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### Anything But Automatic: Dismissal Under § 521

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## ANYTHING BUT AUTOMATIC: DISMISSAL UNDER § 521

### INTRODUCTION

Since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), bankruptcy cases are dismissed more often for apparent violations of the Bankruptcy Code (the “Code”). These dismissal decisions under BAPCPA are being rendered at an increasing rate. Despite the commonality of dismissal decisions, the opinions justifying them tend to range from a strict interpretation of the alleged plain language of the Bankruptcy Code to judgments creating new tests and various loopholes in interpretation. The main purpose of the Code is to provide a procedure by which honest consumers are entitled to a discharge of debts and a fresh start.<sup>1</sup> Through bankruptcy, honest debtors can “reorder their affairs, make peace with their creditors, and enjoy ‘a new opportunity in life’”<sup>2</sup> without having to worry about the encumbrances and restrictions of their past obligations.<sup>3</sup> The Code is designed to restrict such opportunity to the “honest but unfortunate debtor”<sup>4</sup> and weed out debtors who file in bad faith. However, this raises an important question: what happens when a dishonest debtor seeks to take advantage of the Bankruptcy Code and uses provisions meant to protect honest debtors and creditors to his own unfair advantage?

This Comment will look at how a narrow reading of § 521(i) leads to an automatic dismissal which encourages abuse of the bankruptcy system by dishonest debtors.<sup>5</sup> While a strict and rigid application of § 521(i) requirements allows dishonest debtors to manipulate the system, it also leads to unfavorable outcomes for honest debtors. If any documents or information have not been filed in a timely manner, then a bankruptcy case may be dismissed automatically. Although there are several solutions, including the promotion of

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<sup>1</sup> *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991) (“The principal purpose of the Bankruptcy Code is to grant a ‘fresh start’ to the ‘honest but unfortunate debtor.’”)).

<sup>2</sup> *Grogan*, 498 U.S. at 286.

<sup>3</sup> *Id.*; *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934) (“[The] purpose of the [bankruptcy] act has been . . . [to give] to the honest but unfortunate debtor who surrenders for distribution the property which he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”).

<sup>4</sup> *Marrama*, 549 U.S. at 367; *Local Loan Co.*, 292 U.S. at 244.

<sup>5</sup> See 11 U.S.C. § 521(i) (2006).

judicial discretion and the use of waiver forms, this Comment suggests an amendment to the Code that will promote fairer results for debtors.

An example will illustrate how dishonest debtors can abuse the Code. Imagine that Blake, an orthopedic surgeon, had to declare bankruptcy since neither his personal practice nor his investments were doing as well as he had hoped. His creditors pursued him for months without avail, while he continued to ignore them. Seeing no end in sight and in dire need of the automatic stay, Blake filed for chapter 7. His scheduled assets indicated a home in Sandy Springs, Georgia (valued at \$2,500,000), a 2010 Jeep Wrangler (valued at \$35,000), and other minor assets. Unknown to the chapter 7 trustee, fifty days before filing Blake conveyed virtually all his interest in another home (valued at \$1,500,000) and a 2011 Maserati GranTurismo MC Stradale (valued at \$205,000) to a corporate entity named Canttouchthis, Inc., which he controlled. Blake did not notify his creditors or obtain court authorization. Notwithstanding Blake's efforts, the chapter 7 trustee eventually found out about the hidden assets. As a result, Blake amended the schedules to include the newly found property and proposed a new plan. Blake, seeing that he would not be able to keep his prized possessions, did not agree with the plan and moved for an order dismissing his case for failure to file a complete statement of monthly net income, as required by § 521. Using § 521 to his advantage, Blake intentionally failed to file a complete statement since he wanted to make sure he could get out of the bankruptcy proceedings if things were not going his way. After waiting forty-five days without providing all the necessary information, the court would have no other choice but to order dismissal. After enough time had passed, Blake again filed for chapter 7. This time his prized possessions were out of the trustee's reach. The creditors were left with only a partial repayment of his debt while the cunning Blake was able to keep his highly valued assets.

On the other hand, the same provision can work painfully against honest debtors. Imagine Emma, a single mother who has been burdened by numerous bills, child support, and a recent layoff from work. She has been living paycheck to paycheck, and the current economic slump has not helped her situation. Harassed by debt collectors every day and barely able to feed her children, she decides to file for chapter 7 to get a fresh start through bankruptcy. She attempted to compile all the necessary information as advised by her attorney, but unfortunately her employer could not provide pay stubs for the last week of her employment because a fire destroyed the business. Since her paycheck was the same amount every week, her attorney extrapolated the

information for the last pay stub and provided it to the court. A few months after filing, a creditor asked the court to provide an order stating that the case has been automatically dismissed after forty-five days since Emma did not provide all the information required by § 521. Emma's failure to provide the last pay stub from her employer did not meet the requirements of § 521 and her case was automatically dismissed on the forty-sixth day despite her honest need for bankruptcy protection. Emma was an honest but unfortunate debtor who filed her information in good faith but was denied bankruptcy relief because of a minor technicality.

