. Fla. 2005).

108. *See id.* at 486 (examining whether such an interpretation of the statutory language, "previous principal residence," is too narrow).

109. *See id.* at 485 (providing a chart setting out the relevant dates and facts in this case).

days pre-petition.¹¹⁰ Just prior to filing bankruptcy, the debtor sold the second home and purchased his current residence.¹¹¹ All of the homes were located in Florida.¹¹² The Trustee argued there was \$25,000 in nonexempt equity in the current residence based on the \$125,000 cap because the home was purchased within 1215 days, and section 522(p)(2)(B) did not apply because the first home could not be considered the debtor's "previous principal residence."¹¹³ The court rejected the Trustee's "narrow" construction of the statute, finding that it was intended to prevent debtors from relocating to "debtor-friendly" states and that the "safe harbor" in section 522(p)(2)(B) was intended to protect individuals like the debtor who "simply have benefited as a result of their ownership of Florida real property and the general appreciation of property values attributable to previous intra-state transactions."¹¹⁴

IV. CONFUSING CONJUNCTIONS

A. "Delay, Hinder and Defraud Creditors"

The automatic stay is not applicable as to the enforcement of a lien against, or security interest in, real property if an *in rem* order relating to the property has been entered in a prior case under new sections 362(b)(20) and 362(d)(4).¹¹⁵ An *in rem* order may be granted if a creditor proves that (1) the filing of the petition was part of a scheme to delay, hinder *and* defraud creditors, and (2) the scheme involved either the transfer of full or partial interests in the property without the approval of a secured creditor on the property or the bankruptcy court, or multiple bankruptcy filings involving the same property.¹¹⁶

Prior to the enactment of section 362(d)(4), the phrase "hinder, delay *or* defraud" a creditor was found in sections 101(23), 548(a) and 727(a)(2). This same "hinder, delay *or* defraud" phrase was also added to the Code by the 2005 Act in new sections 522(o) and

110. *Id.*

111. *Id.*

112. *Id.*

113. *In re* Wayrynen, 332 B.R. 479, 486 (Bankr. S.D. Fla. 2005).

114. *Id.*

115. 11 U.S.C.A §§ 362(b)(20), 362(d)(4) (West 2004 & Supp. 2006). If the court enters an *in rem* order and the order is properly recorded, the stay does not apply with respect to the property in a later case filed within two years after the date of the order.

116. See, e.g., *In re* Abdul Muhaiman, No. 05-90314-SD, 2006 WL 1153898, at *4 (Bankr. D. Md. 2006) (explaining that a court must affirmatively find that these elements, along with fraud, are present in order to grant an *in rem* order).

548(e).¹¹⁷ Significantly, in all of these provisions other than the stay relief provision in section 362(d)(4), the words in the phrase are joined by the conjunction “or” rather than “and.”

Courts will undoubtedly struggle with whether this was intentional or the product of a drafting error. If the plain words are applied, the burden of proof on a secured creditor will be substantial. Given the drastic nature of *in rem* relief, however, it is certainly plausible that Congress did purposely select this language so that such *in rem* orders would be entered only in the rare case in which a creditor can prove that the debtor’s filing of the petition was part of a scheme not only to hinder and delay, but also to defraud the creditor.¹¹⁸

B. “Willful and Malicious”

Section 1328(a)(4) creates a new type of Chapter 13 non-dischargeability for an award of restitution or damages in a civil action against the debtor, based on “willful or malicious” injury by the debtor that caused personal injury or death of an individual.¹¹⁹ Since section 523(a)(6) was not made applicable in Chapter 13 cases, “willful and malicious” injury to property or to an individual that has not been awarded restitution or damages continues to be dischargeable in Chapter 13.¹²⁰ While it is not clear that the “willful *or* malicious” requirement in the new provision will be much different than the “willful *and* malicious” test under current § 523(a)(6),¹²¹ it seems unlikely that Congress intended to impose a potentially less stringent standard for non-dischargeability in Chapter 13 cases, given its purported preference for having debtors file under Chapter 13 rather than Chapter 7.¹²²

C. Conjunctive “And” or Disjunctive “Or”

When Congress changes the conjunction “or” to “and,” joining a list of items in an existing statute, should we assume this was done by

117. 11 U.S.C.A. §§ 522(o), 548(e) (West 2004 & Supp. 2006).

