CONSUMER WORKSHOP II:

AUTOMATICS, STAYS, DISMISSALS AND ETHICAL TRAPS FOR THE UNWARY

Presentation to the American Bankruptcy Institute
12th Annual Rocky Mountain Bankruptcy Conference

January 25-27, 2007

Written Materials Prepared By:

David Berry
Berry & Tripp
5296 South 300 West, Suite 200
Salt Lake City, UT 84107
Telephone: (801) 265-0700
berryandtripp@aros.net

Hon. Elizabeth E. Brown
United States Bankruptcy Judge
United States Bankruptcy Court
721 19th St
Denver, CO 80202-2508
Telephone: (720) 904-7300

Michael R. Johnson
Snell & Wilmer LLP
Gateway Tower West
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
Telephone: (801) 257-1903
mrjohnson@swlaw.com

Duane H. Gillman
Michael F. Thomson
Durham Jones & Pinegar
111 East Broadway, Suite 900
Salt Lake City, UT 84111
Telephone: (801) 415-3000
dgillman@djplaw.com

(Written materials will be covered by panel discussion)

1.A. Updates. Automatic Dismissal on the 46th day for failure to file documents.

In re Rubio, CASE NO: 06-50065, CHAPTER 13 , UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION , 2006 Bankr. LEXIS 2846, Decided September 25, 2006. Pursuant to 11 U.S.C.S. § 521, a debtor's failure to file payroll records within 45 days of filing his bankruptcy petition resulted in the automatic dismissal of his case. Even if the debtor had timely submitted the records to the former trustee, such submission did not satisfy the requirement to file the records with the court.

In re Riddle, CASE NO. 06-11313-BKC-AJC, Chapter 7 , UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION , 344 B.R. 702; 2006 Bankr. LEXIS 1389, Decided July 17, 2006. A Chapter 7 case was not subject to automatic dismissal under 11 U.S.C.S. § 521(i)(1), (2) because the information required by 11 U.S.C.S. § 521(a)(1), and provided by debtors, was complete. This is an entertaining tongue in cheek sua sponte look at the effects of the automatic dismissal requirements.

In re Copeland, CASE NO. 06-32116-H3-7 , UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION , 2006 Bankr. LEXIS 2200, Decided September 5, 2006. The debtors in a Chapter 7 case with primarily business debts were required to file an Official Bankr. Form B22A, the statement of current monthly income and means test calculation, or to have their case dismissed under 11 U.S.C.S. § 521(a)(1)(B)(v), which required a statement of currently monthly income. The Court allowed the debtor 15 days from the hearing date to comply.

In re Norton, Case No. 06-30893 , UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE , 347 B.R. 291; 2006 Bankr. LEXIS 1788; Bankr. L. Rep. (CCH) P80,705, Decided August 2, 2006. Chapter 7 trustee's motion to extend the time in which the debtor had to perform her stated intentions with respect to a secured vehicle, as required under 11 U.S.C.S. § 521(a)(2), and to extend the automatic stay, was granted because the car was of consequential value and the secured creditor's claim was adequately protected by an equity cushion.

In re Jackson, 348 B.R. 487 (Bankr. S.D. Iowa 2006). 11 U.S.C.S. § 521(i)(1) provides that a voluntary Chapter 7 consumer case must be automatically dismissed on the 46th day after the date of the filing of the petition if the debtor failed to file all the information required under § 521(a)(1) in the interim. Debtors acknowledged that the record as of the 45th day after the petition date was missing at least one of the payment advices required by § 521(a)(1)(B)(iv). Nevertheless, they contended their case should be reinstated because the omission was due to an incorrectly numbered payment advice received from one of their employers and they promptly corrected the error upon discovering it. The court vacated its earlier Order and Notice of Dismissal, but not for the reason advanced by debtors. That is, while the record might have supported debtors' excusable neglect argument, that argument was neither relevant nor material. Rather, the court concluded it should not have acted sua sponte because no party in interest filed a § 521(i)(2) request that it enter an order of dismissal. The Court concludes that the §521(a)(1) automatic dismissal provisions are not truly automatic, and that the Court would only dismiss a

case after 5 days of notice of hearing brought by another party (including the Trustee) in the future.