The two anecdotes illustrate how a rigid application of § 521(i) requirements can lead to unfavorable outcomes for honest debtors and allow dishonest debtors to manipulate the system. The Comment will first introduce the legislative reasoning for the changes provided by BAPCPA and how § 521 plays a role within the new act. Second, this Comment will look at how the majority of bankruptcy courts have interpreted § 521's provisions after acknowledging that the provisions curtail judicial discretion. An analysis of the textualist approach to § 521 will follow. Limiting the bankruptcy court's discretionary authority in § 521(a)(1) encourages bankruptcy abuse. Without discretionary authority, bankruptcy courts cannot prevent an abusive and manipulative debtor from having his case automatically dismissed when he intentionally fails to comply with the § 521(a)(1) filing requirements.<sup>6</sup>

Finally, this Comment will examine the approach of a minority of bankruptcy courts, led by a limited number of circuit courts, that have attempted to discourage bankruptcy abuse by establishing the discretion necessary to waive the § 521(a)(1) filing requirement, even after the filing deadline has passed.<sup>7</sup> Using its discretionary authority, these courts declined to dismiss the debtor's case where the court determined that the debtor was abusing and manipulating the bankruptcy system.<sup>8</sup> Similarly, these courts also refused to dismiss honest debtor's cases where dismissal would go against the best interests of the debtor and the overall bankruptcy system.<sup>9</sup> Their approach rests on the idea that because § 521(i) lacks a single plain meaning, the use of judicial discretionary authority in interpreting it can reduce manipulation of the

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<sup>6</sup> See *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1119 (9th Cir. 2009).

<sup>7</sup> See *id.*; *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8, 14 (1st Cir. 2009); *Miller v. Cameron (In re Miller)*, 383 B.R. 767, 772 (B.A.P. 10th Cir. 2008); *In re Parker*, 351 B.R. 790, 802 (Bankr. N.D. Ga. 2006).

<sup>8</sup> *In re Warren*, 568 F.3d at 1119; *In re Acosta-Rivera*, 557 F.3d at 14.

<sup>9</sup> See *In re Miller*, 383 B.R. at 772; *In re Parker*, 351 B.R. at 801.

bankruptcy process, protect the interests of honest debtors, and in doing so further the goals of BAPCPA.

## I. BACKGROUND

### A. *BAPCPA and Its Attempt to Curb Bankruptcy Abuse*

Section 521 was significantly changed by BAPCPA in order to curb bankruptcy abuse.<sup>10</sup> Congress had specific concerns that it wanted to address and it did so through the act.<sup>11</sup> The Comment will examine the legislative history to better understand the congressional intent behind BAPCPA. Section 521 was restructured to reflect these intentions, and the Comment will analyze each section in greater detail to see what effect it may have on bankruptcy.<sup>12</sup>

In enacting BAPCPA, Congress sought to deliver an all-inclusive package applicable to both consumer and business bankruptcy cases.<sup>13</sup> As Congress stated, “The purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”<sup>14</sup> Many of the reforms that were proposed and enacted included “provisions [that were] intended to deter serial and abusive bankruptcy filings.”<sup>15</sup> Indeed, Congress passed BAPCPA in response to growing concerns of abuse of bankruptcy procedures by dishonest debtors.<sup>16</sup> Thus, BAPCPA is scattered with creditor-friendly language to remedy a perceived imbalance in the Bankruptcy Code favoring debtors.<sup>17</sup>

#### 1. *Congressional Intent*

BAPCPA was enacted by broad bipartisan majorities in both houses of Congress.<sup>18</sup> In support of creditor interests, BAPCPA was meant to “respond to many of the factors contributing to the increase in consumer bankruptcy

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<sup>10</sup> See H.R. REP. NO. 109-31, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89.

<sup>11</sup> See *id.* at 1.

<sup>12</sup> 11 U.S.C. § 521 (2006).

<sup>13</sup> See H.R. REP. NO. 109-31, at 1.

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> See *In re Ott*, 343 B.R. 264, 266 (Bankr. D. Colo. 2006). See generally Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

<sup>18</sup> H.R. REP. NO. 109-31, at 2.

filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system.”<sup>19</sup> Four primary factors generated and supported the need for bankruptcy reform. First, Congress was concerned with the number of yearly bankruptcy filings and thus believed that bankruptcy relief was too readily available.<sup>20</sup> Second, due to the increase in bankruptcy filings, significant economic losses resulted in negative pressure on responsible consumers.<sup>21</sup> Third, Congress recognized that the Code had various loopholes and incentives that encouraged opportunistic bankruptcy filings, which resulted in abuse of the bankruptcy system by dishonest debtors.<sup>22</sup> Lastly, no clear mandate required debtors who were able to repay a significant portion of their debts to do so.<sup>23</sup>

