

Fall 2010

Does an Economic Crisis Merit a Prima Facie Finding of "Exigent Circumstances" or Other Emergency Relief? The Impact of the Credit Counseling Provision of BAPCPA Upon Distressed Homeowners in a Severe National Economic Downturn, 44 J. Marshall L. Rev. 129 (2010)

Gloria J. Liddell

Pearson Liddell Jr.

Michael J. Highfield

Follow this and additional works at: <http://repository.jmls.edu/lawreview>

 Part of the [Banking and Finance Law Commons](#), [Bankruptcy Law Commons](#), [Consumer Protection Law Commons](#), and the [Law and Economics Commons](#)

Recommended Citation

Gloria J. Liddell, Pearson Liddell, Jr. & Michael J. Highfield, Does an Economic Crisis Merit a Prima Facie Finding of "Exigent Circumstances" or Other Emergency Relief? The Impact of the Credit Counseling Provision of BAPCPA Upon Distressed Homeowners in a Severe National Economic Downturn, 44 J. Marshall L. Rev. 129 (2010)

<http://repository.jmls.edu/lawreview/vol44/iss1/3>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

DOES AN ECONOMIC CRISIS MERIT A PRIMA FACIE FINDING OF “EXIGENT CIRCUMSTANCES” OR OTHER EMERGENCY RELIEF? THE IMPACT OF THE CREDIT COUNSELING PROVISION OF BAPCPA UPON DISTRESSED HOMEOWNERS IN A SEVERE NATIONAL ECONOMIC DOWNTURN

GLORIA J. LIDDELL, PEARSON LIDDELL, JR. &
MICHAEL J. HIGHFIELD*

I. THE HISTORY OF BAPCPA AND THE CREDIT COUNSELING PROVISION

A. *A Brief History of the Origin of BAPCPA*

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) was signed into law on October 17, 2005.¹ Since the passage of the first “permanent” U.S. law² to recognize the need to provide relief to distressed debtors in 1898,³ bankruptcy law has experienced change—some momentous, some with less weighty

* Gloria J. Liddell is an Assistant Professor of Business Law at Mississippi State University. Person Liddell, Jr., is a Professor of Business Law at Mississippi State University. Michael J. Highfield is an Associate Professor of Finance at Mississippi State University. Authors Pearson and Gloria Liddell acknowledge the grammatical editorial contributions to this paper by their son, Joshua Nelson Liddell. We have no doubt he thoroughly enjoyed having the opportunity to “do unto others as they did unto him.”

1. Bankruptcy Abuse Prevention and Consumer Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) (codified as amended in scattered sections of 11 U.S.C.).

2. The first U.S. Bankruptcy law was the Bankruptcy Act of 1800, Ch. 19, 2 Stat. 19. It, along with its successors that preceded the Bankruptcy Act of 1898, was of very short duration and limited in applicability. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 14-23 (1995).

3. Bankruptcy Act of 1898, 30 Stat. 544 (1898) (repealed 1979). See Tabb, *supra* note 2, at 24 (explaining that the Bankruptcy Act of 1898 signaled the beginning of the modern era of liberal debtor relief in U.S. bankruptcy laws).

consequence overall.⁴ The most pertinent change relevant to this discussion is The Bankruptcy Reform Act of 1994⁵ (the “1994 Amendments”). Among the accomplishments of the 1994 Amendments⁶ was the establishment of the National Bankruptcy Review Commission⁷ (the “Commission”). The charge of this body was, among other things, “to investigate and study issues and problems relating to [the Bankruptcy Code].”⁸ Although many of

4. The Bankruptcy Act of 1898 was succeeded in historical significance by the Chandler Act of 1938, 52 Stat. 883 (1938) (repealed 1978). The next major reform of the bankruptcy laws came decades later with the passage of the Bankruptcy Reform Act of 1978 (commonly referred to as the Code), Pub.L. No. 95-598, 92 Stat. 2549 (1978), a major milestone in substance and direction for bankruptcy law in this country. See generally Clive W. Bare, *The Bankruptcy Reform Act of 1978*, 47 TENN. L. REV. 501 (1980) (describing the legislative history of the Act); Sean C. Currie, *The Multiple Purposes of Bankruptcy: Restoring Bankruptcy's Social Insurance Function After BAPCPA*, 7 DEPAUL BUS. & COM. L.J. 241 (2009) (discussing the original purpose of the 2005 amendments to the Bankruptcy Code); Jeffrey D. Eaton, Note, *Locked Out: The Unwary Debtor and BAPCPA's Pre-File Credit Counseling Requirement*, 32 T. JEFFERSON L. REV. 261 (2010) (arguing the ineffectiveness of the 2005 amendments to the Bankruptcy Code). Then, in 1984 President Reagan signed into law the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. No. 98-353, 98 Stat. 333 (1984) (the “1984 Amendments”), which contained several revisions to the Code. The driving impetus behind the passage of the 1984 Amendments was the necessity to tackle the quandary provoked by the decision of the U.S. Supreme Court in the case of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), regarding the unconstitutional grant of jurisdiction to U.S. bankruptcy judges as non-Article III judges. The next significant amendment to the bankruptcy laws occurred a decade later in 1994 with the passage of The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994). This law “constitutes the most comprehensive revision of the United States Bankruptcy Code and the related jurisdictional provisions since the Code's inception in 1979.” Ned W. Waxman, *The Bankruptcy Reform Act of 1994*, 11 BANK. DEV. J. 311, 311 (1994/1995).

5. Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106 (1994).

6. The Act affects the following aspects of bankruptcy law: jurisdiction, procedure, and eligibility; case administration; professional fees; property of the estate and the trustee's avoiding powers; claims; exemptions and lien avoidance; discharge; the automatic stay; unexpired leases; bankruptcy relief under chapters 7, 11, 12, and 13; sovereign immunity; and other miscellaneous issues. It also establishes the National Bankruptcy Review Commission to investigate and evaluate the need for future changes to the Bankruptcy Code.

Waxman, *supra* note 4, at 312.

7. *Id.*

8. The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 603, 108 Stat. 4106, 4147 (1994). In offering the proposal to establish the review commission, Senator Grassley expressed that the purpose of the Commission

the recommendations of the Commission were not ultimately adopted by BAPCPA,⁹ it may fairly be said that the Commission Report served as a progenitor of BAPCPA—or at least sowed the seeds for its eventual passage.¹⁰ Yet the path from the its frail

was in “fine tuning” the bankruptcy laws rather than overhauling them. 140 CONG. REC. S4508 (daily ed. Apr. 20, 1994) (statement of Sen. Grassley).

9. The following illustrates the point:

The 1028-page report, accompanied by 272 pages of additional and dissenting views, contained 172 recommendations. The conceptual framework of some of these recommendations was ultimately reflected in BAPCPA. . . . Other proposals were ignored

The thirty-four recommendations concerning consumer bankruptcy were among the most divisive considered by the Commissioners, four of whom prepared a lengthy dissent with respect to many of these recommendations. While they generally supported certain consumer bankruptcy recommendations (some of which were included in BAPCPA), the four dissenting Commissioners most strongly opposed [certain] recommendations. . . .

The dissenting Commissioners argued for a package of reforms that was very different from the majority’s recommendations. . . .

Over the next eight years, the dissent’s arguments would become the same arguments for many of the consumer bankruptcy reforms reflected in BAPCPA.

. . . .

One month before the Commission filed its final report on October 20, 1997, legislation was introduced that would largely reflect the views of the dissenting Commissioners with respect to the direction of consumer bankruptcy reforms. On September 18, 1997, Representative Bill McCollum (R-FL), with Representative Rick Boucher (D-VA) as an original cosponsor, introduced H.R. 2500, the “Responsible Borrower Protection Bankruptcy Act,” which set out the rudimentary elements of means testing for consumer debtors as well as other provisions protective of consumer creditor interests. . . . H.R. 2500 ultimately garnered the support of 185 bipartisan co-sponsors, but it was not formally considered by the Congress as it was subsumed by subsequently introduced legislation.

The day after the Commission filed its report, Senators Charles Grassley (R-IA) and Richard Durbin (D-IL) introduced S. 1301, the Consumer Bankruptcy Reform Act of 1997, . . . on October 21, 1997.

Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 487-88, 493-94 (2005).

10. “The establishment of the National Bankruptcy Review Commission in 1994 either intentionally or unintentionally galvanized the consumer creditor community and ultimately became the impetus for BAPCPA.” *Id.* at 486; See also Barry Rehfeld, *Top Creditor Lobbyist Tassey Goes For Broke*, AM. BANKER, May 17, 2001, at 1 (noting that the Commission’s hearings “became the starting point in rounding up support for the meaningful change that creditors wanted”). Jensen, *supra* note 9, at 486 n.4 (quoting a statement from Rep. John Conyers, ranking member of the House Judiciary Committee, observing that he had “never seen this much excitement around a subject

origins to passage was tortuous and fraught with legislative maneuvering, political theater,¹¹ intensive special interest lobbying efforts,¹² and even direct intervention by then First Lady Hillary Rodham Clinton.¹³ Legislative efforts to reform the bankruptcy laws coursed through the 105th to the 109th Congresses with control of the Congress and the White House shifting from one political party to another.¹⁴ Creditor and banking groups sought to encourage a congressional revamping of the federal bankruptcy laws through their intensive lobbying efforts.¹⁵ These financial institutions were concerned about what they considered the “consumer friendly” nature of the bankruptcy laws and the acceleration in filings that had been occurring since the

that’s usually considered so arcane” and that the Commission “has somehow stirred the passions of everybody on the spectrum”).

11. *Id.* at 519-20. “The 106th Congress began with the Senate’s conduct of the President’s impeachment trial in January 1999” over which House Judiciary Committee Chairman Hyde was appointed to serve as trial manager along with twelve other Republican members of the committee. *Id.* at 519. Shortly thereafter, bankruptcy legislation was introduced which essentially consisted of the legislation that had been considered by the prior Congress. *Id.* at 520. In making concluding remarks about an amendment Chairman Hyde was proposing to the bankruptcy legislation, Chairman Hyde paid homage to the creditor lobby stating, “[t]hey are awesome.” *Id.* at 528. His proposed amendment was defeated. *Id.* at 528 (citing 145 CONG. REC. H2723 (daily ed. May 5, 1999)).

12. See generally Jensen, *supra* note 9 (discussing the legislative history of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

13. *Id.* at 508 (stating that “First Lady Hillary Rodham Clinton, in her May 6, 1998 syndicated column, also expressed concern that the legislation ‘could undermine the ability of some parents to collect child support.’”) First Lady Clinton’s concerns were later essentially echoed by her husband, President Clinton, in his weekly radio address. *Id.* at 508 n.116. She would weigh in again as Senator Hillary Clinton on a similar issue regarding child support, and expressing support for final passage of the bill then pending. *Id.* at 544-45.

14. Jensen, *supra* note 9.

15. *Id.* at 493, 494; See, e.g., 144 CONG. REC. H9146 (1998) (statement of Sen. Kennedy) (stating, “[a]ll year long Congress has been teaming [sic] with credit card lobbyists pushing for legislation making it harder for consumers, for working Americans, to get relief from crushing debt woes.”); Ronald J. Mann, *Bankruptcy Reform and the “Sweat Box” of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 376 n.1 (citing 144 CONG. REC. H10225 (1998) (statement of Rep. Nadler)) (arguing that the bill was written “by and for” credit card companies); Gloria J. Liddell & Pearson Liddell, Jr., *So He Huffed and He Puffed . . . But will the Home(stead) Fall Down?: The Applicability of Section 522(p)(1) of the United States Bankruptcy Code to Varying Interest Accumulations of the Debtor in Homestead Property*, 57 DRAKE L. REV. 729, 732, 733 (2009) (discussing lobbying efforts in relation to the homestead exemption).

last major overhaul of the bankruptcy laws with the passage of the Bankruptcy Reform Act in 1979 and its subsequent amendments.¹⁶ What largely resulted with the passage of BAPCPA were revisions that created a bankruptcy climate distinctly less sympathetic to the consumer debtor.¹⁷ Since its passage, courts, scholars, and commentators have noted that the poor craftsmanship of BAPCPA has left many of its provisions subject to varying interpretations by the courts.¹⁸

16. See Thomas Bak, John Gomant & James A. Woods, *A Comparison of the Effects of the 1978 and 2005 Bankruptcy Reform Legislation on Bankruptcy Filing Rates*, 25 EMORY BANKR. DEV. J. 11 (2008) (describing the ramifications for filing rates in the aftermath of the 1978 and 2005 legislations); Tabb, *supra* note 2, at 37 (stating “the credit industry, unhappy with increased bankruptcy filings and mounting bad debt losses, has steadily lobbied for amendments providing for harsher treatment of debtors”).

17. *In re Sosa*, 336 B.R. 113,114 (Bankr. W.D. Tex. 2005).

The Congress of the United States of America passed and the President of the United States of America signed into law the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Act”). It became fully effective on October 17, 2005. Those responsible for the passing of the Act did all in their power to avoid the proffered input from sitting United States Bankruptcy Judges, various professors of bankruptcy law at distinguished universities, and many professional associations filled with the best of the bankruptcy lawyers in the country as to the perceived flaws in the Act. This is because the parties pushing 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. It is not surprising, therefore, that the Act has been highly criticized across the country. In this writer’s opinion, to call the Act a “consumer protection” Act is the grossest of misnomers.

Id.

From its Orwellian title, an example of deceptive advertising if ever there was one, to the last of its 512 pages, the bankruptcy bill recently passed by Congress presents numerous challenges to attorneys who represent consumer debtors. . . . There is no doubt that bankruptcy relief will be more expensive for almost all debtors, less effective for many debtors, and totally inaccessible for some debtors as a result of the new law.

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 (2005). See also Michael Simkovic, *The Effect of BAPCPA on Credit Card Industry Profits and Prices*, 83 AM. BANKR. L. J. 1, 1 (2009) (stating “[BAPCPA] increased the costs and decreased the benefits of bankruptcy to consumers”).

18. See, e.g., Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. ILL. L. REV. 93, 97 (2007) (declaring that “[t]he problems with the 2005 Act are breathtaking. There are typos, sloppy choices of words, hanging paragraphs, and inconsistencies. Worse, there are largely pointless but burdensome new requirements, overlapping layers of screening, mounds of new paperwork, and

B. Impact of the Credit Counseling Provision

In its 1997 report to Congress,¹⁹ the Commission made several recommendations with respect to the issue of credit counseling. The Commission recommended that “all debtors in both Chapter 7 and in Chapter 13 should have the opportunity to participate in a financial education program.”²⁰ However, the

structural incoherence.”). Braucher goes on to reference a case, *In re Sosa*, 336 B.R. at 116, wherein she characterizes the court as “venting” sarcastically over its frustrations with BAPCPA with respect to the very provision that is the subject of this paper. *Id.* at 102. Braucher notes, “[s]ection 109(h) could be read as creating a trap for debtors who are desperate, uninformed, or both. *In re Sosa* is a case in which this trap played out; on the eve of foreclosure, the debtors filed pro se without first requesting credit counseling services.” *Id.* One bankruptcy judge’s exasperated response to the inequities of Section 109(h) was as follows:

Simply stated, if a debtor does not request the required credit counseling services from an approved nonprofit budget and credit counseling service before the petition is filed, that person is ineligible to be a debtor no matter how dire the circumstances the person finds themselves in at that moment.

This Court views this requirement as inane. However, it is a clear and unambiguous provision obviously designed by Congress to protect consumers. . . .