In re Landers, 2006 Bankr. LEXIS 2272 (Bankr. D. Utah Sept. 11, 2006). The debtor's second amended plan came for hearing. The debtor testified that he believed he had filed all the required bi-weekly payment advices that he received from his employer and that he did not recall whether he received an advice for April 30, 2006. The court found that, because the April 30 payment advice had not been timely filed as required by § 521(a)(1)(B)(iv), the debtor's case was automatically dismissed under § 521(i)(1), effective August 9, 2006, the 46th day after the June 24, 2006, bankruptcy filing. The court held that § 521(a)(1)(B)(iv) dealt only with objective facts and did not rely on the debtor's subjective belief as to what he had done.

In re Wilkinson, 346 B.R. 539 (Bankr. D. Utah 2006). Debtor filed a Chapter 13 petition and on the same day attempted to comply with 11 U.S.C.S. § 521(a)(1)(B)(iv)by filing pay advices received from her employer, purportedly for pay periods covering July 10, 2005 through February 4, 2006. The court's review of the case in preparation for the confirmation hearing revealed that one pay advice for the pay period January 8, 2006 through January 21, 2006 was missing from the pay advices filed with the court. In its place, an apparently erroneous pay advice covering January 9, 2005 through January 22, 2005 had been filed. The court held that the failure to timely file all advices required automatic dismissal of the case under § 521(i)(1), and that there was no requirement that a request for a dismissal order be filed pursuant to § 521(i)(2). The court also held that it did not have the authority under 11 U.S.C. §105 to override the automatic dismissal mandate under § 521(i)(1). The court further held that Fed. R. Civ. P. 60(b) could not be used to bypass the strict statutory scheme established by 11 U.S.C.S. § 521(a)(1) and § 521(I).

In re Hess, Chapter 7 Case # 06-10068, Chapter 7 Case # 06-10026 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF VERMONT , 347 B.R. 489; 2006 Bankr. LEXIS 1713; Bankr. L. Rep. (CCH) P80,685, Decided August 14, 2006. A bankruptcy court determined that there were extraordinary circumstances present so that the court should exercise its discretion and not dismiss two petitions filed without the requisite certificate of credit counseling under 11 U.S.C.S. § 109(h)(1); each petitioner had complied with the statute in substance within 30 days thereafter.

1.B Updates: Credit Counseling Certificate Issues – §109(h).

1. Credit counseling is required pre-petition. General.

In re Raymond, 2006 WL 1047033 (Bankr.D.N.H. 2006). Court has the power to waive filing fee for indigent debtor, but cannot waive the §109(h) pre-petition credit counseling requirement.

Ignorance of a Pro Se debtor is not sufficient to waive pre-petition §109(h) requirement: In re Ashley, 2006 Bankr. LEXIS 354 (Bankr.E.D. Va. 2006)(Pro se's claim of ignorance is not

sufficient - dismissal results); In re Valdez, 335 B.R. 801 (Bankr. S.D.Fla. 2005)(Pro se debtor's ignorance is no excuse - dismissal results).

But see In re Bass, 2006 WL 1593978 (Bankr.W.D. Tenn. June 9, 2006). Pro se debtor filed a "Notice of Continuance" 2 weeks after Petition date to extend time for pre-petition credit counseling. The Court gave the debtor latitude to take the credit counseling and file the resultant credit counseling certificate more than 45 days after the Petition date under a totality of the circumstances test.

In re Bricksin, 2006 Bankr. Lexis 1624 (Bankr. N.C.Cal. July 26, 2006). Court denies motion to dismiss case where credit counseling certificate filed 30 days after petition date, even though no official credit counseling occurred until after the petition date; court relied on fact that debtors had received extensive credit counseling – albeit not the same counseling required by BAPCPA – pre-petition, and that debtors had been making repayments to creditors under a payment plan within 180 days prior to the petition date.

In re Morales, 2006 Bankr. LEXIS 1562 (Bankr. E.D.N.Y. May 24, 2006). The debtor, a single working mother with three children, filed a petition for bankruptcy relief under Chapter 7 and was represented by counsel. The debtor claimed that she was unable to obtain credit counseling because she could not pay the counseling fee because her bank account had been frozen by a judgment creditor. The debtor's counsel was not aware of the requirement under interim Fed. R. Bankr. P. 1007(b)(3) and (c) that a request for a temporary exemption of the credit counseling requirement under 11 U.S.C.. §109(h)(3) should be made at the time the petition was filed. The bankruptcy court found that exigent circumstances were established by the debtor based on the freeze placed on her bank account and the debtor spoke limited English. The debtor's reasons as to why she could not obtain the counseling within five days of her inquiry, because she could not take the time off from work and did not have the funds to pay for counseling, were satisfactory. There would be no delay in the proceedings as a result of the granting of this motion, and the debtor acted in good faith. The debtor was entitled to a finding of excusable neglect under interim Fed. R. Bankr. P. 9006(c)

In re Piontek, 2006 WL 1837905 (Bankr. W.D.Pa. July 5, 2006). Both debtors in a joint filing must take the pre-petition §109(h) counseling. The case was dismissed as to the spouse who did not take the pre-petition counseling.