The first factor in motivating comprehensive reform was Congress’s concern that the number of bankruptcy filings “nearly doubled to more than 1.6 million cases filed in fiscal year 2004.”<sup>24</sup> Congress was worried that there was a “growing perception that bankruptcy relief may be too readily available and is sometimes used as a first resort, rather than a last resort.”<sup>25</sup> However, others point out that the alleged abuse of the system is not as extensive as Congress believed it to be. Some scholars argue that the increase in bankruptcy filings is mainly due to sudden tragedy, such as divorce, illness, or unemployment.<sup>26</sup> In addition, some consumers have increased their debt loads over the past thirty years because lenders are more lenient in their lending policies.<sup>27</sup> Susan Block-Lieb and Edward J. Janger state that “[t]he demise of usury laws and the development of national credit reporting and credit scoring systems and mass marketing techniques permitted lenders to create a national market for consumer credit available to even the least credit-worthy members of society—

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<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> *Id.* at 2–3.

<sup>22</sup> *Id.* at 3.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *See id.*; Susan Block-Lieb & Edward J. Janger, *The Myth of the Rational Borrower: Rationality, Behavioralism, and the Misguided “Reform” of Bankruptcy Law*, 84 TEX. L. REV. 1481, 1488 (2006) (arguing that the credit industries—not opportunistic debtors who abuse the bankruptcy system—are responsible for the increase in bankruptcy filings); Jean Braucher, *Theories of Overindebtedness: Interaction of Structure and Culture*, 7 THEORETICAL INQUIRIES L. 323, 332 (2006) (“Families are driven to borrow more after job loss, divorce or illness . . .”).

<sup>27</sup> Block-Lieb & Janger, *supra* note 26, at 1563; *see also* H.R. REP. NO. 109-31, at 2.

at a price.”<sup>28</sup>As a result, before BAPCPA, any damage done to consumers by over-borrowing was offset somewhat by filing for bankruptcy.<sup>29</sup>Academics and researchers insist that the focus of BAPCPA should have been on consumer protection rather than on bankruptcy reform in response to the increase in bankruptcy filings.<sup>30</sup> Despite these conflicting views, Congress nevertheless thought that reform was necessary.<sup>31</sup>

Second, significant economic losses were associated with bankruptcy filings. Todd Zywicki explained that, when creditors are unable to collect debts because of dishonest bankruptcy proceedings, those losses are passed down as a hidden “bankruptcy tax” onto responsible Americans.<sup>32</sup> Congress also noted that, in 2002 alone, the credit card industry lost \$18.9 billion from consumer bankruptcy filings, an increase of 15.1% over the previous year.<sup>33</sup>

The third factor in support of bankruptcy reform was that “the present bankruptcy system ha[d] loopholes and incentives that allow[ed] and—sometimes—even encourage[d] opportunistic personal filings and abuse.”<sup>34</sup> The U.S. Trustee Program<sup>35</sup> identified multiple problems such as debtor and attorney misconduct, debtor abuse, and other problems associated with bankruptcy petitions.<sup>36</sup> Congress particularly wanted to curtail these problems in the bankruptcy system.

Fourth, Congress was concerned about the high number of debtors filing for bankruptcy and stated that “some bankruptcy debtors are able to repay a significant portion of their debts.”<sup>37</sup> However, Congress acknowledged that there was no clear mandate that required the debtors to repay their debts.<sup>38</sup> These four primary factors led to a congressional effort to “restor[e] personal

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<sup>28</sup> Block-Lieb & Janger, *supra* note 26, at 1565.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1491.

<sup>31</sup> H.R. REP. NO. 109-31, at 2.

<sup>32</sup> *Id.* at 3. Congress explained that in 1997, “\$44 billion of debt was discharged by debtors who filed for bankruptcy relief” and that this loss “translate[d] to a \$400 annual ‘tax’ on every household” in America. *Id.*; see also *Bankruptcy Reform: Hearing on S. 256 Before the S. Comm. on the Judiciary*, 109th Cong. 13 (2005) (testimony of Todd Zywicki, Professor, Georgetown University Law Center).

<sup>33</sup> H.R. REP. NO. 109-31, at 3.

<sup>34</sup> *Id.*

<sup>35</sup> The U.S. Trustee Program is part of the Justice Department charged with administrative oversight of bankruptcy cases.