118. Perhaps it is noteworthy that Congress changed the order of the words, leading with “delay” in section 362(d)(4), and “hinder” in the other sections, suggesting that Congress may have intended the phrase to have a different meaning.

119. 11 U.S.C.A. § 1328(a)(4) (West 2004 & Supp. 2006).

120. 11 U.S.C.A. § 523(a)(6) (2000) (West 2004 & Supp. 2006).

121. See *Kawaauhau v. Geiger*, 118 S. Ct. 974, 977-78 (1998) (finding that the word “willful” modifies the word “injury,” which suggests an act must be intentional, rather than merely reckless or negligent, regardless of whether or not malice is present).

122. See, e.g., Robert J. Bein, *Subjectivity, Good Faith and the Expanded Chapter 13 Discharge*, 70 MO. L. REV. 655, 668 (2005) (arguing that, in drafting BAPCPA, Congress intended to create incentives for a greater number of debtors to pursue relief under Chapter 13 rather than Chapter 7).

design? The substitution of the disjunctive “or” for the conjunctive “and” in section 1112(b) makes clear that the drafting problems in the 2005 Act are not limited to the consumer provisions.

Section 1112(b) provides for the dismissal or conversion of a Chapter 11 case for cause.¹²³ Prior to the 2005 Act, the statute contained a list of ten factors a moving party could rely upon in establishing “cause.”¹²⁴ Because the conjunction “or” was used, a court could dismiss or convert the case if only one of the listed factors for cause was proven. The statute was amended in 2005 to expand the list to sixteen factors and to replace the “or” with “and.”¹²⁵

The court in *In re TCR of Denver, LLC*¹²⁶ was asked to decide whether the plain words of the amendment should be given effect, thereby requiring that all of the factors establishing cause must now be shown.¹²⁷ Unlike many of the early decisions construing the 2005 Act, the court was not confronted with a close call and quickly recognized that strict application of the plain meaning rule would produce a nonsensical result.¹²⁸ Requiring proof of all sixteen factors, some of which apply only to individual Chapter 11 debtors, would render the provision meaningless as virtually no corporate Chapter 11 could ever be dismissed for cause. The court succinctly describes the amendment as follows:

This is a case where the language of BAPCPA passed by Congress tends to defy logic and clash with common sense. This is an example of a specific revision to the Bankruptcy Code, if followed by the Court and applied as Congress seems to intend—*i.e.*, by way of strict construction—would result in an absurd decision and totally unworkable legal precedent.¹²⁹

V. SCRIVENER’S ERRORS

A. “As a Result of Electing”

Of the three new homestead limitations added by the 2005 Act, both sections 522(p) and (q) use language different from that found in section 522(o), in describing when the limitations apply. Sections

123. 11 U.S.C.A. § 1112(b) (West 2004 & Supp. 2006).

124. 11 U.S.C. § 1112(b) (2000), *amended by* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

125. 11 U.S.C.A. § 1112(b).

126. 338 B.R. 494 (Bankr. D. Colo. 2006).

127. *Id.* at 497.

128. *See infra* note 129 and accompanying text (describing the court’s estimation of the Bankruptcy Code revisions).

129. *TCR of Denver*, 338 B.R. at 495-96.

522(p) and (q), unlike section 522(o), state that the provisions apply only “as a result of electing under subsection (b)(3)(A) to exempt property under State or local law.”¹³⁰ Thus, in order to give meaning to the plain words of the phrase “as a result of electing,” the court in *In re McNabb*¹³¹ held that sections 522(p) and (q) are applicable only in states which have not opted out of the federal exemption scheme, because non-opt out states are the only states in which an “election” is available.¹³²

The *McNabb* holding and rationale were promptly rejected in a series of opinions. In *In re Kaplan*,¹³³ the court found that although the construction of the statutory language set forth in *McNabb* “is supportable based on the language as drafted,” it should be rejected because of clear legislative intent to the contrary.¹³⁴ Interestingly, the *Kaplan* court resorted to a review of the legislative history without clearly demonstrating that the “electing” language was ambiguous or that the *McNabb* construction was absurd.¹³⁵ Citing several references in the legislative history suggesting that Congress’ intent was to restrict the “mansion loophole,” the court held that the statute should be construed as applying in all states, even opt-out states.¹³⁶

The *McNabb* and *Kaplan* approaches were both rejected in *In re Virissimo*.¹³⁷ Reaching the same holding as *Kaplan*, however, the *Virissimo* court attempted to do so in a manner consistent with the statute’s plain meaning, by finding that there is an “election” of sorts for all debtors, even those in opt-out states, though the “election may become ineffective if the debtor chooses a federal exemption in an opt-out state”¹³⁸ This construction of the existing language in section 522 permitted the court to reach a result in accordance with

130. 11 U.S.C.A. §§ 522(p)(1), 522(q)(1) (West 2004 & Supp. 2006).