In re Sukmungsa, 333 B.R. 875(Bankr.D.Ut 2005). Case dismissed and motion to set aside dismissal was denied in light of dubious if not contradictory evidence to indicate that pre-petition credit counseling had been timely requested and obtained prior to the filing of the bankruptcy petition. The Court also was not convinced that counsel had properly checked to determine that the requisite pre-petition credit counseling had been obtained and obtained. The Court declined to find that excusable neglect existed.

In re Mills, 341 B.R. 106 (Bankr.D.D.C. 2006). Two issues: (1) Debtor must timely request §109(h) credit counseling (at least one day prior to filing); and (2) A Petition filed by a debtor lacking the §109(h) credit counseling is not void ab initio, the case does exist, and therefore the case is properly dismissed and not stricken.

In re Murphy, 342 B.R. 671 (Bankr. D.D.C. 2006). Credit counseling must occur on a day before the filing of the petition, not the same day.

In re Warren, 339 B.R. 475 (Bankr.E.D.Ark.2006). The requirement for §109(h) credit counseling "during the 180-day period preceding the date of filing of the petition" is found to refer not to the day preceding the filing of the petition. Rather "the date" is found to refer to the moment preceding the filing. The Court also enlarged to file the previously unfiled certificate because the "absence of the certificate is a matter of form over substance."

In re Salazar, 339 B.R. 622 (Bankr.S.D.Tx.2006). Petitions filed without the requisite §109(h) credit counseling (and without §109(h)(3) exemptions) do not commence a case, and thus the cases are not "dismissed" but are instead stricken.

In re Rios, 336 B.R. 177 (Bankr.S.D.N.Y. 2005). Debtor did not attempt to obtain credit counseling before filing, and failed to file certification of exigent circumstances. The case was struck rather than dismissed to avoid the ramifications affecting an automatic stay in a subsequently filed case.

In re Hubbard, 333 B.R. 377 (Bankr.S.D.Tex.2005). §109(h) defect without certification of exigent circustances was found to have never commenced a case, and the petition was struck rather than dismissed).

In re Anderson, 341 B.R. 365 (Bankr. D.C. 2006). §109(h) counseling did not occur, no certification of exigent circumstances was filed, and the case was filed only to stop the execution of a writ for possession of the debtor's home. The debtor was found to have abused the system, and the stay was annulled.

In re Tomco, 339 B.R. 145 (Bankr.W.D.Pa2006). Two issues addressed: (1) An allegation of §109(h)(3) "exigent circumstances" can not give rise to a §109(h) credit counseling exemption unless the debtor actually requested and could not obtain the credit counseling prior to the filing of the Petition; and (2) Case was dismissed and not stricken.

In re Ross, 338 B.R. 134 (Bankr.N.D.Ga. 2006). §109(h) pre-petition counseling is not jurisdictional. Therefore, though the case must be dismissed, the case is dismissed and not stricken.

In re Brown, 342 B.R. 248 (Bankr.D.Md. 2006). A case filed with inexcusable and unwaived §109(h) credit counseling defect still imposes the automatic stay until the case is dismissed, thereby invalidating an intervening foreclosure sale by a creditor who knew the bankruptcy had been filed.

In re Dixon, 338 B.R. 383 (8th Cir.BAP2006). Leaving the request for credit counseling until the last minute does not give rise to "exigent circumstances" despite the imminent foreclosure of the debtors home since the debtor had 20 notice of the exact foreclosure date. The Court discussed and then dismissed the case instead of the striking the case.

In re Wallace, 338 B.R. 399 (Bankr.E.D. Ark 2006). Case dismissed for failure to obtain §109(h) credit counseling until 7 days after filing when debtor failed file a certificate alleging §109(h)(3) exigent circumstances and failed to allege she had attempted to obtain credit counseling pre-petition.

In re Cleaver, 333 B.R. 430 (Bankr.S.D.Ohio2005). Imminent home foreclosure sale constitutes exigent circumstances despite the late action of debtor in filing bankruptcy. However, the failure of the debtor to plead he attempted to obtain requisite §109(h) credit counseling pre-petition resulted in dismissal of the case.