<sup>36</sup> H.R. REP. NO. 109-31, at 3.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.”<sup>39</sup>

Although Congress had strong motivations for enacting BAPCPA, it was not a perfectly written statute. BAPCPA’s many contradictions and inconsistencies caused bankruptcy judges to sometimes exercise discretion in interpreting its provisions. For example, courts are split in terms of interpreting whether an absolute right to automatic dismissal exists or whether the courts can “order otherwise.”<sup>40</sup> Some courts blame this split in the interpretations of BAPCPA to the fact that it is a “poorly written statute.”<sup>41</sup> Commentators have noted that “[t]here 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 structural incoherence.”<sup>42</sup> This may be due to the fact that lobbyists with limited knowledge of real-life consumer bankruptcy practice, instead of bankruptcy professionals, drafted these provisions.<sup>43</sup> Although the drafters intended to limit judicial discretion, “the bill’s poor drafting will require judges to exercise their judgment simply in trying to determine what it means.”<sup>44</sup>

## 2. *Judicial Discretion*

BAPCPA also had a significant effect on judicial discretion, especially when implementing § 521 provisions. Congress intended BAPCPA to limit judicial discretion to encourage reliance on the plain language of the Code’s provisions.<sup>45</sup> Before BAPCPA, the courts had more discretionary power when

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<sup>39</sup> *Id.* at 1.

<sup>40</sup> Compare *In re Lopez*, No. 09-31511-C, 2009 Bankr. LEXIS 3029, at \*3 (Bankr. W.D. Tex. Sept. 17, 2009), with *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1118–19 (9th Cir. 2009), *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8, 14 (1st Cir. 2009), *In re Withers*, No. 06-42098 TM, 2007 WL 628078, at \*4 (Bankr. N.D. Cal. Feb. 26, 2007), and *In re Parker*, 351 B.R. 790, 802 (Bankr. N.D. Ga. 2006).

<sup>41</sup> See *Fokkena v. Hartwick*, 373 B.R. 645, 652–53 (D. Minn. 2007).

<sup>42</sup> 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.

<sup>43</sup> Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,”* 79 AM. BANKR. L.J. 191, 191–92 (2005) (noting that bankruptcy experts drafted previous amendments to title 11 and that BAPCPA drafters refused to make technical corrections to the statute).

<sup>44</sup> *Id.* at 192–93 (noting that intent to limit judicial discretion existed and that the requirement of more judicial discretion will be necessary).

<sup>45</sup> *Musselman v. eCast Settlement Corp. (In re Musselman)*, 394 B.R. 801, 812 (E.D.N.C. 2008); see also Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?*, 13

deciding whether to punish debtors who engaged in prebankruptcy exemption planning.<sup>46</sup> Due to the courts' discretionary powers, inconsistencies arose between courts when trying to identify prohibited prebankruptcy planning.<sup>47</sup> As a result, Congress attempted to limit such discretion through BAPCPA.<sup>48</sup>

Therefore, in enacting BAPCPA, Congress had more than one policy goal in mind. The two main goals of BAPCPA were to preserve bankruptcy relief for those who need it and reduce fraud and abuse of the bankruptcy system by those who do not.<sup>49</sup> However, Congress also sought to streamline the judicial process by providing clear and defined standards.<sup>50</sup> Congress has been adamant about establishing definite rules rather than leaving something up to judicial discretion.<sup>51</sup> This may be due to the fact that bankruptcy judges are perceived in a different light than other judges.<sup>52</sup> As one legal scholar wrote, "It is no secret that the bills' proponents sought to limit the discretion of bankruptcy judges who, according to them, are 'not real judges.'"<sup>53</sup> Thus, Congress sought to impose objective, standard bankruptcy determinations by removing some judicial flexibility in bankruptcy cases.<sup>54</sup> As one scholar put it, "Eliminating flexibility was the point: the obligations of chapter 13 debtors would be subject to 'clear, defined standards,' no longer left 'to the whim of a judicial proceeding.'"<sup>55</sup>

### 3. Section 521 of the Bankruptcy Code

In order to get a better understanding of § 521, how it affects debtors and bankruptcy courts, and how the goals of BAPCPA are achieved through it, it is best to look at how § 521 has evolved. Over time, § 521 became more complex and multifaceted, especially after the BAPCPA amendments. Due to its complexity, some of the language became ambiguous and confusing. Although

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AM. BANKR. INST. L. REV. 665, 679–80 (2005) (arguing that Congress intended to reduce judicial discretion rather than provide bankruptcy courts with more leeway and discretion).

<sup>46</sup> Juliet M. Moringiello, *Has Congress Slimmed Down the Hogs?: A Look at the BAPCPA Approach to Pre-Bankruptcy Planning*, 15 WIDENER L.J. 615, 629 (2006).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> See H.R. REP. NO. 109-31, at 1 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

<sup>50</sup> See generally H.R. REP. NO. 109-31, at 2–3.

<sup>51</sup> See Sommer, *supra* note 43, at 192–93.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Musselman v. eCast Settlement Corp. (In re Musselman)*, 394 B.R. 801, 812 (E.D.N.C. 2008).

<sup>55</sup> Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 527 (2005).

Congress wanted § 521 to be mechanical in its application, the statute as interpreted left many questions unanswered and seemed to create loopholes. In the end, while the statute addresses some of BAPCPA's concerns, it does so in a muddled manner.