Because the Debtors did not request such counseling before they filed their case, Congress says they are ineligible for relief under the Act. Can any rational human being make a cogent argument that this makes any sense at all?

But let’s not stop there. If the Debtors’ case is dismissed and they re-file a new case within the next year, it may be that some creditor will take the position that the new case should be presumed to be filed not in good faith. See 11 U.S.C. §362 (c)(3)(C). Section 362 further states that if subsection (c)(3)(C) applies, then the stay in that second case will only be good for thirty days unless the debtor (i) files a motion, (ii) obtains a hearing and ruling by the Court within such thirty-day period and (iii) proves by clear and convincing evidence that the second case was filed in good faith. It 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 consumers 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.

Id. at 103 (quoting *In re Sosa*, 336 B.R. at 115); See also Sommer, *supra* note 17, at 191 (asserting that “[o]ne of the chief problems that will be confronted is atrocious drafting, especially in many of the consumer provisions of the bill.”).

19. Elizabeth Warren et al., 1.1.5 Financial Education, NAT’L BANKR. REV. COMM’N FINAL REPORT, Oct. 20, 1997, <http://govinfo.library.unt.edu/nbrc/report/05bcons.html>.

20. 1.1.5 Financial Education

All debtors in both Chapter 7 and in Chapter 13 should have the opportunity to participate in a financial education program.

When consumer debtors emerge from bankruptcy, whether Chapter 7 or

13, they inevitably continue to participate in consumer credit transactions. A legal fresh start may not prevent repeated financial failure if debtors do not have the skills to manage the credit marketplace. Repeated financial failure does not benefit debtors, creditors or the public interest.

There is an emerging consensus for the need for pre- and postbankruptcy financial education for all families. New financial devices join the consumer lending market each year. In addition to home mortgages, credit cards, finance company loans, car loans, and retail installment credit, consumers now may be offered financial devices that did not exist just a few years ago, such as preapproved home equity lines of credit, live checks, and overdraft accounts. Managing the family budget is a greater challenge than ever before in a world of compound interest, rent-to-own contracts, FIFO accounting on repayment of secured consumer loans, teaser rates, grace periods, minimum payments based on unknown amortization schedules, declining balances, and other financial terms imbedded in consumer loan contracts. Even for consumers not beset by job losses or unexpected medical emergencies, household budgeting is not an easy task. The people who file for bankruptcy often have demonstrated the pressing need for heightened understanding of family finances.

Representatives from every part of the consumer bankruptcy system—creditors, debtors, trustees, judges, and academics—have spoken to the Commission about the unique opportunity for education that is presented when debtors go through the bankruptcy system. They note that a financial catastrophe is an appropriate time to reestablish their economic equilibrium and learn important lessons on financial management.

Financial counseling of debtors in bankruptcy is hardly a new notion. While the subject has been discussed for decades, however, the current system still does not meet the need for debtor financial education in a systematic way. The Chapter 13 trustees in several judicial districts have established programs that have been the subjects of praise. Far more districts have no analogous programs in either Chapter 13 or Chapter 7. One roadblock to development has been lack of specific authorization to expend funds to initiate and run such programs; apparently, the authority of Chapter 13 trustees to use funds for education programs has been challenged, as has the amount of funds that can be used. In the meantime, some debtors' attorneys assume the roles of financial counselors, but many do not. This type of individualized counseling may not be available to debtors with the greatest need.

The Commission will not attempt to spell out the details of a bankruptcy education program. Better suited parties already are developing more specific details about the kinds of programs to be offered, how they might be evaluated, who should administer them, how content should be determined and how they could be funded. To enhance these efforts, the Commission endorses the exploration of various alternatives, potentially through the development of pilot programs. However, education should be initiated at every level, and need not wait for any specific program.

The Commission's Recommendation focuses on authorizing and increasing the availability of voluntary education programs. It

report made it clear that “voluntary programs are the preferable course of action.”²¹ BAPCPA makes credit counseling mandatory.²²

Section 109 of the U.S. Bankruptcy Code (the “Code”) is statutorily entitled “Who may be a Debtor” and proceeds to define the individual who may be a debtor within the meaning of this statute. Subsection (h) states, in pertinent part, as follows:

(h) (1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual *may not be a debtor* under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) [11 USC § 111(a)] an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

....

(3) (A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that—

(i) describes *exigent circumstances* that merit a waiver of the requirements of paragraph (1);

(ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

contemplates that bankruptcy judges could, in their discretion, require debtors to participate in education programs in appropriate circumstances. Some parties strongly advocate mandatory programs in all cases. Mandatory programs may be unduly coercive and difficult to administer. Mandatory education might also impose a hardship on a debtor whose job interferes with the class schedule, or who lives in a rural area. Voluntary programs are the preferable course of action until various types of postbankruptcy educational programs can be evaluated. A Recommendation for postbankruptcy consumer financial education should not diminish support for other financial education programs that might avert financial crises in the first place. Creditor associations and individual banks and credit unions provide some financial education resources and budget counselors to help their present and future borrowers avoid bankruptcy. Improving individuals’ knowledge of financial matters and money management can and should be encouraged on several fronts.

Warren et al., *supra* note 19.

21. *Id.*

22. 11 U.S.C. § 109 (2006).

(iii) is satisfactory to the court.

(B) With respect to a debtor, an exemption under subparagraph (A) shall cease to apply to that debtor on the date on which the debtor meets the requirements of paragraph (1), but in no case may the exemption apply to that debtor after the date that is 30 days after the debtor files a petition, except that the court, for cause, may order an additional 15 days.

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and 'disability' means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).²³

Thus, the effect of subsection (h)(1) is to disqualify persons from "be[ing] a debtor"²⁴ and hence, gain the protections of the bankruptcy laws when that person has not participated in a credit counseling session under the terms set forth therein.²⁵ Statutory exceptions to the applicability of this provision include residing in a district where such counseling services have been determined not to be reasonably available,²⁶ the inability to obtain such counseling due to active military service, and certain physically and mentally disabling conditions.²⁷ In addition, if the debtor can certify "exigent circumstances" that merit a waiver of the requirements of Section 109(h)(1) to the satisfaction of the court, the debtor may be temporarily exempt from the credit counseling requirement.²⁸ However, even with the waiver, the debtor must certify that approval for credit counseling services was requested by the debtor and that the debtor was unable to obtain these services within five days of making the request.²⁹ The "exigent circumstances" exception is the focus of this Article.

23. *Id.* § 109(h) (emphasis added).

24. *Id.*

25. *In re Wallert*, 332 B.R. 884, 891 (Bankr. D. Minn 2005) (stating that a petitioner expressly cannot qualify as a debtor unless the petitioner meets the credit counseling requirements of § 109(h)).

26. 11 U.S.C. § 109(h)(2).

27. *Id.* § 109(h)(4).

28. *Id.* § 109(h)(3).

29. *Id.* § 109(h)(3)(A)(ii).

C. Scope of This Topic

When BAPCPA was enacted in 2005, few foresaw the unprecedented financial meltdown of 2007-2009. Former Federal Reserve Board Chairman Alan Greenspan termed it a “once-in-a-century credit tsunami.”³⁰ Former Secretary of the Treasury, Henry M. Paulson, Jr., said that such a convergence of negative financial conditions should happen only once or twice in a century.³¹ This level of financial turmoil has not been seen since the end of the Great Depression over sixty years ago.³² In April 2009, one in every 374 housing units received a foreclosure notice—the highest monthly rate since a California based foreclosure listing firm began making such reports in 2005.³³ Foreclosures in April 2009 were thirty-two percent higher than in April 2008.³⁴ According to a recent study, about twenty percent of homeowners in the U.S. owe more on their homes than their homes are worth as a result of the economic downturn.³⁵ The April 2009 national unemployment rate, 8.9 %, ³⁶ is the highest in twenty-five years.³⁷ Major financial institutions have failed or are under government supervision.³⁸ Chrysler filed for bankruptcy

30. Alan Greenspan, Testimony before the Comm. of Gov’t Oversight and Reform (Oct. 23, 2008), <http://clipsandcomment.com/wp-content/uploads/2008/10/greenspan-testimony-20081023.pdf>.

31. Henry M. Paulson, Jr., Sec’y, U.S. Dept. of the Treasury, Remarks at the Ronald Reagan Presidential Library, Nov. 20, 2008, *available at* <http://www.millennium-traders.com/news/marketcommentarynovember2008.aspx>.

32. John M. Bonora, *Fresh-start Reporting: An Opportunity for Debtor Companies Emerging from Bankruptcy*, 28-6 AM. BANKR. INST. J. 48, 48 (2009) (stating “we are in the midst of the worst economic crisis since the Great Depression.”).

33. David Leibowitz, *Foreclosures at Record Levels in April—Failure of Bankruptcy Legislation to Blame*, MORTGAGE LAW NETWORK, May 13, 2009, *available at* <http://www.mortgagelawnetwork.com/foreclosures-at-record-levels-in-april-failure-of-bankruptcy-legislation-to-blame/>.

34. Robert Daniel, *U.S. Foreclosures at Record Rate in April*, WALL ST. J., May 13, 2009, *available at* <http://www.marketwatch.com/story/us-foreclosures-reach-record-rate-in-april>.

35. Ruth Simon & James R. Hagerty, *House-Price Drops Leave More Underwater*, WALL ST. J., May 6, 2009, <http://online.wsj.com/article/SB124156804522089735.html>.

36. BUREAU OF LABOR STATISTICS, EMPLOYMENT SITUATION SUMMARY (2009), <http://link.gs/p6st>.

37. *April 2009 Unemployment Rate 8.9%—Chart of the Day*, THE SUN’S FIN. DIARY, May 8, 2009, <http://www.thesunsfinancialdiary.com/charts/april-2009-unemployment-rate-89-chart-day/>.

38. A. Mechele Dickerson, *Over-indebtedness, the Subprime Mortgage Crisis, and the Effect on U.S. Cities*, 36 FORDHAM URB. L.J. 395, 415 (2009).

[T]his financial crisis has had a catastrophic effect on the entire

protection on April 30, 2009, and General Motors followed suit approximately one month later, not long after the closing of more than one-third of its dealerships.³⁹

In 2008, Wall Street suffered its worst year since 1931.⁴⁰ This financial crisis began with a market correction of inflated housing prices that drained the illusory capital from of an unsuspecting market.⁴¹ When the depth of this economic upheaval is examined, involving Bear Stearns, AIG, Fannie Mae, Freddie Mac, General Motors, Chrysler, Wachovia, and many more, there is general agreement that this monetary imbroglio is the worse convergence of bad news since at least World War II.⁴² While the plights of the multinational conglomerates are grabbing the headlines, it must be remembered that the crisis that began in the housing market and spread to the financial markets is now in the supermarket.⁴³ Everyday people are being adversely affected. Jobs have been lost, and families in good financial condition have seen their financial condition deteriorate, seemingly almost overnight.⁴⁴ Many, having no choice, are seeking the protections of our bankruptcy laws.⁴⁵

financial community—especially the financial industry and other entities involved with mortgage securitization. Specifically, the liquidity restriction that led to the collapse of Bear Stearns and Lehman Brothers, two of the largest investment banks in the world, caused the U.S. government to take over Fannie Mae and Freddie Mac and place them in a conservatorship, to purchase an 80% interest in American International Group (the country's largest insurance conglomerate) to agree to insure the holdings of some money market mutual funds, to spend hundreds of billions of taxpayer dollars to purchase debt from (and stocks of) U.S. banks, and has forced the liquidation of a number of mortgage lenders and hedge funds that invested in those lenders.

Id.

39. Paul Ingrassia, *How GM Lost Its Way*, WALL ST. J., June 3, 2009, <http://online.wsj.com/article/SB124389995447074461.html>.

40. Eamonn K. Moran, *Wall Street Meets Main Street: Understanding the Financial Crisis*, 13 N.C. BANKING INST. 5, 7 (2009).

41. *Id.* at 7-8.

42. *Id.* at 7-9.

43. See Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1074 (2009) (asserting that the subprime crisis has affected plethora parties, including the local neighborhoods).

44. See Arthur E. Wilmarth, Jr., *The Dark Side of Universal Banking: Financial Conglomerates and the Origins of the Subprime Financial Crisis*, 41 CONN. L. REV. 963, 968 (2009) (stating that 4.4 million jobs were lost in the United States January 2008 through February 2009).

45. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 3-5 (2008) (surmising that the easy credit, including subprime mortgages, led consumer debtors to financial distress and social distress, followed by bankruptcies and foreclosures).

Even the former chairman of Merrill Lynch compared the current crisis to the Great Depression, the gold standard for all economic upheavals.⁴⁶ The American economy has been in a period of drastically slowed growth since December 2007, the longest since the Great Depression.⁴⁷ In recent recessions the American economy dug its way out by exporting goods and services, but because this recession is worldwide, such prospects are dismal;⁴⁸ again reminiscent of the Great Depression. Economists Vernon L. Smith, Nobel Laureate, and Steven Gjerstad believe that the economic occurrences of the past ten years bear striking similarities to the Great Depression.⁴⁹ The most important similarity, according to Smith and Gjerstad, is that both the Great Depression and the current economic crisis had their genesis in consumer debt concentrated on the lower end of the wealth scale, which allows the effects of the crisis to be “transmitted quickly and forcefully into the financial system.”⁵⁰ Such a hypothesis seems to be supported by the accelerated rate of bankruptcy filings and forebodes much trouble for the average consumer.⁵¹

In sum, these are unprecedented and stressful times.⁵² At the

46. Greg Farrell, *Merrill Chief Sees Severe Global Slowdown*, FINANCIAL TIMES, Nov. 11, 2008, http://us.ft.com/ftgateway/superpage.ft?news_id=tf0111120080957111501.

47. Moran, *supra* note 40, at 77.

48. See Fred Bergsten, *Trade Has Saved America from Recession*, FINANCIAL TIMES, June 30, 2008, http://www.ft.com/cms/s/0/d87f2158-46a4-11dd-876a-0000779fd2ac.html?nclink_&nclink_check=1 (projecting that eighty percent of U.S. economic growth in 2008-2009 will come from exports); David J. Lynch, *‘Green Shoots’ Have a Long Way to Grow; Economic Outlook Remains Bleak as World Leaders Meet*, USA TODAY, Apr. 24, 2009, at 1B (explaining that global growth is set to increase four percent in 2008 and 2009 due to exports even though the U.S. has a sharp slowdown in its economy).

49. Steven Gjerstad & Vernon L. Smith, *From Bubble to Depression?*, WALL ST. J., Apr. 6, 2009, <http://online.wsj.com/article/SB123897612802791281.html>.

50. *Id.*

The causes of the Great Depression need more study, but the claims that losses on stock-market speculation and a monetary contraction caused the decline of the banking system both seem inadequate. It appears that both the Great Depression and the current crisis had their origins in excessive consumer debt—especially mortgage debt—that was transmitted into the financial sector during a sharp downturn.

Id.

51. Mike Baker, *Bankruptcies Soar Despite Legal Changes; 1.5 Million Filings Predicted This Year*, THE BOSTON GLOBE, Apr. 14, 2009, at 6.

52. John M. Bonora, *Fresh-start Reporting: An Opportunity for Debtor Companies Emerging from Bankruptcy*, 28-6 AM. BANKR. INST. J. 48, 48 (2009).