Hedquist v. Fokkena (In re Hedquist), 342 R.R. 295 (8th Cir. B.A.P. 2006). Debtor failed to seek §109(h) credit counseling before filing. Debtor alleged that they were attempting to work out a settlement of the mortgage arrearages to avoid foreclosure. The Court found that the debtors did not meet the §109(h)(3)(B) requirements.

In re Westenberger, 2006 WL 1105008 (Bankr. S.D.Fla. 2006). Social Security pensioner's bank account was frozen, and he could not pay for the credit counseling. Exigent circumstances were found to exist.

In re Curlington, 2005 WL 3752229 (Bankr.E.D.Tenn 2005). Debtor's allegation of inability to pay the $50 fee for counseling is not sufficient exigent circumstance.

In re Petit-Louis, 338 B.R. 132 (Bankr.S.D.Fla. 2006). Creole speaking debtor (with only limited English language skills) could not obtain credit counseling in his language. The Court found that since meaningful credit counseling was not available to the debtor, and the exigent circumstance waiver applied.

In re Watson, 332 B.R. 740 (Bankr.E.D. Va. 2005). An individual filed Chapter 11 Petition together with a certificate of exigent circumstances and pleaded that the §109(h)(3) exigent circumstances should be read in the disjunctive of the 5-day request period requirement. The Court did not agree and dismissed the case.

In re Davey, 2006 WL 898101(Bankr.D.Vt.2006). Debtor took the credit counseling pre-petition but the credit counseling agency did not issue the certificate. The debtor filed anyway certifying the counseling had been taken. The credit counseling agency then required the debtor to take the credit counseling again after filing in order to obtain a certificate, and the debtor did so comply. The case was not dismissed as the error was found to be that of the credit counseling agency, and not the fault of the debtor.

In re Moteiro, 2005 Bankr. LEXIS 2695 (Bankr. N.D.Ga. 2005). Pro se debtor's assertion that she had a complicated case that credit counseling had been futile in the past was not sufficient to achieve waiver of §109(h) counseling requirement.

In re Sosa, 336 B.R. 113 (Bankr. W.D.Tex. 2005). Emergency filing without pre-petition credit counseling after negotiations terminated with mortgage holder was not sufficient.

In re Parker, Case No. 06-61224, Chapter 7 , UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION , 2006 Bankr. LEXIS 2236, Decided September 12, 2006. Debtor's Motion to Dismiss over the objection of the Trustee on the grounds he was ineligible to be a debtor under 11 U.S.C.S. for failure to comply with § 109(h) was denied, as he had waived the protections of that statute and was judicially estopped from arguing his ineligibility. Debtor's other Motion to Dismiss was denied, as there was no evidence that he failed to comply with 11 U.S.C.S. § 521(a)(1)(B).

2. Timing of §109(h) Credit Counseling request.

A. Many rulings find that exigent circumstances do not exist unless the debtor requested the requisite §109(h) counseling at least five days before the petition date.

In re Talib, 335 B.R. 417 (Bankr.W.D.Mo 2005). Debtor who requested §109(h) credit counseling the day before foreclosure on her home but could not obtain such requisite counseling until two days after the request was made did not qualify for the §109(h)(3) "exigent circumstances" exemption as she did not make the request on furing the 5-day period prior to the date of filing.

In re Gee, 332 B.R. 602 (Bankr.W.D. Mo. 2005). Request for §109(h) counseling 4 days beforePetition Date on eve of home foreclosure did not satisfy 5-day period requirement, and therefore exigent circumstances were not found to exist and the case was dimissed.

In re Rodriguez, 336 B.R. 462 (Bankr.D.Id. 2005). Requirement for pre-petition §109(h) waiver is prerequisite that debtor sought credit counseling and that counseling was not available for five days before the filing date.

In re Afolabi, 2006 WL 1524628 (Bankr. S.D. Ind. 2006). Sheriff's Sale pursuant to 21 days notice as required by state law gives sufficient notice to debtor that to wait until the eve of foreclosure to seek credit counseling amounts to self created exigent circumstances whether or not a five day pre-request for counseling is required. Case Dismissed.

In re Burrell, 339 B.R. 664 (Bankr. W.D. Mich. 2006). An impending foreclosure sale is an exigent circumstance, but such exigent circumstance can only result in waiver if the debtor has first requested and not been able to obtain the necessary §109(h) credit counseling within 5 days before the Petition date.