In general, § 521 of the Code enumerates debtors' duties in a bankruptcy case.<sup>56</sup> It applies to all cases under the Code regardless of the chapter under which the debtor's petition is filed.<sup>57</sup> Some of these duties apply to all debtors, while others are specific to certain chapters of the Code and certain types of debtors. In addition, certain parts of § 521 apply to individual chapter 7 debtors who have property securing consumer debts,<sup>58</sup> while other parts of the section apply to trustees serving in the case.<sup>59</sup>

While § 521 is largely derived from § 7 of the former 1898 Bankruptcy Act, it has been amended several times. Most of the changes were "intended to speed up and improve the administration of bankruptcy and to clarify the language of the various provisions."<sup>60</sup> One of the most significant changes came in 2005 through BAPCPA when § 521 was amended to add new requirements and deadlines for documentation.<sup>61</sup> These amendments changed the scope and extent of § 521 in an attempt to make the process more mechanical and streamlined while at the same time trying to prevent abuse of the bankruptcy proceedings. Of particular note is the slightly perplexing subsection (i). Subsection (i) requires the court to automatically dismiss a case if information required by § 521(a)(1) is not timely filed with the Court.<sup>62</sup>

Section 521 works with other Code sections that impose duties on debtors. These other closely related sections also explain a debtor's duties. For example, additional duties are found in § 343, in which the debtor must submit to an examination at the meeting of creditors.<sup>63</sup> "If the debtor should conceal or fraudulently convey assets, make a false oath, falsify financial records or

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<sup>56</sup> See 11 U.S.C. § 521 (2006).

<sup>57</sup> *Id.* § 103(a).

<sup>58</sup> *Id.* § 521(a)(2).

<sup>59</sup> *Id.* § 521(a)(3), (4).

<sup>60</sup> 4 COLLIER ON BANKRUPTCY ¶ 521.LH (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011).

<sup>61</sup> See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, PUB. L. NO. 109-8, 119 Stat. 23. As part of the amendments, some of the changes included: redesignation of subsections (1) through (5) as subsections (a)(1) through (a)(5); an addition of documents to be filed pursuant to subsection (a)(1); and under (a)(2), the time period for filing the statement of intention regarding secured debt was changed. In addition, subsections (b) through (j) were added to § 521. See *id.*

<sup>62</sup> See *id.*

<sup>63</sup> 4 COLLIER ON BANKRUPTCY, *supra* note 60, ¶ 521.02.

fraudulently make a false declaration, verification, or statement under penalty of perjury, the debtor may not receive a discharge and may be subject to prosecution under [§] 152 of title 18.”<sup>64</sup> In contrast to the harsh penalties faced by debtors in violation of § 343, the penalties of discharge under § 521 are minimal, and in some cases there are no penalties.<sup>65</sup> Thus, although the duties created by § 521 are important, failure to abide by them results in dismissal rather than prosecution under 18 U.S.C. § 152.<sup>66</sup>

Despite congressional intent, the current § 521(i) is neither simple nor mechanical.<sup>67</sup> Rather, it is full of intertwining procedures, possibilities for motions, unclear timing rules, and non-ministerial judgments.<sup>68</sup> For example, under § 521(i), the debtor’s case is “automatically dismissed” if the debtor does not file the required documents, as prescribed by § 521(a)(1), within forty-five days of petition.<sup>69</sup> No judicial act is necessary and simply the passage of time may result in a dismissal of the case.<sup>70</sup> However, § 521(i)(2) provides that if a case is dismissed under such circumstances, then it will be dismissed by an order of the court on request of a party-in-interest.<sup>71</sup> This provision intends to remedy “instances where business debtors would operate as debtors in possession for many months without filing schedules and financial affairs, relying on multiple extensions of time from the court.”<sup>72</sup> Understandably, courts have struggled to make sense of these contradicting provisions as to whether dismissal is automatic or whether it requires an order of the court.<sup>73</sup> To better understand the difficulties of implementing § 521(i), this Comment will now examine each of its subsections to determine how they relate to each other and to § 521(a)(1).<sup>74</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See 18 U.S.C. § 152 (2006).

<sup>67</sup> Keith M. Lundin, *Automatic Dismissal Under § 521(i) After BAPCPA: Much Danger Ahead*, NORTON BANKR. L. ADVISER, Nov. 2005, at 15, 16.

<sup>68</sup> *Id.*

<sup>69</sup> 11 U.S.C. § 521 (2006).

<sup>70</sup> See *In re Parker*, 351 B.R. 790, 801 (Bankr. N.D. Ga. 2006).

<sup>71</sup> 11 U.S.C. § 521(i)(2); *In re Parker*, 351 B.R. at 801.

<sup>72</sup> 3 WILLIAM L. NORTON, JR. & WILLIAM L. NORTON III, NORTON BANKRUPTCY LAW AND PRACTICE 3D § 55:4 (2011).