In 2008, there were 43,546 business bankruptcies—a 65 percent

time of the passage of BAPCPA, it is unlikely that Congress could have fathomed that our nation would have been facing an economic crisis of this magnitude.⁵³ It is doubtful that such a remake of our bankruptcy system would have been structured in this manner in today's climate.⁵⁴ Section 109(h) of the Code places an additional burden upon individuals who are already operating within a stressed economic structure. The state of the economy when in severe decline should, by definition, be deemed an exigent circumstance such that an individual would be able to waive (at least temporarily) the pre-bankruptcy credit counseling requirement set forth in the statute.⁵⁵

In this Article, we discuss some of the legal issues surrounding Section 109(h) and the failure to comply therewith. The exigent circumstances exception is reviewed to ascertain what types of circumstances courts deem eligible to fall within this "safe harbor" provision. Further, to provide analogous logic for the proposed thesis, we compare the proposed recommendation for invoking the "exigent circumstances" provision of the Code in an effort to invoke force majeure and other commercial impracticability type provisions in contractual settings, both arguments being based upon the severity of the nation's economy. We also discuss the special provision adopted in response to Hurricane Katrina regarding compliance with Section 109(h) to accommodate that extraordinary circumstance. Finally, we propose solutions to what we deem an unnecessarily burdensome mechanism for carrying out what these authors assume to be the intention of Congress in adopting this provision, and alternatively, we propose recommendations for legislative modification.

increase over 2007, and more than double the 2006 figure of 19,965. A total of 9,272 of those 2008 cases involved a chapter 11 filing—again, a dramatic increase over the 2007 and 2006 totals (there were 5,736 in 2007 and 5,163 in 2006).

Id.

53. See generally, R. Travis Santos, Comment, *The Legal Way to Defeat Optimus Sub-prime*, 25 BANK. DEV. J. 285 (2008) (discussing the various changes Congress is contemplating making to the bankruptcy code in order to mitigate the financial crisis).

54. *Id.*

55. If there was a health crisis persisting such as a flu epidemic (such as the swine flu pandemic that is occurring at the time of the writing of this paper), would it be efficacious to require a person who lives in an area where the flu is prevalent to prove they have counseling about how to protect themselves from the flu before making a vaccine available to that person?

II. COMPLIANCE WITH SECTION 109(H)

A. *Consequences of Failure to Comply—Dismiss or Strike: What Difference Does It Make?*

Section 109(h) sets forth the requirements a person must meet in order to be a debtor under the Code. If a person files a petition for bankruptcy protection without having met these requirements, that person may suffer severe consequences.⁵⁶ To comply with Section 109(h), a statement of compliance with the credit counseling requirement (known as Exhibit D) must be filed with the court along with the bankruptcy petition. The court must determine how to treat the person who is seeking the protection of the court when that person has not complied with these jurisdictional requirements.

There is a split among the courts as to how to handle the case of an individual who has not complied with Section 109(h)⁵⁷ because there is no explicit authority within the statute for the consequences of noncompliance.⁵⁸ As the court in the case of *In re Hess*⁵⁹ reasoned when considering the dismissal of a Chapter 7 proceeding:

56. See, e.g., *In re Bolling*, No. 08-00746, 2009 WL 435083, at *1-3 (Bankr. D. D.C. Feb. 9, 2009) (providing an example of a debtor who did not meet the requirements of 109(h) and whose motion for reconsideration of an order to disgorge fees was denied by the court). The authors refer to this example as “The 18 Minute Case,” where the debtor began credit counseling at 12:10 p.m. and the petition was filed at 12:28 p.m. [hence the 18 minutes] in an effort to stop a foreclosure scheduled for 1:00 p.m. *Id.* However, the debtor did not complete counseling until 1:35 p.m., after the time of filing the bankruptcy petition. *Id.* The court had dismissed the case and was ordering the attorney to disgorge the attorney fees. *Id.* In connection with the dismissal the court stated, “[s]ection 109(h) is a harsh statute when it comes to a debtor who has overlooked seeking credit counseling until the last moment before a bankruptcy petition would have to be filed in order to stop a foreclosure sale.” *Id.*

57. There is even at least one split among courts within the same district. See *Wytenbach v. Comm’r Internal Revenue (In re Wytenbach)*, 382 B.R. 726, 730 (Bankr. S.D. Tex. 2008) (striking the petition); *In re Jones*, 352 B.R. 813, 814 (Bankr. S.D. Tex. 2006) (dismissing the petition); See generally Lindsay Sherp, “To Strike or to Dismiss, That is the Question: How Courts Should Dispose of Bankruptcy Cases Filed By Debtors Who Failed to Obtain Credit Counseling”, 60 BAYLOR L. REV. 317 (2008) (providing a discussion of the differences between striking the petition and dismissing the case and the arguments for and against each judicial method of treating individuals who have failed to comply with 109(h)).

58. *In re Wytenbach*, 382 B.R. at 729 (citing *In re Henderson*, 364 B.R. 906 n.9 (Bankr. N.D. Tex. 2007)).

59. 347 B.R. 489 (Bankr. D.Vt. 2006).

When Congress amended the Bankruptcy Code through BAPCPA, it definitely circumscribed bankruptcy courts' discretion in certain situations. It used unambiguous terms such as "automatic dismissal" and "the court shall dismiss." . . . It is significant that there is no such language restricting discretion in § 109(h). This Court deduces that Congress did not intend to limit the courts' exercise of discretion under § 707(a) when determining a motion to dismiss based upon a credit counseling eligibility defect.⁶⁰

When faced with this issue, courts have resolved these cases in varying ways: by dismissing the case,⁶¹ dismissing the petition,⁶² striking the petition,⁶³ or even allowing the debtor to proceed with the bankruptcy case based upon equitable factors,⁶⁴

60. *Id.* at 497.

61. *In re Dixon*, 338 B.R. 383, 389 (B.A.P. 8th Cir. 2006); *In re DiPinto*, 336 B.R. 693, 701 (Bankr. E.D. Pa. 2006); *In re Jones*, 352 B.R. at 826; *In re Seaman*, 340 B.R. 698, 707 (Bankr. E.D. N.Y. 2006); *In re Laporta*, 332 B.R. 879, 884 (Bankr. Minn. 2005); *In re Cleaver*, 333 B.R. 430, 436 (Bankr. S.D. Ohio 2005); *In re Talib*, 335 B.R. 417, 424 (Bankr. W.D. Mo. 2005); *In re Randolph*, 342 B.R. 633, 635 (Bankr. M.D. Fla. 2005).

62. *In re Valdez*, 335 B.R. 801, 803-04 (Bankr. S.D. Fla. 2005).

Because the petition failed to provide Mirielys Valdez status as a debtor, 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. Thus, the Court views the criteria established by 11 U.S.C. § 109 as jurisdictional. Should Mirielys Valdez proceed to obtain budget and credit counseling as required under 11 U.S.C. § 109(h)(3), she will then be eligible to become a debtor under 11 U.S.C. § 109 and any petition thereafter filed in a timely manner, within 180 days after completion of the credit counseling services, will be treated as her first petition, not subject to 11 U.S.C. § 362 (c)(3) or (c)(4).

Id.

63. *See e.g., In re Elmendorf*, 345 B.R. 486, 504 (Bankr. S.D. N.Y. 2006) (deciding three separate bankruptcy cases on motions to dismiss by the trustee); *In re Henderson*, 341 B.R. 789, 792 (Bankr. M.D. Fla. 2006) (concluding that the bankruptcy court properly denied the motion for clarification); *In re Wytenbach*, 382 B.R. at 728 (affirming the decision of the bankruptcy court striking the petition and retroactively annulling the stay); *In re Hubbard*, 333 B.R. 377, 383 (Bankr. S.D. Tex. 2005) (striking petitions for debtors who failed to obtain credit counseling); *In re Salazar*, 339 B.R. 622, 635 (Bankr. S.D. Tex. 2006) (involving two of the putative debtors whose case had been stricken in *In re Hubbard*, affirming the decision of the bankruptcy court striking the petition and determining that no automatic stay arose).

64. *See, e.g., In re Enloe*, 373 B.R. 123, 133-34 (Bankr. D. Colo. 2007) (declining to dismiss debtor's case for failure to obtain credit counseling within 180 days before filing their bankruptcy case because of inadequate counsel and because "there are equitable factors that tip the balance in favor of not dismissing the case").

such as substantial compliance⁶⁵ or totality of the circumstances, to avoid manifest injustice.⁶⁶ The majority of courts have taken the view that dismissing the case is the appropriate remedy,⁶⁷ although some have dismissed the case without discussing the issue.⁶⁸ The courts that have provided reasoning for concluding that dismissal is the proper remedy have determined that 109(h) is not a jurisdictional statute such that a debtor who does not comply with that provision was never a “debtor,” and therefore, no case ever existed.⁶⁹ The courts that have decided to strike the petition have generally determined that filing the petition is synonymous with the commencement of the case.⁷⁰ Therefore, if

65. See, e.g., *Kistler v. Meza*, No. 2:06cv1207-MCE, 2007 U.S. Dist. LEXIS 48430, at *6, 8-9 (Bankr. E.D. Cal. 2007) (affirming the bankruptcy court’s denial of a motion to dismiss debtor’s petition because the debtor demonstrated substantial compliance with 109(h)).

66. See, e.g., *In re Nichols*, 362 B.R. 88, 96 (Bankr. S.D.N.Y. 2007) (declining to grant a motion to dismiss debtor’s case because, based on the totality of the circumstances, a strict interpretation of 109(h) and dismissal would result in injustice against the debtor); *In re Hess*, 347 B.R. 498, 501 (Bankr. D.Vt. 2006) (setting forth a six-criteria “totality of the circumstances” test for courts to consider when determining whether a debtor’s Chapter 7 petition should be dismissed).

67. See generally *In re Wytenbach*, 382 B.R. at 729-30 (providing that only a minority of courts dismiss the petition when the debtor fails to comply with 109(h), but that other courts dismiss the case, such as this court); *In re Seaman*, 340 B.R. at 706 n.3 (citing several cases and stating, “[t]his court also notes that of the thirty-four decisions addressing ineligibility under Section 109(h), to date, thirty-one have resulted in dismissal.”).

68. *In re Tomco*, 339 B.R. 145, 157 (Bankr. W.D. Pa. 2006).

Most of the courts rejecting dismissal of the ineligible debtor’s bankruptcy case have included some commentary in their opinions as to why striking a petition is a preferred remedy; conversely, the courts dismissing petitions have offered little reason or explanation as to why they have done so. This Court agrees with its brethren supporting dismissal of these types of cases where the petitioner is ineligible to be a ‘debtor,’ but feels compelled to elaborate on why given the flux of case law under the 2005 Act.

Id.

69. *In re Bass*, 365 B.R. 131, 138 (Bankr. W.D. Tenn. 2007). “This court is also persuaded by those courts that have held that ‘eligibility to be a debtor is not jurisdictional and that until a bankruptcy court determines eligibility, a case actually exists which cannot thereafter be deemed a nullity by simply ‘stiking’ [sic] the case as if it never existed.’” *Id.* (quoting *In re Wilson*, 346 B.R. 59, 64 (Bankr. N.D.N.Y. 2006), citing *In re Mills*, 341 B.R. 106, 110 (Bankr. D.D.C. 2006)); *In re Seaman*, 340 B.R. at 709; *In re Tomco*, 339 B.R. at 161; *In re Ross*, 338 B.R. 134, 136 (Bankr. N.D. Ga. 2006).

70. See e.g., *Gargula v. Thompson (In re Thompson)*, No. 1:06-cv-1033-LJM-WTL, 2006 U.S. Dist. LEXIS 95486, at *3 (Bankr. S.D. Ind. 2006) (finding that a voluntary case begins when a proper debtor under the statute files a petition with the bankruptcy court).

there is no “case,” there can be no “debtor,” and the petition would be stricken as if no case ever commenced.⁷¹ And the court in *Wytttenbach v. Commissioner Internal Revenue*⁷² went one step further and retroactively annulled the automatic stay.⁷³

Whether a case is dismissed or stricken can have distinct consequences. The passage of BAPCPA brought with it significant consequences when a case is deemed “dismissed.”⁷⁴ Specifically, newly amended sections 362(c)(3)⁷⁵ and 362(c)(4)⁷⁶ of the Code serve to limit or annul the applicability of the most powerful tool in the bankruptcy process—the automatic stay.⁷⁷ If a case is dismissed, the debtor is then penalized upon the filing of any subsequent bankruptcy case within a year.⁷⁸ As the court in the case of *In re Salazar*⁷⁹ stated in determining that “striking” was the proper course of action,

Prior to BAPCPA’s enactment, the question of whether to dismiss a case or strike a petition was a difference without a distinction. It rarely mattered whether an individual’s petition in his last case had been “stricken” thereby rendering the current case his first (or second, and so on), or whether it was “dismissed” thereby rendering his current case the second (or third, and so on). Following the adoption of BAPCPA, the distinction has meaningful consequences under § 362(c)(3) and (4). Thus, striking a petition today—with the intention that its filing never commenced a case—is significant when applying § 362(c)(3) and (4). Section 362(c)(3) terminates the automatic stay in a second case pending within the previous year. A debtor must then prove that he is entitled to an extension of the stay. *See, e.g., In re Rios*, 336 B.R. 177, 179-80 (Bankr. S.D.N.Y. 2005). If the debtor had two or more cases pending within the previous year, the new “case” would render an even harsher result

71. *See, e.g., In re Hubbard*, 333 B.R. at 388.

72. *In re Wytttenbach*, 382 B.R. at 729.

73. *Id.*

74. *Adams v. Finley*, 2006 U.S. Dist. LEXIS 81591, at *8-9 (Bankr. S.D. N.Y. Nov. 3, 2006) (consolidating cases, including *In re Elmendorf* and stating, “[t]he draconian consequences of a dismissal could include a resultant limited applicability of the fundamental protection of the automatic stay under §362(c), in subsequent filings, merely for an initial failure to comply properly with the credit counseling requirement.”).

75. 11 U.S.C. § 362(c)(3) (2010).

76. *Id.* § 362(c)(4).

77. *Id.* § 362(a). In striking three cases of debtors who had not undergone credit counseling the *In re Elmendorf* court stated, “Congress did not intend for ineligible debtors to enjoy the ‘most powerful protection’ offered by the Bankruptcy Code—the automatic stay.” *In re Elmendorf*, 345 B.R. at 502 (citing *In re Salazar*, 339 B.R. at 629, 630).

78. 11 U.S.C. § 362(c)(2) (2010).

79. *In re Salazar*, 339 B.R. at 635.

under § 362(c)(4), with no stay at all unless the debtor proves entitlement to a stay. *See, e.g., In re Toro-Arcila*, 334 B.R. 224 (Bankr. S.D. Tex. 2005).⁸⁰

Thus, if a case is “dismissed,” a second filing of a new case within the previous year would normally mandate that the automatic stay terminate within thirty days after the date the case is filed, unless the debtor can prove entitlement to an extension of the stay.⁸¹ Furthermore, a third or subsequent filing would normally result in the debtor not being able to benefit from the protections of the automatic stay at all.⁸²

On the other hand, if a case is “stricken,” it will be deemed that no case was ever filed.⁸³ Indeed, in one case the court even granted the “debtor’s” motion to waive the filing fee because no case had ever commenced.⁸⁴ The putative “debtor” will be reverted to the pre-filing status of that debtor, without the protection of the automatic stay, and subject to whatever creditor actions and claims that would have been available to any such creditors, as if the “debtor” had never filed. Thus, any creditor actions against the putative debtor that might have been commenced prior to, concurrent with, or subsequent to the alleged “filing,” would not be protected by the U.S. bankruptcy laws.