In re Childs, 335 B.R. 623 (Bankr.D.Md. 2005). A debtor with a pending foreclosure sale certified that he had requested credit counseling more than 5 days before filing and that it was not available. The foreclosure sale was found to constitute exigent circumstances and the waiver was granted.

B. Other vourts may not require that a request be made 5 or more days before filing in order to allow the exigent circumstances waiver.

In re Cleaver, 333 B.R. 430 (Bankr.S.D.Ohio2005). Imminent home foreclosure sale constitutes exigent circumstances despite the late action of debtor in filing bankruptcy. However, the failure of the debtor to plead he attempted to obtain requisite §109(h) credit counseling pre-petition resulted in dismissal of the case.

In re DiPinto, 336 B.R. 693 (Bankr. E.D. Pa. 2006). The Court could not find that the 5-day period must expire before the filing of the Petition under the plain meaning of the statute. The debtor requested §109(h) credit counseling the day before filing, but could not obtain the counseling before foreclosure on the debtor's home. However, the Court found that waiting to the last minute to seek counseling and file bankruptcy when debtor had 20 days notice of the impending foreclosure sale amounted to a self-inflicted exigent circumstance not meriting a waiver. The case was dismissed.

C. Effect of Failure to File Certificate or to Certify Exigent Circumstances.

In re Mingueta, 338 B.R. 833 (Bankr. C.D.Cal. 2006). Failure to provide certification of exigent circumstances to justify waiver does not satisfy §109(h)(3) and the case was dismissed.

The following cases were dismissed for failure to certify that they had attempted to obtain §109(h) counseling pre-petition, but could not: In re Childs, 335 B.R. 623 (Bankr.D.Md. 2005)(only one of the five debtors properly certified the pre-petition request and so the other four cases were dismisssed); In re DiPinto, 336 B.R. 693 (Bankr. E.D. Pa. 2006); In re Fields, 337 B.R. 173 (Bankr.E.D. Tenn. 2005)(all five cases were dismissed as none of them certified an attempt to obtain counseling pre-petition); In re Tomco, 339 B.R. 145 (Bankr.W.D.Pa2006); In re Randolph, 342 B.R. 633 (Bankr.M.D.Fla. 2005); In re Williams, 2005 WL 3752226 (Bankr.E.D.Ark. 2005)(debtor is given four days to supplement his motion by providing a certification of exigent circumstances before the case is dismissed); In re Cleaver, 333 B.R. 430 (Bankr.S.D.Ohio2005).

D. Statement of the debtor of exigent circumstances and unavailable counseling is required.

The following cases were dismissed for failure of the debtor to swear under penalty of perjury as to the unavailability of timely pre-petition credit counseling and exigent circumstances: In re Rodriguez, 336 B.R. 462 (Bankr.D.Id. 2005); In re Cobb, 343 B.R. 204 (Bankr.E.D.Ark. 2006); In re Hubbard, 333 B.R. 373 (Bankr.S.D.Tex.2005); In re LaPorta, 332 B.R. 879 (Bankr. D.Minn. 2005)(unsworn statement that convenient and free or affordable counseling was not available was insufficient);; In re DiPinto, 336 B.R. 693 (Bankr. E.D. Pa. 2006)(debtor must sign the sworn certification and the attorney's signature alone is insufficient).

Other Courts have found that unsworn statements signed by the debtor are sufficient if they are substantively sufficient: In re Talib, 335 B.R. 417 (Bankr. W.D.Mo. 2005)(The certification need not be signed under penalty of perjury, but must be presented for a proper purpose)(reconsideration denied 335 B.R. 424); In re Childs, 335 B.R. 623 (Bankr.D.Md. 2005)(Certification need not be under oath); In re Postlethwait, 2006 Bankr. LEXIS 2098 (Bankr. W.D. Pa. Sept. 12, 2006)(A request for a temporary exemption is not signed under the penalties of perjury. But like any other filing signed by an attorney or a party who is not represented by an attorney, it may not be presented for any improper purpose, and must have evidentiary support); In re Graham, 336 B.R. 292 (Bankr. W.D.Ky. 2005)(unsworn statement from debtor was sufficient, but the statement was insufficient and the debtor was given 15 days to amend).

3. §521 Payment Advice Issues.

In re Rubio, CASE NO: 06-50065, CHAPTER 13 , UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF TEXAS, LAREDO DIVISION , 2006 Bankr. LEXIS 2846, Decided September 25, 2006. Pursuant to 11 U.S.C.S. § 521, a debtor's failure to file payroll records within 45 days of filing his bankruptcy petition resulted in the automatic dismissal of his case. Even if the debtor had timely submitted the records to the former trustee, such submission did not satisfy the requirement to file the records with the court.