<sup>73</sup> See *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1119 (9th Cir. 2009); *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8, 14 (1st Cir. 2009); *Miller v. Cameron (In re Miller)*, 383 B.R. 767, 772 (B.A.P. 10th Cir. 2008); *In re Parker*, 351 B.R. at 802.

<sup>74</sup> 11 U.S.C. § 521(i) states:

(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under

First, § 521(i)(1) states that if the debtor fails to file all of the documents required by § 521(a)(1) by the forty-fifth day after the filing of the case, the case shall be automatically dismissed on the forty-sixth day.<sup>75</sup> “The dismissal of a case terminates the exercise of the bankruptcy court’s jurisdiction over a debtor and the debtor’s estate. Under certain circumstances, it is as though no bankruptcy case had ever been initiated.”<sup>76</sup> The dismissal of a bankruptcy case ends the case, which also includes most of the legal consequences stemming from the bankruptcy filing.<sup>77</sup> Although the debtor does not get a discharge of his debts, the debtor and the bankruptcy estate are released from bankruptcy. As a result, the creditors are free to pursue their collection remedies outside of bankruptcy.<sup>78</sup>

Second, § 521(i)(2) provides that, in the circumstances described in § 521(a)(1), “any party in interest may request the court to enter an order dismissing the case,” which the court “shall” do within seven days of the request.<sup>79</sup> This suggests that the automatic dismissal can occur regardless of any ministerial order.<sup>80</sup> The Code does not provide courts with guidance on how they should deal with a dismissal request filed right before the forty-five day “automatic dismissal” deadline.<sup>81</sup> *Norton* states that “[i]n the event that the bankruptcy court does not ‘automatically’ dismiss a case on the [forty-sixth]

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subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 7 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in the paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

11 U.S.C. § 521(i).

<sup>75</sup> *Id.*

<sup>76</sup> 2 COLLIER BANKRUPTCY PRACTICE GUIDE ¶ 37.21 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

<sup>77</sup> 1 COLLIER BANKRUPTCY MANUAL ¶ 349.01 (3d ed. rev. 2010).

<sup>78</sup> *See id.*

<sup>79</sup> 11 U.S.C. § 521(i)(2).

<sup>80</sup> KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY § 388.1[7] (4th ed. 2010), available at <http://www.ch13online.com>.

<sup>81</sup> Sommer, *supra* note 43, at 215.

day, a [party-in-interest] can request dismissal, and the court shall dismiss the case within [seven] days of such request.”<sup>82</sup> However, a court order under § 521(i)(2) dismissing the case after forty-five days would be unnecessary if the case has already been automatically dismissed.<sup>83</sup>

Section 521(i)(3), however, provides an express exception to the automatic dismissal upon passage of the forty-five day deadline.<sup>84</sup> This section states that the court may extend the time to file the required information up to another forty-five days if the debtor files a motion for an extension before the initial forty-five day deadline.<sup>85</sup> Naturally, the court must “find[] justification” for such an extension; it also may not grant an extension for longer than another forty-five day period.<sup>86</sup> Curiously, the Code limits how long a court has to decide to grant the extension. If the court waits too long, the case may automatically be dismissed although the extension was justifiably for cause.<sup>87</sup> The statute is also silent on whether the case is automatically dismissed if the debtor again fails to file the required information at the end of an extension granted by the court. Otherwise, a party-in-interest would try to get an extension that would bar an automatic dismissal of the case, making § 521(i) moot.<sup>88</sup>

Another exception to the automatic dismissal is found in § 521(i)(4), which provides that the trustee may ask the court to decline to dismiss the case under certain conditions.<sup>89</sup> The trustee’s motion to decline to dismiss the case must be filed before the end of the initial forty-five day period or before an extension is given.<sup>90</sup> Section 521(i)(4), in conjunction with § 521(i)(2), further grants the trustee the power to make such a motion within seven days of a “party in interest requesting the court to enter an order dismissing the case.”<sup>91</sup> The court may uphold the trustee’s motion and decline to dismiss the case if it finds “that the best interests of creditors would be served by administration of

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<sup>82</sup> 3 NORTON, *supra* note 72, § 55:4.

<sup>83</sup> LUNDIN & BROWN, *supra* note 80, § 388.1[8]. Another question arises as to how one would know that the case has been automatically dismissed if there is no court order. *Id.*

<sup>84</sup> See 11 U.S.C. § 521(i)(3).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Lundin, *supra* note 67, at 16.

<sup>88</sup> *Id.* at 15.