B. How to Comply with the 180 “Day” Period: What Does “Day” Mean?

Section 109(h) requires that the requisite credit counseling occur “during the 180-day period preceding the date of filing of the petition by such individual”⁸⁵ In a consequentially significant number of cases, individuals have filed their cases on the same day as the day that the individual obtained the credit counseling.⁸⁶

80. *Id.* at 633.

81. 11 U.S.C. § 362(c)(2) (2006).

82. *Id.* §362(c)(4).

83. *See, e.g., In re Hubbard*, 333 B.R. at 388 (holding that no case was commenced by the filing of the petitions and thus there was no case to dismiss).

84. *In re Doll*, 369 B.R. 104, 105 (Bankr. W.D. N.Y. 2007); *but cf. In re Johnson*, No. 08-60998, 2008 Bankr. LEXIS 1081, at *4-5 (Bankr. N.D. Ohio 2008) (involving the dismissal of the debtor’s case where the court ordered the debtor to pay the filing fee).

85. 11 U.S.C. § 109(h)(1) (2010).

86. *In re Wise*, 415 B.R. 579, 583 (Bankr. N.D. Ala. 2009); *In re Hammonds*, No. 08-40928-JJR-13, 2008 Bankr. LEXIS 2929, at *14 (Bankr. N.D. Ala. 2008); *In re DeHoog*, No. 13-08-12312 SF, 2008 Bankr. LEXIS 3364, at *5 (Bankr. D. N.M. 2008); *In re Francisco*, 390 B.R. 700, 705 (B.A.P. 10th Cir. 2008); *In re Gossett*, 369 B.R. 361, 365 (Bankr. N.D. Ill. 2007); *In re*

Thus, the issue becomes whether the credit counseling occurred “preceding the date” the case was filed. If it is deemed not to have occurred, the individual is “out” of bankruptcy;⁸⁷ if it is deemed that the credit counseling did occur in a timely fashion, the individual becomes a “debtor” in bankruptcy.⁸⁸

To illustrate, Alpha gets credit counseling on January 3, 2009, at 8 a.m. Alpha files the bankruptcy petition with the court at 9 a.m. on the same day the credit counseling takes place in order to avoid a foreclosure scheduled for 10 a.m., all on that same day. (Alpha had been attempting to reach an agreement with the creditor up to the time of filing.) Depending upon the court in which Alpha has filed the bankruptcy case, Alpha may no longer own his residence.

There are two lines of cases upon which the courts are divided: (1) the “plain language” cases⁸⁹ and (2) the “bright line” cases.⁹⁰ The courts following the “plain language” line hold that the plain language of the statute dictates that “date” within the meaning of the statute means a full calendar day,⁹¹ which would eliminate a filing that occurs the same day as the day the case was filed. On the other hand, the “bright line” courts hold that the line is drawn at the moment of filing the bankruptcy petition, such that any credit counseling that may have occurred prior to that moment is in compliance with the statute.⁹²

Courts using the “plain language” rationale have based their reasoning upon dictionary meanings of the word “date”⁹³ and upon bankruptcy Rule 9006(a),⁹⁴ the rule for computing time.⁹⁵ At least

Barbaran, 365 B.R. 333, 337 (Bankr. D.C. 2007); *In re Swanson*, No. 06-00968-TLM, 2006 Bankr. LEXIS 3639, at *8 (Bankr. Idaho 2006); *In re Moore*, 359 B.R. 665, 673 (Bankr. E.D. Tenn. 2006); *In re Hudson*, 352 B.R. 391, 396 (Bankr. D. Md. 2006); *In re Cole*, 347 B.R. 70, 75 (Bankr. E.D. Tenn. 2006); *In re Toccaline*, No. 06-20218, 2006 Bankr. LEXIS 1644, at *8 (Bankr. D. Conn 2006); *In re Spears*, 355 B.R. 116, 120 (Bankr. E.D. Wis. 2006); *In re Warren*, 339 B.R. 475, 479-80 (Bankr. E.D. Ark. 2006).

87. *In re Wise*, 415 B.R. at 579-81 (holding that the debtor must have had credit counseling at least the day before filing).

88. *In re Barbaran*, 365 B.R. at 338 (stating that the debtor must have had credit counseling at the moment of filing).

89. See, e.g., *In re Francisco*, 390 B.R. at 702 (citing several cases and resolving the split within that circuit by following “bright line” cases).

90. See, e.g., *id.* at 702 (resolving the circuit split in favor of the “bright line” cases).

91. *Id.* at 702-03.

92. *Id.* at 703.

93. *Id.* at 702, 703.

94. FED. R. BANKR. P. 9006(a).

95. *In re Francisco*, 390 B.R. at 703.

one court has also reasoned that the legislative intent of Congress suggests that a debtor should have an opportunity for a “waiting period” to make an “informed choice” after obtaining the counseling to analyze the information obtained during the counseling session and decide whether bankruptcy is the best option to pursue.⁹⁶

The “bright line” courts look at specific provisions of the Code that use the phrase “date of filing of the petition,” noting that these provisions refer to this time period as “the moment of filing.”⁹⁷ These courts have also specifically rejected the view that Congress intended that there be a waiting period after obtaining the counseling before filing bankruptcy.⁹⁸

So where does Alpha stand? Alpha obviously would fare best if the bankruptcy petition were filed in those courts following the “bright line” reasoning. Alpha engaged in credit counseling just one hour prior to filing the petition. The “bright line” is drawn at 9 a.m., the moment of filing, thus Alpha is safe and foreclosure upon the house will be stayed. If Alpha filed the bankruptcy petition in a court following the “plain language” line of reasoning, the case would likely be dismissed or stricken due to failure to comply with Section 109(h), and the creditor would be free to proceed with foreclosure.

III. THE SO-CALLED “SAFE HARBOR”:⁹⁹ EXIGENT CIRCUMSTANCES

A. What Is Required?

Unless Alpha qualifies for one of the limited exceptions to obtaining credit counseling,¹⁰⁰ Alpha may seek refuge in the “safe harbor” provision of Section 109(h) by obtaining a “temporary exemption” pursuant to subsection 109(h)(3).¹⁰¹ To do so, Alpha

96. *In re Cole*, 347 B.R. 70, 72, 76 (Bankr. E.D. Tenn. 2006).

97. *In re Francisco*, 390 B.R. at 703-04.

98. *Id.* at 705; *In re Warren*, 339 B.R. 475, 480 (Bankr. E.D. Ark. 2006).

99. *See generally In re Thompson*, 344 B.R. 899, 908 (Bankr. S. D. Ind. 2006) (denying the U.S. Trustee’s motion for reconsideration of the lower court’s decision to strike the debtor’s petition for failure to comply with § 109(h) instead of dismissing the case for non-compliance).

100. *See* 11 U.S.C. § 109(h)(2), (4) (setting forth the limited bases upon which a debtor may be exempted from complying with the credit counseling requirement of section 109(h)). The exemption includes where there are no approved credit counseling agencies within the district and where a debtor is unable to complete the counseling due to incapacity, disability, or active military duty in a military combat zone. *Id.*

101. *Id.* § 109(h)(3).

must prepare an Exhibit D¹⁰² to the bankruptcy petition to certify all of the following (summarizing the statute): (1) Describe the exigent circumstances; (2) state that she requested credit counseling services from an approved agency, but was unable to obtain the services during the five-day period beginning on the date she made that request; and (3) the certification must satisfy the court.

Yet in spite of the ostensibly simplistic manner in which these three requirements are set forth, the “safe harbor” seems far from safe. Navigating through this statutory murkiness requires a skilled hand along with a bit of luck (the luck of landing in a “debtor friendly” jurisdiction); and a favorable aligning of the debtor’s state of affairs to appease the applicable court. Otherwise, the hopeful debtor may be facing a rocky course.

B. The Five-day Period: Must the Debtor Wait Five Days to File?

One obstacle is the five-day period required by this provision.¹⁰³ The courts are split as to whether the five-day period is intended to run pre-petition.¹⁰⁴ There are two lines of reasoning

102. Victoria L. VanZandt, *The Exigent Circumstances Exception to the Pre-Petition Credit Counseling Requirement Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Exigent or Extreme?*, 6 DEPAUL BUS. & COM. L. J. 265, 284 (2008).

Labeled ‘Exhibit D,’ this portion of the Voluntary Petition now requires every individual debtor to check a box, indicating he or she, or, if the case is joint, each debtor has completed and signed an Exhibit D that is attached and made a part of the petition. Exhibit D, adopted in October of 2006, entitled ‘Exhibit D-Individual Debtor’s Statement of Compliance with Credit Counseling Requirement,’ requires a debtor to choose one of five boxes. The five boxes are: (1) a statement that credit counseling was obtained within the 180 days pre-petition and that a certificate from an approved credit counseling agency is attached; (2) a statement that credit counseling was obtained within the 180 days pre-petition and that a certificate from an approved credit counseling agency is not attached (therefore, further requiring a debtor to obtain the certificate and file the same with the court within fifteen days); (3) a statement seeking a temporary waiver under § 109(h)(3) (therefore, requiring the debtor to attach a motion for determination by the court); (4) a statement demonstrating that the debtor is not required to complete the counseling because he or she meets the statutory requirement of § 109(h)(4); or (5) a statement demonstrating the debtor is not required to complete the counseling because he or she meets the statutory requirements of § 109(h)(2). The end of Exhibit D includes certification language, similar to that found in § 1746 and requires the debtor’s signature.

Id.

103. 11 U.S.C. § 109(h)(3)A(ii).

104. See *In re Afolabi*, 343 B.R. 195, 199 (Bankr. S.D. Ind. 2006) (holding

courts have employed. In the view of some courts the five-day period precludes the debtor from filing until the five-day period has completely elapsed, treating it as a “waiting period.”¹⁰⁵ Conversely, other courts have held that the debtor may file at any time during the five-day period.¹⁰⁶ We will term these courts the “request period” courts.

If we follow the logic of the “request period” courts, which allows the debtor to file bankruptcy at any time during the five-day period after making the request for credit counseling, a second issue arises; one which was dealt with in the case of *In re Giambrone*.¹⁰⁷ The question raised by *In re Giambrone* was whether the debtor would be compelled to delay filing bankruptcy until the five days has elapsed when there is a foreclosure scheduled before the five-day period elapses,¹⁰⁸ even though the

that the credit counseling must received be pre-petition); *In re Dipinto*, 336 B.R. 693, 700 (Bankr. E.D. Pa. 2006) (holding that the credit counseling requirement may be satisfied post-petition).

105. *In re Afolabi*, 343 B.R. at 199. The *In re Afolabi* court held that a debtor must attempt to obtain credit counseling at least five days in advance of filing. *Id.* The court cites cases for and against requiring a debtor to have a five-day waiting period stating:

Arguably, § 109(h)(3)(A)(ii) is awkwardly worded, making it unclear whether a debtor is required merely to request credit counseling prior to filing for bankruptcy relief or whether such request must be made at least five days prior to filing. *Contra* DiPinto, 336 B.R. at 699 (finding that even though Congress likely intended the five-day period to run pre-petition, the language of the statute unambiguously provides otherwise). While courts are unfortunately not in agreement on this issue, in this Court’s opinion, the most logical reading of the statute dictates that debtors must attempt to obtain credit counseling at least five days in advance of filing. See *In re Carey*, 341 B.R. 798; *In re Cleaver*, 333 B.R. at 435 (noting in dicta that § 109(h)(3)(A)(ii) would appear to require a five-day waiting period before a debtor could file a petition together with the certification). To hold otherwise would render the statute’s reference to a “5-day period” nonsensical. If a debtor is able to satisfy § 109(h)(3)(A)(ii) by showing that he unsuccessfully requested credit counseling the day before filing a bankruptcy petition, then what relevance does the 5-day period have?

Id.

106. *In re Giambrone*, 365 B.R. 386, 391-92 (Bankr. W.D. N.Y. 2007); *In re Dipinto*, 336 B.R. at 700.

107. 365 B.R. 386 (Bankr. W.D. N.Y. 2007).

108. See also Laura B. Bartell, *From Debtors’ Prisons to Prisoner Debtors: Credit Counseling for the Incarcerated*, 24 BANK. DEV. J. 15, 21 (2008) (referencing *In re Gambrione* and stating, “[a]t least one court has declined to give effect to the literal language of this provision, suggesting that the five-day period referred to in § 109(h)(3)(A)(ii) is intended to mean five days or the period between the request for credit counseling and the time of the bankruptcy filing compelled by exigent circumstances, whichever is shorter.”).

debtor has a credit counseling appointment within that five-day period. To examine both issues we refer to the following illustrations involving Beta.

For the first issue involving whether the statute imposes a five-day waiting period, Beta requests the counseling within the five-day period and obtains the counseling on the third day of that period. Beta then proceeds to file bankruptcy on the fourth day of the five-day period. Courts requiring that there be a five-day waiting period would find that Beta is not in compliance with the statute,¹⁰⁹ whereas the courts interpreting the statute as a “request period” would not find the debtor failed to comply with this Code provision on this basis.¹¹⁰

For the second issue, assume Beta again requests the credit counseling during the five-day period, except that Beta is unable to obtain the required counseling until the fifth day of that five-day period. A foreclosure or other creditor action which would irreparably alter the debtor’s financial status quo is scheduled to occur the third day of that five-day period. Beta decides to file bankruptcy on the second day of that five-day period. For courts that interpret the statute to require a five-day waiting period, this is no issue at all because the debtor would not be able to comply with the statute by filing prior to the end of the five-day period.¹¹¹ However, for the courts that treat the five-day period as a “request period,” a court may decide, as the *In re Giambrone* court did, to deem the debtor in compliance with the statute,¹¹² particularly where there are equitable factors such as in *In re Giambrone* where the debtor eventually did obtain the counseling, albeit post-petition.

C. What Are Exigent Circumstances?

What prospective debtors may come upon in navigating through the “safe harbor” provision is the fact that there are differing opinions among the courts as to how the “safe harbor” provision is to be interpreted and applied. Some courts hold that the exigency must relate purely to the inability to obtain credit counseling without regard to the financial circumstance that may be causing the debtor to file for bankruptcy.¹¹³ Other courts will

109. *In re Afolabi*, 343 B.R. at 195.

110. *In re Dipinto*, 336 B.R. at 699-701.

111. *In re Afolabi*, 343 B.R. at 199-200.

112. *In re Giambrone*, 365 B.R. at 392.

113. *In re Richardson*, No. 07-42881, 2007 Bankr. LEXIS 4153, at *4-5 (Bankr. E.D. Tex. 2007) (quoting *In re Afolabi*, 343 B.R. at 198). This Court agrees with the later line of cases inasmuch as the proper focus under §109(h)

look to the underlying financial circumstance that is creating the exigent situation for the individual.¹¹⁴ Additionally, for those courts that do give consideration to the underlying precipitating event, there is disagreement as to what type of event should be deemed exigent, and/or the context in which such event should be given exigent status. In the view of some courts, if a debtor had a certain amount of notice of the threatened negative creditor action, the creditor action is no longer considered "exigent."¹¹⁵ The following chart, which begins of the next page, examines certain cases involving exigent circumstances where courts have dealt with these issues to provide a comparative analysis as to how these matters have been treated.

is not on the circumstances that precipitated the bankruptcy filing, "but on whether those circumstances or any other prevented the debtor from being able to obtain credit counseling prior to filing for bankruptcy." *Id.*

114. See *In re Richardson*, 2007 Bankr. LEXIS 4153, at * 3-4 (citing cases that do not agree with this court's holding stating, "[s]ome courts have viewed an imminent foreclosure sale as an exigent circumstance."); *In re Henderson*, 364 B.R. at 909, n.3 (Bankr. N.D. Tex. 2007) (stating in dicta that a non-judicial foreclosure sale of a family home under Texas law is an exigent circumstance); *In re Henderson*, 339 B.R. 34, 38-39 (Bankr. E.D. N.Y. 2006) (showing that an "impending sale of home or sole means of transportation are examples of potentially exigent circumstances warranting this temporary . . . relief."); *In re Romero*, 349 B.R. 616, 620 (Bankr. N.D. Cal. 2006) (determining that "looming wage garnishment constitutes exigent circumstances."); *In re Hubbard*, 333 B.R. at 384 (showing that exigent circumstances exist when a debtor faces loss of family home or permanent loss of sole means of transportation unless immediate bankruptcy relief is granted); *In re Childs*, 335 B.R. 623, 630-31 (Bankr. D. Md. 2005) (demonstrating that imminent sale of property at foreclosure and/or imminent eviction from residence are exigent circumstances).