In re Landers, Bankruptcy Number: 06-22265, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF UTAH , 2006 Bankr. LEXIS 2272, Decided September 11, 2006. Debtor's Chapter 13 case was automatically dismissed 46 days after the bankruptcy filing because his testimony that he always received payment advices for each bi-weekly paycheck but could not recall receiving the late-filed advice showed by a preponderance of evidence that the advice was not timely filed under 11 U.S.C.S. § 521(a)(1)(B)(iv).

4. §521 Tax Return Issues.

In re Norton, 347 B.R. 291 (Bankr. E.D. Tenn. 2006). § 521(e)(2) "expressly states that debtors "shall" provide their most recent tax return to the trustee "no later than" one week prior to the first date set for the first meeting of creditors, and if the debtor does not do so, the court "shall" dismiss the case "unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor." 11 U.S.C. § 521(e)(2). This language does not instruct or authorize the Trustee to file a motion requesting an extension of time to allow compliance. Nowhere within this provision are motions or extensions mentioned. Similarly, based upon the clear wording of § 521 (e)(2)(B), the court has little discretion, and, in fact, the statute clearly provides that it is only the Debtor who may prevent dismissal for failure to comply with subsection (e)(2)(A). Other than being the party to whom the tax return is to be provided, the Trustee is not implicated in this statute. There is simply nothing within § 521(e)(2) to allow the Trustee to request an extension on the Debtor's behalf. An Order to Show Cause is issued to the Debtor to show cause why the case should not be dismissed."

In re Gessner-Elfman, 2006 Bankr. LEXIS 2715 (Bankr. D. Colo. Sept. 22, 2006) In each of the cases, the debtors did not provide the Trustee with a copy of her most recent federal tax return within the time specified pursuant to 11 U.S.C.S. §521(e)(2). At the first meeting of creditors, the Trustee advised each debtor of the requirement, and in each case, the debtor promptly provided a copy of her tax return to the Trustee. Nevertheless, the Trustee explained that he was uncertain whether he had any discretion in determining whether to file a motion to dismiss under 11 U.S.C.S. § 521(e)(2). By the plain language of the statute, the court could excuse the debtors' failure to comply with 11 U.S.C.S. § 521(e)(2) only if the debtors demonstrated circumstances beyond their control. In the instant cases, the debtors did not meet their burden. The debtors presented no evidence or argument that their failure to comply with 11 U.S.C.S. § 521(e)(2) was due to any reason other than their ignorance of the law's requirements, which they candidly acknowledged was an insufficient justification. The case was dismissed.

In re Moser, 347 B.R. 471 (Bankr. W.D.N.Y. 2006). The trustee did not receive the debtors' tax returns or transcripts at least seven days prior to the first meeting of creditors. When the debtors' counsel presented copies of the returns at the first meeting, the case trustee declined to review them at that time. The debtors' attorney reported that the debtors had given him their tax returns more than a week before the first meeting of creditors, but that counsel had neglected to forward a copy to the trustee within the time mandated. The court held that, although the failure of the debtors' attorney to submit tax returns was an oversight attributable to the debtors, the inaction nonetheless qualified as a circumstance beyond the debtor's control under 11 U.S.C.S. § 521(e)(2)(B). The Trustee's motion to dismiss was denied.

5. Repeat Filer Case Updates - Extending the Stay.

In re Covert, CASE NO. 06-10156-LMK, CHAPTER 13 , UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION , 2006 Bankr. LEXIS 2607; 20 Fla. L. Weekly Fed. B 19, Decided October 5, 2006. Debtor's motion to extend automatic stay under 11 U.S.C.S. § 362(a), which was filed and served on the same day the stay automatically terminated, was denied because it was not timely filed under Bankr. N.D. Fla. R. 4001-3 and granting it would have deprived parties who did not receive notice and opportunity to be heard of procedural due process.