<sup>89</sup> 11 U.S.C. § 521(i)(4).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* § 521(i)(2), (4). The court may also grant a longer extension if the debtor has made a good faith effort to file payment advices and the best interests of creditors are served by the continuation of the case in chapter 7 or 13. *Id.* § 521(i)(4).

the case” and “the debtor attempted in good faith to file all the information required by subsection 521(a)(1)(B)(iv).”<sup>92</sup>

Honest debtors benefit from the discretion § 521(a)(1)(B)(iv) grants courts in declining to dismiss a case. With so many documents that must be filed, it may make sense to give the debtor some leniency.<sup>93</sup> There are many reasons why the debtor may not be able to comply, no matter how hard he tries.<sup>94</sup> For example, the filing requirement for payment evidence from employers is sometimes out of the debtor’s control.<sup>95</sup> Thus, if the trustee acknowledges that a good faith effort is made, then the bankruptcy court may deny the dismissal since it is in the best interest of everyone to follow through with the proceedings. However, this exception is limited in that it is only available to the debtor if the trustee moves to request that the court decline to dismiss the case.<sup>96</sup> Without such a motion, the debtor faces dismissal of his bankruptcy case despite going through extraordinary means to acquire and file the required information.<sup>97</sup>

In addition to payment evidence, the debtor is also asked to provide a vast amount of other required information.<sup>98</sup> Section 521(i) depends heavily on § 521(a)(1) and specifically states that it is the debtor’s duty to file a list of creditors<sup>99</sup> and, “unless the Court orders otherwise,” to also provide: a schedule of assets and liabilities; a schedule of current income and current expenditures; a statement of the debtor’s financial affairs; a § 342(b) certificate;<sup>100</sup> payment advices for the sixty days before petition; an itemized statement of monthly net income; and a statement of reasonably anticipated increases in income or expenditures over the year following the petition.<sup>101</sup> “The ‘information’

<sup>92</sup> *Id.* § 521(i)(4). Subsection (a)(1)(B)(iv) requires the debtor to file “copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor.” *Id.* § 521(a)(1)(B)(iv).

<sup>93</sup> *See id.* § 521(a)(1); LUNDIN & BROWN, *supra* note 80, § 388.1[5]–[6].

<sup>94</sup> *See* Michael Anthony Sabella, *The Category 5 Crisis: How Hurricanes Katrina and Rita Exposed Deficiencies in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 15 AM. BANKR. INST. L. REV. 321, 333 (2007) (noting that the document requirements and time limitations of § 521 provide quite a significant burden for disaster victims seeking a chapter 7 discharge).

<sup>95</sup> *See id.*

<sup>96</sup> *See* 11 U.S.C. § 521(i)(4).

<sup>97</sup> *See id.*; LUNDIN & BROWN, *supra* note 80, § 388.1[5].

<sup>98</sup> *See* 11 U.S.C. § 521(a)(1).

<sup>99</sup> *Id.* § 521(a)(1)(A).

<sup>100</sup> Section 521(a)(1)(B)(iii) requires an individual debtor with primarily consumer debt, his attorney, or his bankruptcy petition preparer to file a certificate that a § 342(b) notice was delivered by the attorney to the debtor. *Id.* § 521(a)(1)(B)(iii).

<sup>101</sup> *Id.* § 521(a)(1)(B)(iv), (v), (vi).

contained in all of the filings required by § 521(a)(1) is an enormous quantum difficult or impossible to describe with precision.”<sup>102</sup>

Federal Rule of Bankruptcy Procedure 1007(c) requires a debtor to file most of the documents required by § 521(a)(1)(B) with his petition or within fourteen days thereafter.<sup>103</sup> An extension for the filing of schedules, statements, and other documents may be granted if sufficient cause is shown.<sup>104</sup> However, such an extension “would not extend the [forty-five]-day deadline to avoid automatic dismissal under § 521(i)(1).”<sup>105</sup> The precision and care with which schedules are prepared reflect the value of the discharge obtained by the debtor. Therefore debtors must be especially meticulous when it comes to § 521(a)(1) and Rule 1007.<sup>106</sup>

The concept of “automatic dismissal” seems troubling because it suggests that something happened behind the scenes without a court action.<sup>107</sup> In other words, a case may be dismissed invisibly without any judicial determination or any review by the court in general. Neither bankruptcy judges nor clerks are compelled to “fill the voids in the absence of ordinary adversary process.”<sup>108</sup> The “automatic” feature of the § 521(i) dismissal may harm honest debtors and benefit dishonest debtors. For example, a debtor may intentionally fail to file a required document in an effort to get his case dismissed. In these instances, courts have interpreted § 521(i) as resulting in either strict dismissal, non-dismissal of the case due to good faith, or a finding that any missing information was not required.<sup>109</sup>

These vastly different interpretations and results stemming from a single section of the Code need to be explored in greater detail. This Comment will proceed to analyze how a textual approach to § 521(i) created an absolute right of dismissal, which in turn encouraged abuse of the bankruptcy system by dishonest debtors and wreaked havoc on the proceedings of honest debtors. Most bankruptcy courts have interpreted § 521’s provisions very narrowly, acknowledging that the statute limits their judicial discretion.<sup>110</sup> Limiting the

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<sup>102</sup> LUNDIN & BROWN, *supra* note 80, § 388.1[5].