115. See generally *In re Richardson*, 2007 Bankr. LEXIS 4153, at *4 (stating, "[o]thers have found that because the foreclosure process provides considerable notice to homeowners, the foreclosure sale allows no excuse for procrastination in seeking the protection of bankruptcy."); *In re Rodriguez*, 336 B.R. 462, 474 (Bankr. D. Idaho 2005) ("Waiting . . . until the eve of creditor action before addressing the §109(h) prerequisite for filing bankruptcy makes the exigency rather self-inflicted."); *In re Dixon*, 338 B.R. at 388-90 (holding that a foreclosure sale does not merit deferral of credit counseling requirement); *In re DiPinto*, 336 B.R. at 698, 701 (holding also that a foreclosure sale does not merit deferral of credit counseling requirement); *In re Afolabi*, 343 B.R. at 198 (holding again that a foreclosure sale does not merit deferral of credit counseling requirement).

PUTATIVE DEBTOR/DEBTOR	CITATION	CLAIMED EXIGENT CIRCUMSTANCE	OTHER FACTORS	COURT DISPOSITION/ CC FACTOR
Musgrove	2009 B.L. 786 D. D.C.	Sick, in hospital.	Court said not exigent; debtor not disabled per 109(h)(4).	Waiver denied. Debtor did not get CC.
Bolling	2009 B.L. 340 D. D.C.	Foreclosure at 1:00 p.m. same day as filing.	Started CC before filing; finished after.	Dismissed. Atty. ordered to disgorge fees. CC not completed.
Hughes	2009 B.L. 339 D. D.C.	Wage garnishment	Tried internet CC—site failed; tried phone—long wait.	Waiver denied. Court could not look at exigency. Debtor did not get CC.
Houston	2008 B.L. 1829 E.D. Va., Alex.	Eviction might occur w/n five days.	Court said impending eviction would generally be exigent.	Dismissed. Debtor did not request CC.
Richardson	2008 B.L. 432 D. D.C.	Debts unbearable; # of dependents.	Court said does not rise to level of exigency.	Denied Motion to Reconsider Dismissal.
Thompson	2008 B.L. 2666 W. Div. Iowa	Debtor did not know needed certification of exigency.	Court said not exigent.	Dismissed. Debtor did not request CC.
Sherry	2008 B.L. 2628 N.D. Oh., E.	Sheriff's sale. Debtor also says cannot pay CC fee. Debtor got CC in a prior case.	Court said financial hardship not basis for exigency, esp. when agencies must charge based on ability to pay.	Dismissed. Exemption denied. Debtor did not request CC in this case.

Mahjor	2008 B.L. 2190 E.D. Va., Alex	Impending Foreclosure	Court said impending does generally qualify as exigent.	Dismissed. Debtor did not request CC.
Bain	2008 B.L. 3603 E.D. Va., Alex	Impending Foreclosure	Court admits CC unlikely to result in rec. other than bankruptcy.	Dismissed. Debtor did not request CC.
Shea	2008 B.L. 51 E.D. Va., Alex	Lost job, eviction, auto repossession.	Court assumes these risks imminent.	Waiver Denied. Debtor did not request CC.
Richardson, L.	2007 B.L. 4153 E.D. Tex., Sherman	Impending Foreclosure. Debtor had twenty-one days notice.	Court said Debtor could have sought counseling so not exigent.	Waiver Denied. Debtor did not request CC. Court says focus should be on circumstances preventing CC.
Magnusson	2007 B.L. 4516 D. N.D.	IRS tax lien and impending eviction by IRS.	Court said not exigent because Debtor had ninety days notice of tax deficiency.	Dismissed. Debtor did not request CC until day after filing.
Hailemichael	2007 B.L. 3562 E.D. Va., Alex	Unemployed. Residing in a homeless shelter for a week prior to filing.	Court said no showing Debtor could not have delayed filing.	Dismissed. Debtor did not request CC.
Enloe	2007 B.L. 2946 D. Col.	Impending Foreclosure	Debtor got CC 189 days prior. Court found delay in filing was due to attempt to sell home to avoid foreclosure.	Dismissal denied. Court found equitable factors in favor of not dismissing.

Vian	2007 B.L. 2072 D. Minn.	Persistent dunning by a few creditors.	Court said not exigent and Debtor did not sign cert., the lawyer signed it.	Dismissed.
Gossett	2007 B.L. 1340 N.D. Ill., E.	Vehicle already repossessed.	Court said Debtor intended to surrender vehicle.	Dismissed. Debtor got CC same day as filing, so not 180 days.
Giambrone	2007 B.L. 1058 W.D. NY	Impending Foreclosure. Filed petition evening before foreclosure.	Court said exigent. Debtor did CC five days after filing. Court said Debtor should not have to delay until get CC because Debtor demonstrated unable to obtain CC before the sale and during five-day period beginning from moment of the request.	Granted extension to get CC.
Henderson	2007 B.L. 1042 N.D. Tex.	Impending Foreclosure	Court said exigent. Court noted Debtor's attempted to get CC by trying all weekend by internet but no connection with only address given by atty. and no phone number to try.	Granted extension to get CC. Debtor requested CC but did not.

Dixon	338 B.R. 383 8th Cir. BAP 2006	Impending Foreclosure	Court said not exigent because Debtor had advance notice.	Order Dismissing Affirmed. Debtor requested but could not obtain CC, after finding out from bankruptcy attorney she contacted the day before filing that it was required.
Romero	2006 B.L. 2277 N. D. Cal.	Wage Garnishment	Court said exigent even though Debtor had advance knowledge of garnishment.	Denied Motion to Dismiss. Debtor requested CC but no time.
DiPinto	336 B.R. 693 E.D. Pa. 2006	Impending Foreclosure	Court said not exigent. Debtor had advance knowledge.	Waiver Denied. Dismissed. Debtor did not request CC.
Anderson	2006 B.L. 136	Wage Garnishment of Husband; Wife lost job.	Court said not exigent. Debtor had advance knowledge.	Dismissed. Debtor requested but did not obtain CC before filing.
Burrell	339 B.R. 669 W. D. Mich. 2006	Impending Foreclosure	Court said exigent.	Dismissed. Motion for Add. Time Denied. Debtor stated she requested CC but failed to state unable to obtain CC during the five day period.

Rodriguez	336 B.R. 462 D. Idaho 2005	Boilerplate allegations re. impending third garnishment.	Court said not exigent. Debtor did not sign certification.	Waiver Denied. Dismissed. Debtor attempted to get CC, but not successful.
Valdez	335 B.R. 801 S.D. Fla. 2005	Impending Foreclosure	Court said not exigent. Court said Debtor had opportunity to obtain CC.	Dismissed. Debtor did not request CC.
Hubbard	333 B.R. 377 S.D. Tex. 2005	Needed to reclaim sole transportation.	Court said exigent.	Stricken. Debtor did not request CC.

*CC = Credit counseling referring to the credit counseling required by the Section 109(h)

**B.L. = Bankr. LEXIS (citation to LEXIS)

"Debtor did not request CC" normally means debtor did not make the certification required by Section 109(h)(3).

For brevity purposes some of the salient facts may have been omitted, however the authors have attempted to utilize this format to give a skeletal comparison of these matters. It is acknowledged that in some cases it may be necessary to go to the case to get a full picture.

IV. TODAY'S ECONOMIC PARADIGM AS APPLIED TO THE DISTRESSED HOMEOWNER

A. *The Subprime Mortgage Mess: A Simplified Backdrop*

While the current U.S. subprime mortgage crisis and subsequent recession is the result of a series of complex events surrounded by a myriad of opinions on the correct actions of government and private decision-makers, a simplified description of events is necessary to understand how the sequence of events over the past few years could be considered exigent circumstances as applied to the distressed homeowner.

The Federal Housing Administration (FHA), created by Congress at the height of the Great Depression by the Housing Act of 1934, was established to insure loans on private residential mortgages.¹¹⁶ While default risk was largely mitigated through FHA insurance, as interest rates rose, the value of the loan portfolio fell (that is, interest rate risk).¹¹⁷ Accordingly, the federal government created the Federal National Mortgage Association (FNMA or “Fannie Mae”) to purchase FHA loans at face value, thus giving banks the capital they needed in exchange for loans they did not wish to hold, effectively eliminating interest rate risk for originating banks.¹¹⁸ In 1968, Congress privatized Fannie Mae,¹¹⁹ and in 1970, Congress created the Federal Home Loan Mortgage Corporation (FHLMC or “Freddie Mac”).¹²⁰ Fannie Mae and Freddie Mac, both private companies with “implicit backing of the U.S. Government,” became known as government-sponsored

116. National Housing Act, 73 Pub. L. No. 479, § 2, 48 Stat. 1246, 1246-49 (1934); Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2195-96 (2007) (stating that this housing act guaranteed that home mortgage lenders were protected from the borrower’s credit risk and any risk of housing price deterioration); Alexander von Hoffman, *A Study in Contradictions: The Origins and Legacy of the Housing Act of 1949*, 11 HOUS. POLICY DEBATE 299, 301 (2000) (stating, “[t]he National Housing Act of 1934 established the Federal Housing Administration (FHA) to provide insurance for private residential mortgages and home improvements . . .”).

117. THE HANDBOOK OF FIXED INCOME SEC. 968 (Frank J. Fabozzi ed., McGraw-Hill 7th ed. 2005) (defining interest-rate risk as “the potential impact on a bond portfolio value of any given change in the location and shape of the yield curve.”).

118. Peterson, *supra* note 116, at 2195-96 (stating that this housing act guaranteed that home mortgage lenders were protected from the borrower’s credit risk and any risk of housing price deterioration); Robert Hockett, *A Jeffersonian Republic by Hamiltonian Means: Values, Constraints, and Finance in the Design of a Comprehensive and Contemporary American “Ownership Society”*, 79 S. CAL. L. REV. 45, 110-14 (2005) (discussing Congress’ move to “insure the lending institutions” by providing secondary markets for securities trade and noting that, through Fannie Mae, Freddie Mac, and the Government National Mortgage Association, or Ginnie Mae, the FHA’s scheme “complet[ed] the market for housing credit and housing credit-risk bearing, thereby maximizing the availability of credit” and lowering the cost of such credit to home-buyers).

119. Richard W. Bartke, *Fannie Mae and the Secondary Mortgage Market*, 66 NW. U. L. REV. 1, 30 (1971) (discussing President Johnson’s proposal to Congress that Fannie Mae be privatized because “secondary market operation is largely a private function” and thus, it “ought to be performed by the private sector.”).

120. Federal Home Loan Mortgage Corporation Act, Pub. L. No. 91-351, §§ 300-10, 84 Stat. 451, 451-58 (1970); *see generally* Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565, 570-96 (2005) (discussing the creation and functionality of GSEs).

enterprises (GSEs).¹²¹

Seven years later, Congress passed the Community Reinvestment Act of 1977, which encouraged banks to increase lending to low- and moderate-income individuals.¹²² While lenders were encouraged to lend to individuals not meeting typical FHA and conventional standards, no entity stood ready to purchase these loans.¹²³ The lender would bear both the default risk and the interest rate risk and could get only moderate relief from default risk through private mortgage insurance.¹²⁴ Recognizing that lenders would not be active in the subprime market without the ability to offload these mortgages, fifteen years later Congress passed the Federal Housing Enterprises Financial Safety and Soundness Act of 1992,¹²⁵ which encouraged the GSEs to increase their support of affordable housing and opened the door to the purchase and securitization of subprime mortgages.¹²⁶

121. Carnell, *supra* note 120, at 570–71 (explaining that while investors perceive GSEs as implicitly backed by the federal government, GSEs do not form any part of the federal government and “lack the ability to bind the government financially.”); THE HANDBOOK OF FIXED INCOME SEC., *supra* note 117, at 245 (defining government sponsored enterprises as “privately owned and operated entities chartered by Congress to decrease the cost of funding for certain sectors of the economy” where “the agencies’ securities are thought to have an implicit government guarantee.”).

122. 12 U.S.C. § 2903(a) (2006); THE FED. RESERVE BD., COMTY. REINVESTMENT ACT, (2008) <http://www.federalreserve.gov/dcca/cra/>; Robert B. Avery, Raphael W. Bostic & Glenn B. Canner, *Economic Commentary, The Performance and Profitability of CRA-Related Lending*, FED. RESERVE BANK OF CLEVELAND, Nov. 2000, <http://www.clevelandfed.org/research/Commentary/2000/1100.htm>.

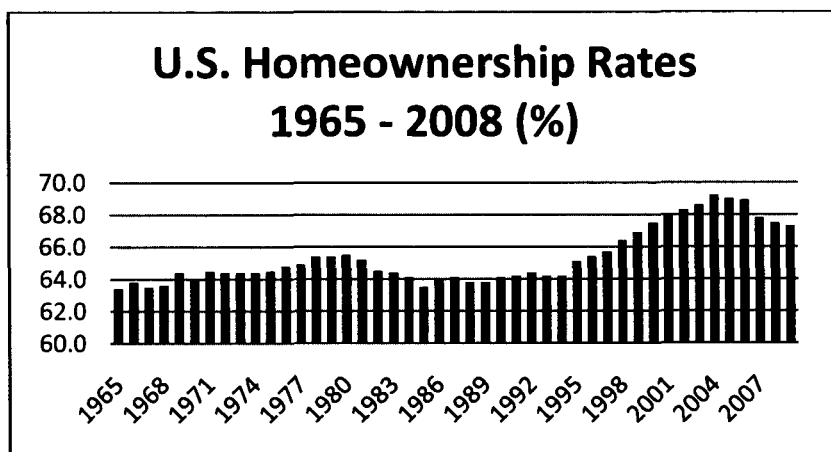
123. See generally Thomas E. Plank, *Regulation and Reform of the Mortgage Market and the Nature of Mortgage Loans: Lessons from Fannie Mae and Freddie Mac*, 60 S.C. L. REV. 779, 779–85 (2009) (discussing the distressed markets and economic climate of the 1960s and 1970s).

124. *Id.* at 794–97 (discussing the risks associated with ownership of a mortgage loan in the context of the savings and loan crash of the late 1970s and 1980s).

125. 12 U.S.C. §§ 4501–4651 (2006).

126. Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Community Affairs Research Conference, The Community Reinvestment Act: Its Evolution and New Challenges (Mar. 30, 2007), available at <http://www.federalreserve.gov/newsevents/speech/Bernanke20070330a.htm> (implementing the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, which set low- and moderate-income housing goals and an attendant enforcement scheme); see also Plank, *supra* note 123, at 796–97 (describing the “dramatic shift” in the percentage of mortgage loans held by savings institutions in the 1970s and the percentage held by similar institutions in 2006). “Savings institutions held more than 50% of all single-family mortgage loans” from 1958–1979, but by late 2006, “savings institutions held only 7.8% of all first-lien single-family mortgage loans.” *Id.* at

Historically low interest rates encouraged development of high-yield products like low documentation, no documentation, and piggyback loans, and lending standards were greatly relaxed.¹²⁷ Most people had the ability to qualify at teaser rates, and regulators did not police these products or the institutions that created them.¹²⁸ The loan originators also did not care about credit quality because they quickly sold newly created loans to the GSEs.¹²⁹ Consequently, as shown in the figure below, U.S. homeownership began to rise in the late 1990s and early 2000s, peaking at just under seventy percent in 2004.¹³⁰



797-98. On the other hand, “GSEs held 44.4% of all first-lien single family mortgage loans” in 2006, and due to the declining confidence in mortgage-backed securities, the number of loans held by GSEs grew to 51.6% by fall 2009. *Id.*

127. *Breaking New Grounds in U.S. Mortgage Lending*, FED. DEPOSIT INS. CORP. OUTLOOK, Summer 2006, available at http://www.fdic.gov/bank/analytical/regional/ro20062q/na/2006_summer04.html [hereinafter FEDERAL DEPOSIT].

128. *Id.*

129. Cf. Robert Hockett, *Bringing it All Back Home: How to Save Main Street, Ignore K Street, and Thereby Save Wall Street*, 36 FORDHAM L. REV. 427, 439 (2009) (positing several theories for Fannie Mae and Freddie Mac’s aggressive pursuit and quick incurrence of risky mortgages that did not comply with FHA regulations, such as the mortgages’ immense profitability, the implicit guarantees of such mortgage loans by the federal government, and “active pressure” from officials of the Clinton and Bush administrations); See also FEDERAL DEPOSIT, *supra* note 127 (noting increased concern among mortgage lenders in 2006 about non-traditional mortgage loan quality).

130. See U.S. Census Bureau, *Housing Vacancies and Homeownership, Homeownership Rates for the U.S. and Regions: 1965 to Present*, <http://www.census.gov/hhes/www/housing/hvs/historic/index.html> (last visited Mar. 19, 2011) (providing homeownership rates by quarter).

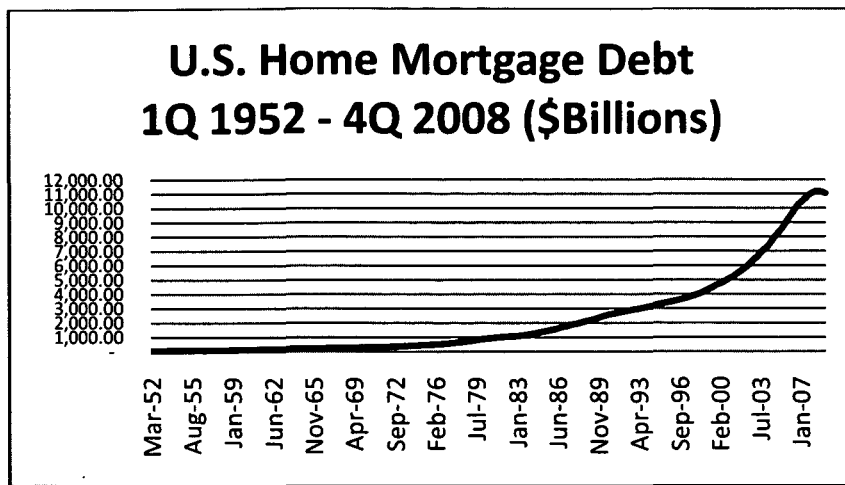
As shown in the figure below, the rise in homeownership was accompanied by substantial growth in U.S. home mortgage debt.¹³¹ Individuals began to purchase homes that were more expensive than they could ordinarily afford under previous lending standards, and investors began to speculate on housing prices by flipping properties.¹³² Consumers demanded more and more capital, loan products continued to get pushed beyond reasonable limits, investors chased returns by buying mortgage-backed securities of all types, and the feedback loop repeated as capital returned to lenders to create more extreme mortgage contracts.¹³³ In fact, at the writing of this Article, the GSEs held or backed more than half, or just under \$5.3 trillion, of the more than \$10 trillion in U.S. home mortgage debt.¹³⁴

131. See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, FEDERAL RESERVE STATISTICAL RELEASE: FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES (2009), <http://www.federalreserve.gov/releases/z1/20090312/data.htm> [hereinafter BOARD OF GOVERNORS] (showing the amount of U.S. home mortgage debt by quarter).

132. Harry Markowitz, *Proposals Concerning the Current Financial Crisis*, FIN. ANALYSTS J. 25, 25 Jan.-Feb. 2009; Cf. Moran, *supra* note 40, at 15, 16 (explaining that “[n]ontraditional financing, including mortgage commitments such as adjustable-rate mortgages (ARMs) and interest-only mortgages which vary from the traditional thirty-year fixed rate mortgage, allowed buyers to qualify for homes they otherwise could not afford under traditional fixed-rate mortgage lending guidelines.”).

133. See FEDERAL DEPOSIT, *supra* note 127 (recalling that lenders packaged nontraditional mortgages in the 2000s, fulfilling growing consumer demand and “introducing considerable new liquidity” for investors in the mortgage market).

134. See INT’L MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT: FINANCIAL STRESS AND DELEVERAGING: MACROFINANCIAL IMPLICATIONS AND POLICY (2008), <http://imf.org/external/pubs/ft/gfsr/2008/02/pdf/text.pdf> (stating Fannie Mae and Freddie Mac “have a combined \$5.3 trillion in mortgage risk.”); BOARD OF GOVERNORS, *supra* note 131 (calculating just over \$11 trillion in U.S. mortgage debt in the fourth quarter of 2008).



*B. Housing Prices Have Dropped: Owners Are Losing Equity;
Banks Are Not Lending*

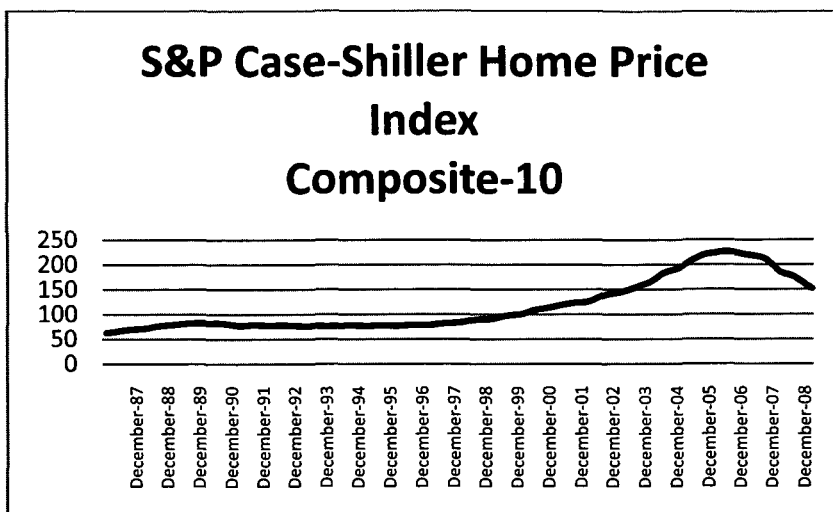
Home prices began to level off in 2005 and subsequently declined as subprime borrowers began to default.¹³⁵ As shown in the figure below, the base period (index = 100) Standard & Poor's Case-Shiller Home Price Index is the first quarter of 2000.¹³⁶ By the first quarter of 2006, the average price of a home in the Case-Shiller Composite-10, a composite of ten geographically diverse U.S. cities, had doubled.¹³⁷ However, modest increases in interest rates and the 2005 hurricane season's impact on energy prices subsequently slowed the real estate market.¹³⁸

135. See FEDERAL DEPOSIT, *supra* note 127 (predicting in 2006 that mortgage delinquency would become a problem, especially for subprime borrowers).

136. STANDARD & POOR'S, S&P/CASE-SHILLER HOME PRICE INDICES (2009), http://www2.standardandpoors.com/spf/pdf/index/CSHomePrice_History_033114.xls [hereinafter CASE-SCHILLER].

137. *Id.* (calculating a value of 222.46 for the first quarter of 2006 compared with a value of 100 for the first quarter of 2000).

138. Cf. Eduardo Porter & Vikas Bajaj, *Economy Sets Fastest Pace Since the Summer of 2003*, N.Y. TIMES, Apr. 29, 2006, at C3 (noting that economists predicted a thirty to forty percent drop in the housing market by the third quarter of 2006, resulting in part from "Hurricanes Katrina and Rita and a spike in oil prices, [which] sharply slowed economic growth to 1.7 percent.").



Home prices began to slide in late 2006, beginning a steep decline that has extended into 2009. In fact, the average home in the Case-Shiller Composite-10 suffered a staggering twenty-seven percent price decline from December 2006 to December 2008, devastating home equity particularly for those who purchased their homes in the mid-2000s.¹³⁹

Suddenly, the financial world found itself with an array of newly-created financial instruments that were based on the mortgage boom: collateralized debt obligations (CDOs), collateralized mortgage obligations (CMOs), and credit default swaps (CDSs).¹⁴⁰ Unfortunately, few people understood these instruments and how they were all intricately linked.¹⁴¹ The combination of market-to-market accounting, which required

139. See CASE-SHILLER, *supra* note 136 (documenting the decline in home prices month by month).

140. See Moran, *supra* note 40, at 36-43 (describing the “complex financial instruments” generated on Wall Street, such as mortgage-backed securities, collateralized mortgage obligations, and credit default swaps which “allow[ed] banks to expand their lending business by originating more loans while facilitating income streams for capital markets.”).

141. Markowitz, *supra* note 132, at 25; see also Moran, *supra* note 40, at 42, 43 (opining that the lack of regulatory supervision over credit-default markets, coupled with an overreliance on the credit ratings of the securities and financial firms selling them, meant that even the government regulators “lacked any means to assess the amount of risk in the system”). Some scholars posit that the financial crisis actually began in July 2007. *Id.* at 32. Although the fallout cannot be attributed to one determining cause, a major factor to lever the housing market bubble “was the financial innovations that developed on Wall Street as a result of securitization.” *Id.*

financial institutions to write down assets to fire-sale prices and the inability to determine the extent of a financial institution's holdings of these devalued assets, led to a sudden decrease in system-wide liquidity.¹⁴² As borrowers began to default, the GSEs were forced to cover the losses to pay off the bonds secured by the defunct mortgages; thus, their financial cushion flattened.¹⁴³ In 2008, the GSEs needed more capital to cover the growing number of defaults of recently originated subprime mortgages, but capital became increasingly difficult to obtain in a worsening economic environment.¹⁴⁴

C. Foreclosures and Bankruptcies Have Risen

Each quarter the Mortgage Bankers Association (MBA) releases its National Delinquency Survey (NDS). Since 1953, the MBA has administered the NDS, which "covers 45 million loans on one- to four-unit residential properties."¹⁴⁵ "Loans surveyed [are]

142. See Moran, *supra* note 40, at 44, 45 (surmising that a central cause of the financial crisis was "[t]he absence of significant regulatory controls" as "the financial innovations which grew out of the mortgages—derivatives built on other derivatives—were packaged and repackaged until no one could identify that they contained and how much they were worth."); cf. Markowitz, *supra* note 132, at 25-27 (proposing a program to determine the value of billions of dollars in exotic debt instruments, the lack of understanding of which triggered the global financial crisis).

143. Cf. Plank, *supra* note 123, at 800 (explaining that "the GSEs retain full liability for the debt that they issue."). Professor Plank explains:

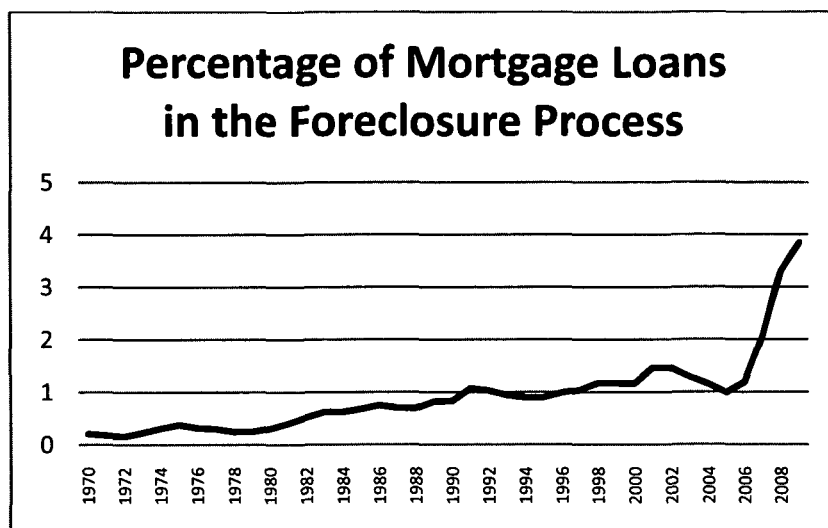
GSEs use the proceeds of this debt, among other purposes, to acquire and hold mortgage loans and mortgage-backed securities for which the GSEs retain full market value risk—not just default or credit risk. Therefore, although the amount of the GSEs' debt is substantially lower than the amount of their guaranteed mortgage-backed securities, the GSEs' liability on such debt is greater than their liability on the guarantees.

Id.; See Matthew Cowley, U.S. "Triple-A" Seems Secure, WALL ST. J., July 11, 2008, at C3, <http://online.wsj.com/article/SB121569929864042645.html> (noting Fannie Mae and Freddie Mac "play a key role in the troubled mortgages market").

144. Moran, *supra* note 40, at 60 (explaining that Fannie Mae and Freddie Mac's purchase and guarantee of billions of dollars in loans to risky borrowers was "a serious mistake in risk management," and "given the substantial losses in their mortgage portfolios," their ability to raise "sufficient new capital from private investors was infeasible"); cf. Press Release, Bd. of Governors of the Fed. Reserve Sys., Other Announcements (July 13, 2008), available at <http://federalreserve.gov/newsevents/press/other/20080713a.htm> (announcing the authorization of supplemental as-needed lending to Fannie Mae and Freddie Mac to maintain the availability of mortgage credit "during a period of stress in financial markets").

145. Press Release, Mortgage Bankers Association, Delinquencies Continue

reported by approximately 120 lenders, including mortgage bankers, commercial banks, and thrifts.”¹⁴⁶ The figure below illustrates historical foreclosure rates from 1970 through the first quarter of 2009.¹⁴⁷ As shown, foreclosure rates have risen dramatically since 2006 and set a new record in the second quarter of 2009.¹⁴⁸



to Climb in Latest MBA National Delinquency Survey (Mar. 5, 2009), available at <http://www.mbaa.org/NewsandMedia/PressCenter/68008.htm> [hereinafter *Delinquencies Continue to Climb*]; MORTGAGE BANKERS ASSOCIATION, NATIONAL DELINQUENCY SURVEY FACTS (2008), <http://www.mortgagebankers.org/file/Research/NDSFactSheet.pdf>. The survey “represent[s] between 80 to 85 percent of all ‘first-lien’ residential mortgage loans outstanding in the United States.” *Delinquencies Continue to Climb*, *supra*.