In re Mullins, Case No. 06-10948 , UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO DIVISION , 2006 Bankr. LEXIS 2171, Decided September 1, 2006. Chapter 13 debtors' evidence was sufficient to overcome application of 11 U.S.C.S. § 362(c)(4) to their case. The debtors claimed that their first two bankruptcy cases were dismissed for failure to make plan payments and that they were unable to make the payments because one of the debtors had become ill and was unable to work for several months. Their proposed plan was different from their prior plans in that they no longer were seeking to retain their home. Their proposed Chapter 13 plan required much lower monthly payments because it did not include any mortgage payments. The Court applied § 362(c)(3) analysis to debtors' motion because the presumptions in § 362(c)(3) and in (c)(4) were identical and the underlying circumstances, involving the dismissal of previously filed cases, were similar. The court determined that the debtors presented clear and convincing evidence that their third bankruptcy case was filed in good faith. Their debts were not the result of luxury

spending, they had agreed to surrender their home in order to increase the likelihood of success of their proposed plan, and the prior dismissals did not reflect an attempt to manipulate the bankruptcy system. No creditor had objected to imposition of the stay.

In re Holmes, C/A No. 06-03243-JW, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 2006 Bankr. LEXIS 2233, Decided August 28, 2006. After reviewing debtor's budget, court was not convinced that the debtor's failure to timely pay Chapter 13 plan payments in his previous case was due to his previous counsel's negligence for purposes of a good faith determination under 11 U.S.C.S. § 362(c)(3) because the debtor was in essentially the same unfeasible status in this new case despite the representation by new counsel in the new case. Moreover, Congress did not include a provision for counsel's negligence in § 362(c)(3).

In re Davis, Case No. 06-50966 , UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, WINSTON-SALEM DIVISION , 2006 Bankr. LEXIS 1986, Decided August 23, 2006. Debtor presented clear and convincing evidence that her case was filed in good faith and her motion to extend the automatic stay under 11 U.S.C.S. § 362(c)(3) was granted over a creditor's objection because her motive for filing was to save her home from foreclosure and, with projected income increases, she would be able to fund the plan. The debtor's prior Chapter 13 case was dismissed for failure to make plan payments. Since the debtor had a prior bankruptcy case within the year preceding the filing of her current case, she filed a motion to extend the automatic stay. The court granted the motion because she presented clear and convincing evidence that the case was filed in good faith. The court held that the two-week delay between the closing of her prior case and the filing of her current case was reasonable and that the debtor did not manipulate the bankruptcy system considering that she was not timely receiving her wages and her car required repairs. The court found that the debts were not the result of luxury spending but were unsecured credit card debts incurred 15 years ago and that her financial condition was virtually the same as it was in her last case. The court found that, while the debtor's motive for filing was to save her home from foreclosure, the filing of the case negatively affected the objecting creditor. The court found convincing testimony that, with decreases in expenses and projected increases in income, the debtor would be able to fund her current plan.

In re Hunt, Case No. 06-50835 , UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, WINSTON-SALEM DIVISION , 2006 Bankr. LEXIS 2000, Decided August 18, 2006. A debtor who had incurred significant unsecured debt prior to the filing of her third bankruptcy case was not entitled to extension of an automatic stay because she failed to present clear and convincing evidence to rebut the presumption under 11 U.S.C.S. § 362(c)(3)(C) that her third bankruptcy case filed within two years was filed in bad faith.

In re Dinkins, C/A No. 06-02820-JW, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 2006 Bankr. LEXIS 2249, Decided August 16, 2006. Debtor's motion to extend the stay pursuant to 11 U.S.C.S. § 362(c)(3)(B) was denied despite the fact that the prior case was dismissed when the employer withheld and paid

over the original $325 plan payments instead of the $450 amended plan payments on the confirmed plan. The Court found the amount to be paid was the ultimate responsibility of the debtor, not the employer. The Court further found that without additional income, the debtor would not have sufficient income to make the proposed plan payment in the new case as it appeared that the debtor's income from employment had decreased by more than $ 700.00 since the previous case was filed.

In re Jones, C/A No. 06-02691-JW, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 2006 Bankr. LEXIS 2234, Decided August 7, 2006. Debtor was not entitled to extension of stay pursuant to 11 U.S.C.S. § 362(c)(3)(B) where, although debtor stated that he received an increase and wages and had returned to working 40 hours per week, debtor's schedules indicated a decrease in monthly disposable income. Thus, debtor did not experience a substantial change in his financial condition.

In re Norton, Case No. 06-30893 , UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE , 347 B.R. 291; 2006 Bankr. LEXIS 1788; Bankr. L. Rep. (CCH) P80,705, Decided August 2, 2006. Chapter 7 trustee's motion to extend the time in which the debtor had to perform her stated intentions with respect to a secured vehicle, as required under 11 U.S.C.S. § 521(a)(2), and to extend the automatic stay, was granted because the car was of consequential value and the secured creditor's claim was adequately protected by an equity cushion.