131. 326 B.R. 785 (Bankr. D. Ariz. 2005).

132. *Id.* at 788.

133. 331 B.R. 483 (Bankr. S.D. Fla. 2005).

134. *Id.* at 486.

135. *Cf. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (“[W]hen the statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.”) (internal quotation marks omitted) (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989)).

136. *See Kaplan*, 331 B.R. at 488 (finding no evidence in the statute’s legislative history that would lead the court to conclude that Congress intended the new provisions to apply in some non opt-out states and not others). *Accord In re Landahl*, 338 B.R. 920, 922 (Bankr. M.D. Fla. 2006) (reviewing legislative history to conclude that Congress intended to close the “mansion loophole” in all states); *In re Wayrynen*, 332 B.R. 479 (Bankr. S.D. Fla. 2005) (concluding that legislative history demonstrates that Congress intended the section 522(p)(1) limitations to apply to all debtors).

137. 332 B.R. 201, 205-06 (Bankr. D. Nev. 2005).

138. *Id.* at 205.

the new provision's apparent intent without relying upon legislative history.

Finally, the court in *In re Kane*¹³⁹ rejected the *McNabb* holding by staking out yet another approach to the statutory construction dilemma posed by the "electing" language. Following a detailed discussion of the court's authority to reform a statute when confronted with a certain scrivener's error, the *Kane* court concluded that Congress should be saved from its apparent drafting error by effectively striking the "electing" language from the statute.¹⁴⁰ Curiously, although the statutory construction argument is well-researched and carefully laid out, the court did not discuss the most recent decision of the Supreme Court addressing scrivener's errors in the context of bankruptcy legislation. The *Lamie v. U.S. Trustee*¹⁴¹ decision makes clear that courts should rarely find that such errors exist, particularly when there is at least some reasonable interpretation of the language. As *Lamie* instructs, a statute may be "awkward, and even ungrammatical; but that does not make it ambiguous."¹⁴²

The *Virissimo* court offers one such plausible construction of the language. Another explanation for the "electing" language, not yet considered by any of the cases, is that Congress intended the new homestead limitations to apply when the debtor elects to exempt homestead property under section 522(b)(3)(A), but not when the debtor elects to exempt under section 522(b)(3)(B) (formerly section 522(b)(2)(B)) homestead property held as a tenant by the entirety or by joint tenancy, if that interest is exempt from process under nonbankruptcy law. The existence of section 522(b)(3)(B) points to another form of election available to debtors. Moreover, the exemption under section 522(b)(3)(B) is available to debtors in all states to the extent recognized by state law, even in opt-out states, and would therefore suggest a reason why Congress may have included the "electing" language.

CONCLUSION

Congress, not the courts, should take on the monumental task of fixing the numerous drafting errors in the 2005 Act. This time, however, it is essential that Congress shun the efforts of lobbyists to

139. 336 B.R. 477 (Bankr. D. Nev. 2006).

140. See *id.* at 489 (supporting this conclusion by stating that "the scrivener's error is obvious from the extensive record and from common sense").

141. 540 U.S. 526 (2004).

142. *Id.* at 534.

provide actual statutory language.¹⁴³ Rather, Congress must permit the legislation to be vetted in the time-honored tradition of bankruptcy legislation in which the comments of practitioners, scholars and bankruptcy judges are considered. Until such time, though, participants in the bankruptcy system must look for ways to work around the numerous problems in the current legislation and should ignore the statutory language only in rare circumstances.

143. One commentator has noted that “[i]n contrast to the 1978 legislation, which was crafted with extensive assistance from many of the finest minds in the bankruptcy world, many of the consumer provisions of the 2005 legislation were largely drafted by lobbyists with limited knowledge of real-life consumer bankruptcy practice.” Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 AM. BANKR. L.J. 191, 191-92 (2005).