146. *Id.*

147. See Peter J. Elmer & Steven A. Seelig, *The Rising Long-Term Trend of Single-Family Mortgage Foreclosure Rates*, 21–22 (Fed. Deposit Ins. Corp., Working Paper No. 98-2), available at <http://www.fdic.gov/bank/analytical/working/98-2.pdf> (providing data up to 1997); U.S. CENSUS BUREAU, MORTGAGE ORIGINATIONS AND DELINQUENCY AND FORECLOSURE RATES: 1990 TO 2007 (2009), <http://www.census.gov/compendia/statab/2009/tables/09s1154.xls> (providing data for 1998 to 2007); *Delinquencies Continue to Climb*, *supra* note 145 (providing national delinquency data).

148. Press Release, Mortgage Bankers Association, *Delinquencies Continue to Climb, Foreclosures Flat in Latest MBA National Delinquency Survey* (Aug. 20, 2009), available at <http://www.mbaa.org/NewsandMedia/PressCenter/70050.htm>.

Confirming the MBA NDS, on May 13, 2009, RealtyTrac, a foreclosure tracking company based in Irvine, California, announced “that one in every 374 housing units received a foreclosure filing in April [2009].”¹⁴⁹ Like the MBA data, this is the highest rate on RealtyTrac’s record, and it represents a thirty-two percent year-over-year increase.¹⁵⁰

While BAPCPA dramatically lowered bankruptcy filings in the United States after it went into effect on October 17, 2005, data from the Bankruptcy Data Project at Harvard University illustrates an upward trend in bankruptcy filings.¹⁵¹ Approximately 18,000 Chapter 13 bankruptcies were filed by individuals in January 2006.¹⁵² By August 2007, this number broke 40,000, and in April 2009, approximately 45,500 individuals filed Chapter 13 bankruptcy petitions.¹⁵³ As shown in the figure below, according to the United States Bankruptcy Court, total non-business bankruptcy filings in 2008 climbed to 1,074,225.¹⁵⁴ Approximately two-thirds of these were Chapter 7 filings.¹⁵⁵ While these numbers remain well below the figures for 2005, the annual growth rates in non-business bankruptcy filings from 2006 to 2007 (37.6 percent) and 2007 to 2008 (30.6 percent) exceed those posted prior to BAPCPA.¹⁵⁶

149. Press Release, RealtyTrac, Foreclosure Activity Remains at Record Levels in April (May 13, 2009), available at <http://www.realtytrac.com/content/press-releases/foreclosure-activity-remains-at-record-levels-in-april-4883>.

150. *Id.*

151. See generally Bankruptcy Data Project at Harvard, <http://bdp.law.harvard.edu> [hereinafter Bankruptcy Data Project] (last visited Mar. 19, 2011) (providing searchable bankruptcy database showing upward filing trend). See Thomas Evans & Paul B. Lewis, *Bankruptcy Reform and the Foreclosure Crisis*, 28 BANKING & FIN. SERVICES POL’Y REP. 1, 1 (2009) (stating that “[b]ankruptcies have once again reached the levels associated with the period prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.”).

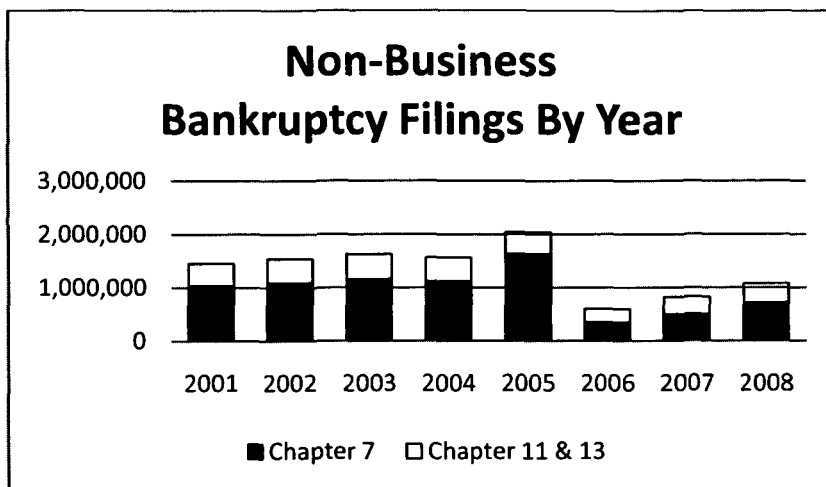
152. See Bankruptcy Data Project at Harvard, <http://bdp.law.harvard.edu/filingsdb.cfm> (last visited Mar. 19, 2011) (calculating filings for the specified period).

153. See Bankruptcy Data Project, *supra* note 151 (calculating filings for the specified periods); see also Evans & Lewis, *supra* note 151, at 6 (noting that the BAPCPA sought to “alter the percentage of Chapter 13 filings relative to Chapter 7 filings Although immediately following the enactment of the BAPCPA the number of consumers filing for Chapter 7 relief dropped, “the share of Chapter 7 bankruptcies has been generally increasing”).

154. See U.S. COURTS, BANKRUPTCY STATISTICS, <http://www.uscourts.gov/bkrpctstats/statistics.htm#calendar> (last visited Mar. 19, 2011) (providing numbers of bankruptcy filings per twelve-month periods).

155. See *id.* (showing 714,389 Chapter 7 filings in calendar year 2008).

156. See *id.* (showing 2,039,214 non-business bankruptcy filings in 2005;



V. MAKING THE "SAFE HARBOR" SAFE

Section 109(h)(3) is referred to as a "safe harbor" provision to protect the debtor experiencing "exigent circumstances" from being deemed ineligible for bankruptcy protection.¹⁵⁷ However, as discussed in Part II.C., *supra*, section 109(h)(3) has limited prophylactic capability.¹⁵⁸

A. *Parallel to Special Provisions Adopted in Response to Hurricane Katrina*

As discussed in Part VI.A., *infra*, during Hurricane Katrina the U.S. Trustee recognized that these extreme circumstances called for extreme measures. Pursuant to Section 109(h)(2), the

597,965 in 2006; 822,590 in 2007; and 1,074,225 in 2008).

157. *In re Thompson*, 344 B.R. at 902. "In the event the counseling cannot be obtained pre petition, § 109(h)(3) provides a "safe harbor" where the debtor may obtain the counseling post petition if "exigent circumstances" merit a waiver and are satisfactory to the court." *Id.*

158. Michael Newman, Comment, *BAPCPA's New Section 109(h) Credit Counseling Requirement: Is It Having the Effect Congress Intended?*, 2007 UTAH L. REV. 489, 491-92.

Furthermore, the "safe harbor" provision of BAPCPA's section 109(h)(3) is limited and creates an exception for non-compliant bankruptcy petitioners to obtain credit counseling post-petition only where he or she can prove "exigent circumstances" that the court believes merit a waiver. Otherwise, if a petitioner fails to comply with section 109(h), he or she is simply not eligible for bankruptcy relief under any chapter of the Bankruptcy Code.

Id.

U.S. Trustee suspended the requirement for debtors to acquire pre-bankruptcy counseling because the hurricane had disrupted the availability of counseling services.¹⁵⁹ Similarly, this proposal would provide relief for those caught up in the global “economic tsunami” to lessen the burden by removing the credit counseling hurdle that appears to cause greater harm than good. Although the “safe harbor” provision in Section 109(h)(3) provides a distinct basis for relief and gives the specific authority to suspend the applicability of the Section 109(h) credit counseling provision, the special circumstances of the nation’s economic crisis provides a basis for the Trustee to suspend its applicability. At a minimum, Congress should act to take emergency measures to do so.

*B. Parallel to Contractual Concepts of Commercial
Impracticability and Force Majeure*

Parties in contractual disputes are asserting that the present severe global economic crisis impacting our nation is creating an extraordinary circumstance in the context of commercial impracticability and force majeure contractual provisions. Courts are being presented with this novel issue in matters that have recently been initiated in at least two commercial disputes.¹⁶⁰

Commercial impracticability is a general contract principle which asserts that “[w]here, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”¹⁶¹ Force majeure is also a general contract principle which asserts that an unforeseen event that renders the performance of the contract impossible is a valid excuse for non-performance.¹⁶² Force majeure events include acts

159. Clifford J. White, Acting Director, Executive Office for the United States Trustee, Department of Justice, Testimony before the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives 8 (Apr. 26, 2006), *available at* http://www.usdoj.gov/ust/eo/public_affairs/testimony/docs/testimony_060426.pdf.

160. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F. 3d 721 (7th Cir. 2009); *Rohm & Haas Co. v. The Dow Chemical Co.*, et al., No. 4309-CC, 2009 LEXIS 31 (Del. Ch. 2009).

161. Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1134 (2008) (citing RESTATEMENT (SECOND) OF CONTRACTS § 261).

162. See Jonathan Riley, *Embracing the Principle of Growth: A Call for the Expansion of the Doctrine of Fortuitous Event in Louisiana Law*, 35 S.U. L. REV. 413, 416-18 (2008) (describing the similarities of the concepts of force majeure, fortuitous event, and impossibility of performance).

of nature, such as floods, earthquakes, hurricanes, and acts of humanity, such as wars, strikes, and riots.¹⁶³ A concept analogous to force majeure is “impossibility of performance.” Commercial impracticability deals with the difficulty of performance, while force majeure concerns the inability to perform. Either of these concepts may be included as provisions in contracts and the particular terms may be tailored to the circumstances and needs of the specific transaction.

Contract parties are seeking to excuse performance with respect to force majeure contract clauses and the general legal concept of commercial impracticability because of this severe economic crisis.¹⁶⁴ Although to date we have found no evidence that a court has specifically ruled on the merits in favor of parties seeking relief from contract obligations using the rationale of commercial impracticability or force majeure, the Seventh Circuit Court of Appeals in *Hoosier Energy Rural Electric Cooperative, Inc. v. John Hancock Life Insurance Co.*¹⁶⁵ affirmed a preliminary injunction based upon the argument of force majeure created by the financial crisis.¹⁶⁶

Hoosier Energy involves a complex sale-lease out (SILO) tax avoidance scheme. The SILO agreement involved assets owned by Hoosier Energy that were sold to John Hancock and then leased back to Hoosier Energy.¹⁶⁷ As a part of the deal, Hoosier Energy had to get a “credit default swap” from Ambac, which guaranteed that John Hancock would receive all of its lease payments.¹⁶⁸ Under this agreement, Ambac had to maintain a certain credit rating threshold.¹⁶⁹ When Ambac’s credit rating fell below the threshold—due to the global economic crisis—Hoosier Energy was required to find another guarantor.¹⁷⁰ Hoosier Energy worked diligently to find a replacement for Ambac, but it proved extremely difficult in the existing credit climate.¹⁷¹ John Hancock gave

163. *Id.* at 417.

164. Michael Orey, *The Financial Crisis Excuse: Companies Are Trying to Get Out of Deals by Arguing that the Meltdown Is So Bad It Should Void Legal Obligations*, BUSINESSWEEK, Feb. 23, 2009, at 32.

165. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 582 F. 3d 721 (7th Cir. 2009).

166. *Id.* at 728-30.

167. *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins. Co.*, 588 F. Supp. 2d 919, 922 (S.D. Ind. 2008).

168. *Id.* at 922-23.

169. *Id.* at 922.

170. *Id.* at 924.

171. *Id.* at 932-33.

Hoosier Energy several extensions.¹⁷² Hoosier Energy finally secured a tentative agreement with Berkshire-Hathaway at considerable financial pain to Hoosier Energy, but needed a ninety-day extension to close the deal.¹⁷³ John Hancock refused to grant Hoosier Energy another extension.¹⁷⁴ John Hancock's refusal triggered a clause in the agreement that obligated Ambac to pay a substantial termination payment to John Hancock that, in turn, would obligate Hoosier Energy to immediately begin reimbursing Ambac.¹⁷⁵ Hoosier Energy's obligation would have forced it into bankruptcy,¹⁷⁶ and thus, the suit was filed asking the court for the time to close the deal with Berkshire-Hathaway.

John Hancock argued that New York law, the substantive law under which this case was decided,¹⁷⁷ does not recognize the doctrine of commercial impracticability.¹⁷⁸ However, the appeals court acknowledged that New York does recognize the doctrine of impossibility.¹⁷⁹ While the court pointed out certain difficulties Hoosier Energy may have in proving the doctrine of impossibility under the premise of a severe economic crisis, the court still held that such proof was not outside the bounds of reasonableness.¹⁸⁰ The court held that if Hoosier Energy could prove at trial that it had a duty to find a replacement for Ambac, as opposed to a mere option to find a replacement for Ambac, then Hoosier Energy had a real chance at proving the impossibility defense.¹⁸¹ The court reasoned that under the duty theory it is possible that Hoosier Energy could prove:

that (a) all parties to the transaction assumed, when they negotiated the terms, that it would be possible to find *some* other intermediary with adequate credit standing, and (b) as a result of a financial crisis, no such intermediary existed in late 2008, no matter how much Hoosier Energy offered to post in liquid assets to secure its obligations.¹⁸²

The court further reasoned that because both parties would

172. *Id.* at 933.

173. *Id.* at 925-26.

174. *Id.*

175. *Id.* at 926.

176. *Id.*

177. *Hoosier*, 582 F. 3d. at 725.

178. *Id.* at 727-29.

179. *Id.* at 727.

180. *Id.* at 729-30.

181. *Id.* at 729.

182. *Id.* (emphasis in original).

not have been anticipating or expecting a financial crisis of the magnitude experienced in 2008, Hoosier Energy's ability to perform the contract would qualify as impossible under New York law.¹⁸³ The appeals court also found significant the fact that Hoosier Energy was only asking for a temporary delay in finding a replacement for Ambac.¹⁸⁴

So it appears that if a company's predicament is precipitated by a global economic crisis, the company has taken reasonable steps to abate the predicament, and the company is asking for a temporary delay in order to meet its obligations, then the company may have a viable impossibility of performance or commercial impracticability defense. It should be noted that commercial impracticability is easier to prove than impossibility of performance; therefore, in states that recognize the commercial impracticability defense, the thresholds of proof should be lower than in states that recognize only impossibility of performance.

In another case, Donald Trump, the renowned luxury resort and hotel financier, contended that the economic tsunami qualified as a force majeure event in response to a suit filed by Deutsche Bank to collect on a \$40 million loan that was personally guaranteed by Trump.¹⁸⁵ Legally, Trump's position may be stronger than Hoosier Energy's because his contract contained a force majeure clause with the unusually comprehensive language that allows any matter that is "not within the reasonable control of the borrower" to be deemed a force majeure event.¹⁸⁶ The court did not get the opportunity to rule on this matter because Trump and Deutsche agreed to discontinue the suit.¹⁸⁷ However, the mere fact that it was asserted by Trump to his presumed advantage signifies its potential viability.

In documents filed in the Delaware Chancery Court on February 3, 2009, Dow Chemical cited the unprecedented global

183. *Id.*

184. *Id.* at 730. "The district court itself stressed the word 'temporary' in 'temporary commercial impracticability'; we are confident that the court will not allow 'temporary' to drag out in the direction of permanence." *Id.* See also *MidFirst Bank v. 159 W. 24th St. LLC*, No. 107873/09, slip op. at 8 (N.Y. June 21, 2010) (citing *Hoosier*, 588 F. Supp. at 931) (stating that "parties may be temporarily excused from performance under a contract if 'unexpectedly and radically changed conditions render the judicial enforcement of certain promises of little or no utility' under 'sufficiently extreme circumstances.'").