In re Penland, No. 06-11895, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE , 2006 Bankr. LEXIS 1598; Bankr. L. Rep. (CCH) P80,748,Decided July 21, 2006. Bankruptcy debtor failed to rebut presumption under 11 U.S.C.S. § 362(c)(3)(C) that second case was not filed in good faith after first case was dismissed for failure to make plan payments, and extending automatic stay was thus not warranted, since debtor failed to show substantial change in financial circumstances or ability to make plan payments.

Bankers Trust Co. of Ca., N.A. v. Gillcrese (In re Gillcrese), Bankruptcy No. 05-50408 JKF, Chapter 13, Related to Dkt. No. 25 , UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA , 346 B.R. 373; 2006 Bankr. LEXIS 1549, Decided July 20, 2006, Amended, July 21, 2006. Statutory language of 11 U.S.C.S. § 362(c)(3)(A) was clear and unambiguous in that it did not reach property of estate; automatic stay as to property of estate was not terminated by § 362(c)(3)(A). Even though the provision might have been awkward, and even ungrammatical, that did not make it ambiguous on the point at issue.

In re Mack, C/A No. 06-02212-JW, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 2006 Bankr. LEXIS 1659, July 7, 2006, Decided, July 7, 2006. A stay was extended pursuant to 11 U.S.C.S. § 362(c)(3)(B) because a debtor overcame the presumption that his case was not filed in good faith where his previous Chapter 13 case failed for failure to make payments due to the fact that he lost his job as a store manager and he currently earned income through his new mortgage business.

In re Fleming, C/A No. 06-00888-JW, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 349 B.R. 444; 2006 Bankr. LEXIS 1185, Decided, June 30, 2006. Pursuant to 11 U.S.C.S. §§ 1325(a) and 1327(a), a trustee was not entitled to a denial of confirmation of the debtors' proposed Chapter 13 plan based solely upon the termination of the stay under 11 U.S.C.S. § 362(c)(3)(A) prior to confirmation.

In re Thomas, C/A No. 06-01961-DD, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 2006 Bankr. LEXIS 2838, Decided June 27, 2006. Though debtor had filed 2 previous bankruptcies, both of which were dismissed when debtor failed to make payments to trustee, debtor was granted an extension of the automatic stay per 11 U.S.C.S. § 362(c)(3)(B) because the totality of the circumstances as adduced by debtor showed that instant case had been filed in good faith as to all creditors.

In re Jumpp, Chapter 13, Case No. 06-40677-JBR, Chapter 13, Case No. 06-40479-JBR , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS , 344 B.R. 21; 2006 Bankr. LEXIS 1158, Decided June 23, 2006. Having concluded that 11 U.S.C.S. § 362(c)(3)(A) terminated the automatic stay on the 30th day after each debtor filed her second bankruptcy petition, court could not use its general equitable powers under 11 U.S.C.S. § 105(a) to impose a stay Congress had declared must terminate if the requirements of 11 U.S.C.S. § 362(c)(3) were not met.

In re Johnson, C/A No. 06-01923-JW, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 2006 Bankr. LEXIS 1294, Decided, June 16, 2006. A motion to reinstate a Chapter 13 case was denied because counsel's suspension from the practice of law did not excuse the dismissal of a debtor's second case where counsel should have filed a motion to extend the stay with his petition and the debtor's lack of diligence in failing to appear at a dismissal hearing contributed to the dismissal.

In re Potts, C/A No. 06-02068-JW, Chapter 13 , UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF SOUTH CAROLINA , 2006 Bankr. LEXIS 2314, Decided, June 15, 2006. A bankruptcy debtor had met his burden of proof to show that his later bankruptcy case was filed in good faith despite having filed it within one year of a prior pending Chapter 13 case. It was therefore ordered that the automatic stay was extended as to all creditors pursuant to 11 U.S.C.S. § 362(c)(3)(B).

Update as to 11 U.S.C. §526(a)(4).

Zelotes v. Martini, 2006 U.S. Dist. LEXIS 81385 (D. Conn. Nov. 7, 2006). "The two other district courts to address the question of the constitutionality of 11 U.S.C. § 526(a)(4) to date have both found the provision unconstitutional. See Hersh, 347 B.R. 19; Olsen, 2006 U.S. Dist. LEXIS 56197. As in those cases, this Court finds, regardless of whether strict scrutiny or the Gentile standard is applied, 11 U.S.C. § 526(a)(4) is facially unconstitutional."