185. Orey, *supra* note 164.

186. *Id.*

187. Mary Ellen Podmolik, *Donald Trump, Deutsche Bank Reach Truce over Chicago Skyscraper's Finances*, CHI. TRIB., Mar. 4, 2009, http://articles.chicagotribune.com/2009-03-04/news/0903030537_1_donald-trump-trump-international-hotel-skyscraper.

economic meltdown as its reason for reneging on its \$18.9 billion acquisition deal to purchase Rohm & Haas.¹⁸⁸ This case settled on the eve of its March 9, 2009, trial date in which Dow Chemical was able to restructure the deal in its favor.¹⁸⁹ While the court did not have an opportunity to rule on the validity of the factual basis of Dow Chemical's contentions, the factual contentions were likely strong enough to allow Dow to wrangle pre-trial concessions from Rohm & Haas.¹⁹⁰

Hoosier Energy, Donald Trump, and Dow Chemical are examples of venues recognizing that the global economic meltdown may be an exigent circumstance necessitating a revision of contract terms. The court in *Hoosier Energy* asserted that it is reasonably likely that Hoosier Energy will prevail on the merits that it suffered a temporary impossibility to perform based upon the global crisis.¹⁹¹ The court recognized that this is an unusual remedy for unusual times.

C. Establishing a Prima Facie Case

The severe economic crisis can serve as a basis for establishing a prima facie case of exigent circumstances. The creditor can rebut it by showing that this particular debtor was an irresponsible debtor; however, the debtor should be able to walk into a court and make his or her assertion. Many judges have lamented the harshness of the pre-filing credit counseling provisions.¹⁹² By making the assertion of the global economic crisis a prima facie exigent circumstance, the court would then have the power to grant relief to deserving debtors and withhold relief from undeserving debtors.

188. Rohm & Haas Co. v. The Dow Chemical Co., et al., No. 4309-CC, Answer of Defendants Dow Chemical Company and Ramses Acquisition Corp, Paragraphs 9 and 13-30, available at <http://www.scribd.com/doc/11602453/Dows-Answer-to-Rohm-Haass-Lawsuit>; Orey, *supra* note 164.

189. Shawn Langlois and Christopher Hinton, *Dow Chemical, Rohm & Haas Shares Gain on Deal*, WALL ST. J., Mar. 10, 2009, <http://www.marketwatch.com/story/dow-chemical-rohm-haas-shares-gain>.

190. *Dow Chemical and Rohm Haas Reach Deal to Complete Merger*, N.Y. TIMES, Mar. 9, 2009, <http://www.nytimes.com/2009/03/09/business/worldbusin/ess/09iht-9dow.20710410.html>.

191. *Hoosier*, 588 F. Supp. at 727-30.

192. *In re Bolling*, 2009 Bankr. LEXIS at *3-4; *In re Enloe*, 373 B.R. at 133-34; *In re Rendler*, 368 B.R. 1, 4 (Bankr. D. Minn. 2007); *In re Gossett*, 369 B.R. 361, 370 (Bankr. N.D. Ill. 2007); *In re Manalad*, 360 B.R. 288, 307 (Bankr. C.D. Cal. 2007); *In re Valdez*, 335 B.R. at 803; See Baucher, *supra* note 18 (discussing the lamentations of bankruptcy judges over the harshness and rigidity of the pre-filing credit counseling provisions).

VI. ALTERNATIVE SOLUTIONS: AMEND SECTION 109(H)

On May 1, 2007, Yvonne D. Jones, Director of Financial Markets and Community Investment for the United States Government Accountability Office, a non-partisan agency, stated that pre-bankruptcy credit counseling may not be beneficial to debtors because by the time the debtors file bankruptcy, their financial situation has deteriorated to the point that they have no viable alternative but to file bankruptcy.¹⁹³ As evidence of the ineffectiveness of the credit counseling requirement, Director Jones proffered that less than two percent of debtors counseled from October 2006 to October 2007 entered into a debt management plan rather than filing for bankruptcy protection.¹⁹⁴ Another issue Director Jones raises in her statement is that the pre-bankruptcy credit counseling may not be achieving its basic purpose, which is to give the debtor information from which the debtor can evaluate bankruptcy and its consequences and alternatives knowledgeably prior to filing.¹⁹⁵ The Director also points out that debtors in severe financial straits generally have already interfaced with a bankruptcy attorney prior to receiving credit counseling and the actual counseling then becomes a mere formality.¹⁹⁶ Because anecdotal data suggests that the vast majority of debtors still file bankruptcy even after the credit counseling, the merit of such counseling has been questioned.¹⁹⁷ Such data infers that pre-bankruptcy credit counseling may be an administrative hurdle rather than a valuable financial tool for debtors.

Moreover, as stated in the introduction, many courts and commentators alike have complained that Section 109(h) (as with much of BAPCPA) is not a model of statutory clarity,¹⁹⁸ resulting in the conflicts discussed in the legal issues presented here. Based upon these concerns, the following are suggested amendments to the pre-bankruptcy credit counseling requirement.

193. YVONNE D. JONES, DIRECTOR OF FINANCIAL MARKETS AND COMMUNITY INVESTMENTS, U.S. GOV'T ACCOUNTABILITY OFFICE, BANKRUPTCY REFORM: THE VALUE OF CREDIT COUNSELING REQUIREMENT NOT CLEAR, TESTIMONY BEFORE THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES 8 (2007), <http://www.gao.gov/new.items/d07778t.pdf>.

194. *Id.* at 10.

195. *Id.* at 10.

196. *See id.* at 11.

197. *Id.* at 11; *See In re Gaddis*, No. 07-40476, 2007 Bankr. LEXIS 1879, at *8-9 (Bankr. D. Kan. 2007) (dismissing the debtor's petition for technical non-compliance with filing requirements).

198. *See supra* note 18 and accompanying text.

A. Eliminate the Pre-Bankruptcy Credit Counseling Requirement Altogether

One recommended solution would be to eliminate the pre-bankruptcy credit counseling requirement altogether. First, it appears that the purpose of the requirement is not being fulfilled, and second, all debtors are required to receive financial management counseling prior to discharge.¹⁹⁹ The fact that the evidence suggests that the pre-bankruptcy credit counseling requirement is not fulfilling its stated purpose²⁰⁰ suggests that the provision be eliminated. A study has already been commissioned by The Executive Office for the U.S. Trustee (EOUST) that operates the U.S. Trustees Program (USTP), which is in turn responsible for managing the pre-bankruptcy agencies and which concluded that within the field of credit counseling there are no common standards or measurements that can meaningfully assess the efficacy of pre-bankruptcy counseling agencies.²⁰¹ This means that Congress may have legislated required credit counseling without any credible evidence that it works, and without any relevant way to assess the viability of the provision's effectiveness.²⁰² Such a naive basis is an unwise paradigm for any legislative effort, but is even more so when involving bankruptcy legislation. These are not simply numbers in a computer data bank. These are real people with real problems looking for real solutions at a critical stage of their financial lives. It is irresponsible to enact provisions with no demonstrated benefits, but with severe and harsh consequences for noncompliance.²⁰³ In the case of *In re Manalad*,²⁰⁴ the bankruptcy court aptly describes some of the deleterious effects of noncompliance to Section 109(h):

For a debtor in financial straits, this means the expense of another

199. 11 U.S.C. § 727(a)(11) (2010); *Id.* § 1328(g)(1).

200. JONES, *supra* note 193, at 10.

201. NOREEN CLANCY & STEPHEN J. CARROLL, PRE-BANKRUPTCY CREDIT COUNSELING, RAND CORPORATION (2007), http://www.usdoj.gov/ust/eo/public_affairs/reports_studies/docs/Pre-Bankruptcy_Credit_Counseling_Report_Rand.pdf.

202. See Karen Gross & Susan Block-Lieb, *Empty Mandate or Opportunity for Innovation? Prepetition Credit Counseling and Post - Petition Financial Management Education*, 13 AM. BANKR. INST. L. REV. 549, 549-50 (2005) (stating that prior to the passage of BAPCPA, there was no empirical evidence that "consumer debtors would benefit from financial management instruction, particularly when they were already experiencing considerable stress."); *Id.* at 553-60 (giving a brief history of the credit counseling industry).

203. See generally Braucher, *supra* note 18 (discussing the challenges presented by the 2005 amendments).

204. 360 B.R. 288 (Bankr. C.D. Cal. 2007).

filing fee (§ 299[.]00) and the time, effort, and possible attorneys' fees needed to prepare a new petition and set of case commencement documents. It also means a potential limited availability of the protection of the automatic stay. Under § 362(c)(3), when a debtor files a petition after a petition was pending within the preceding year, the debtor may lose the protection of § 362(a) thirty days after filing the later petition with respect to secured creditors and lessors. A debtor has an opportunity to obtain an order continuing the automatic stay but must promptly file a motion, schedule a hearing, and overcome a presumption that the later case was not filed in good faith. For debtors who had one case dismissed, then a second case dismissed for failure to comply with the Credit Counseling Requirements, they must wait a full year to file another petition if they wish for any protection of the automatic stay.²⁰⁵

Under Sections 727(a)(11) and 1328(g)(1) of the Code, Chapter 7 and Chapter 13 debtors are required to complete a personal financial management course from an approved budget and credit counseling agency prior to discharge. The criteria of the course are specified under 11 U.S.C. Section 111(d); however, what should be noted is that the criteria for pre-bankruptcy counseling are the same as for post-bankruptcy counseling. Therefore, debtors are going to get similar counseling twice. It is notable that research shows that while it is debatable whether debtors receive any benefit from the required pre-bankruptcy counseling,²⁰⁶ financial professionals believe that the required post-filing counseling does have value.²⁰⁷ American citizens do suffer from credit ignorance, and there is a need to provide financial direction and guidance to those in desperate financial condition.²⁰⁸ However, having to make financial decisions under duress is not the manner in which many financial professionals believe that advantageous financial behaviors are likely to be cultivated.²⁰⁹

There is no need for two counseling sessions covering the same material especially because the pre-bankruptcy credit counseling appears to be a mere formality—another obstacle to clear—providing no material benefit. Therefore, Congress should eliminate the pre-bankruptcy credit counseling requirement and maintain the post-filing financial management course requirement.

205. *Id.* at 307.

206. JONES, *supra* note 193, at 10-11.

207. *Id.* at 13.

208. Nathalie Martin & Ocean Tama y Sweet, *Mind Games: Rethinking BAPCPA's Debtor Education Provisions*, 31 S. ILL. U. L. J. 517, 520-24 (2007).

209. JONES, *supra* note 193, at 10-11.

*B. Alternative Solutions to Mitigate the Harshness
of the Consequences*

In lieu of eliminating the pre-bankruptcy credit counseling provision of Section 109(h), Congress can take measures to mitigate the harshness of the provision. First, Congress can pass an amendment to this provision that mandates a suspension of the pre-bankruptcy credit counseling provision during this unprecedented economic crisis. The provision could be amended to provide the U.S. Trustee with the authority to remove the suspension when the economic crisis has abated; or Congress could give the Trustee the power to both initiate and remove the suspension based upon particular economic parameters.

Such legislative action would be similar to a provision in Section 109(h)(2) where the Trustee for any particular district can suspend the pre-bankruptcy credit counseling requirement when the Trustee determines that adequate counseling services are not available. Section 109(h)(2) also mandates that a review of the circumstances precipitating any suspension of the requirement be undertaken at least once every year. In the aftermath of the Hurricane Katrina disaster, Section 109(h)(2) was employed to suspend the pre-bankruptcy credit counseling requirement because adequate counseling services were not accessible. The suspension was removed when such services became readily obtainable.

Second, Congress could specify certain threatened creditor actions such as foreclosures, garnishments, and repossessions as *per se* "exigent circumstances," even if the petition is filed on the eve of such threatened activity, notwithstanding the fact that notice of such actions may be provided to the debtor. Many times debtors are attempting to negotiate with creditors until the last minute in an effort to avoid filing bankruptcy. Such action would offer some certainty to an already stressful situation and would allow such ongoing negotiations to continue without the debtor having to worry about complying with a statutory provision that debtors generally would not be aware of until all other options have been explored.²¹⁰ Further, at a point where time and money are in limited supply, the debtor would not have to expend those resources searching out qualified financial counseling that evidence has shown has resulted in debtors ultimately filing

210. See Braucher, *supra* note 18, at 104 (suggesting that courts may be able to use the bad faith negotiations of creditors to excuse the credit counseling deficiencies of last-minute filing debtor).

bankruptcy.²¹¹ The money and/or time not spent on credit counseling can be used to help in a potential agreement with creditors. Further, these debtors would remain obligated to get personal financial management counseling to be eligible for a discharge.²¹²

Third, Congress can pass an amendment to this statute to limit the requirement for credit counseling to the debtors who could obviously benefit from it, that is, the debtors whose debts consist significantly as debts for luxury goods and services. Such luxuries might include second homes, jewelry, vacations, and gambling debts. The nature of the debts of any particular debtor is discernible from the any schedules and statements a debtor is required to file. In addition, a supplemental schedule could be required that would specifically reveal this type of information.

Many debtors are in financial straits because of unforeseen circumstances such as lost jobs and unexpected medical bills and may have otherwise been financially responsible in managing their financial affairs.²¹³ The court in *Adams v. Findlay*²¹⁴ notes that strict compliance with section 109(h) is mandated “even where credit counseling would be an empty charade, for example, where sudden illness, loss of employment, divorce, incarceration of the bread winner or any number of causes not related to fiscal irresponsibility compel a person to seek refuge in the bankruptcy court.”²¹⁵

These responsible debtors may have understood and practiced financial competency, but a lost job, loss of a pension, or the inability to pay an unexpected medical bill as a result of a global meltdown brings them to the brink of financial disaster. The directive to compel the irresponsible debtors to seek counseling prior to filing bankruptcy, that is, those whose debts consist significantly of luxury goods and services, while allowing the “responsible debtors” to avert counseling is equitable. Again, even the responsible debtors are required to receive personal financial management counseling to qualify for a discharge.²¹⁶

211. JONES, *supra* note 193, at 11.

212. 11 U.S.C. § 727(a)(11) (2006); *Id.* § 1328(g)(1).

213. *Adams v. Finley*, No. 06 Civ. 6039, 2006 U.S. Dist. LEXIS 81591, at *8 (S. D. N.Y. Nov. 3, 2006).

214. *Id.*

215. *Id.*

216. 11 U.S.C. § 727(a)(11); *Id.* § 1328(g)(1).

VII. CONCLUSION

The present economic global crisis that our nation is experiencing is unprecedented. It will likely be years before the full scale of the magnitude of this crisis is calculated. The impact it is and will be having upon our economy indeed resists quantification as it impacts the lives of everyday people in both objective and subjectively personal ways.

The proposals we suggest here are reasonable measures to lessen the hardship upon people who are in need of the protection of the bankruptcy courts. The bankruptcy courts have authority, pursuant to the exigent circumstances provision of Section 109(h)(3), to at least give *prima facie* recognition to the economic crisis in making determinations of "exigent circumstance." Alternatively, we suggest Congress needs to act emergently and with compassion to correct the impact of the law, recognizing that at the time BAPCPA was passed this economic crisis was not generally predicted. Even in the sacredness of the contractual setting, the impact of the global crisis is being recognized as a basis for potentially voiding contractual obligations. The U.S. saw the need for implementing emergency measures in response to Katrina. The data is in. The crisis is real. Measures such as those proposed here should be adopted to lessen the hardship upon prospective debtors during this severe crisis and for any future economic crises of this magnitude.