<sup>103</sup> FED. R. BANKR. P. 1007(c).

<sup>104</sup> *Id.*

<sup>105</sup> LUNDIN & BROWN, *supra* note 80, § 388.1[10].

<sup>106</sup> 4 COLLIER ON BANKRUPTCY, *supra* note 60, ¶ 521.03[3].

<sup>107</sup> Lundin, *supra* note 67, at 15.

<sup>108</sup> LUNDIN & BROWN, *supra* note 80, § 388.1[21].

<sup>109</sup> 3 NORTON, *supra* note 72, § 55:4.

<sup>110</sup> See *In re Catania*, 397 B.R. 667, 669 (Bankr. W.D.N.Y. 2008); *In re Scalise*, No. 08-61739, 2008 Bankr. LEXIS 2983, at \*5 (Bankr. N.D.N.Y. Oct. 30, 2008).

bankruptcy court's discretionary authority, however, has encouraged bankruptcy abuse.<sup>111</sup> An abusive and manipulative debtor can easily have his case automatically dismissed simply by declining to comply with the § 521(a)(1) filing requirement.<sup>112</sup> Dismissal is, naturally, beneficial for the debtor in order to escape "estate administration" by the trustee, especially when the trustee discovers assets that the debtor tried to hide or when the debtor is generally not happy with how his bankruptcy case is turning out. This Comment will proceed to analyze how a certain amount of judicial discretion promotes the values of BAPCPA and bankruptcy law in general.

## II. ARGUMENT

### A. *Textualism and Absolute Right to Automatic Dismissal*

The Supreme Court has held that the starting point in statutory interpretation is the text of the statute itself.<sup>113</sup> Championed by Supreme Court Justices Antonin Scalia and Clarence Thomas, textualism is based on the theory that the language of a statute should be read to reflect the meaning of its text at the time it was written.<sup>114</sup> The Supreme Court often follows the "plain meaning" rule, which precludes looking at external sources like legislative history if the statute is clear.<sup>115</sup> In uncovering the true meaning of a statute, textualists look at word choice, placement of words in the document, and overall grammatical structure.<sup>116</sup> In addition, textualists compare related parts of the statute and give weight to subtle similarities and differences.<sup>117</sup> Thus for textualists if the language of the statute is relatively clear, there is no need to look outside the statute in order to determine the statute's meaning.<sup>118</sup> Textualists argue that a plain meaning analysis may be the best guide for interpreting a statute since it can be the most obvious and most objective way for one to know and understand what the law requires.<sup>119</sup>

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<sup>111</sup> *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1118 (9th Cir. 2009).

<sup>112</sup> *Id.*

<sup>113</sup> *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) ("[W]here . . . the statute's language is plain, the 'sole function of the courts is to enforce it according to its terms.'").

<sup>114</sup> William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 496 (2007).

<sup>115</sup> See YULE KIM, CONG. RESEARCH SERV., RL 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 2 (2008).

<sup>116</sup> Treanor, *supra* note 114, at 488.

<sup>117</sup> *Id.*

<sup>118</sup> KIM, *supra* note 115, at 2.

<sup>119</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 227 (2006).

Another distinguishing feature of textualism is the “whole act” rule, which dictates that a statute should be read as a coherent whole, with its various parts interpreted within the structure of the document in a way that furthers statutory purposes.<sup>120</sup> Justice Scalia remarked that

[s]tatutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.<sup>121</sup>

Textualism dictates that whenever a court interprets a statute, it must start with the text of the statute itself and, if the language of the statute is plain, interpret such language by its common usage.<sup>122</sup> The courts presume that Congress acted “intentionally and purposely when it include[d] particular language in one section of a statute but omitted it in another.”<sup>123</sup> Thus, textualism compels courts to conclude that the inclusion of the “automatic dismissal” language in § 521 is both meaningful and purposeful.

Textualist methodology is attractive to those who would constrain judicial discretion by limiting the manner in which statutes can be interpreted.<sup>124</sup> Modern textualism established itself as a response to the perceived excessive use of purposivism<sup>125</sup> in statutory interpretation, which was criticized for being a simple façade for judges to yield results with which they personally agree.<sup>126</sup> Textualists claim that their approach appropriately and meaningfully constrains judges.<sup>127</sup>

However, textualism has flaws as well. It has been criticized for focusing on the manner in which words are used in a document, while overlooking other

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<sup>120</sup> Frank B. Cross, *The Significance of Statutory Interpretive Methodologies*, 82 NOTRE DAME L. REV. 1971, 1973 (2007).

<sup>121</sup> *United Sav. Ass’n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988).

<sup>122</sup> *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); KIM, *supra* note 115, at 2.

<sup>123</sup> *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (quoting *City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 338 (1994)); *see also* KIM, *supra* note 115, at 14.

<sup>124</sup> *See* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1937 (2008).

<sup>125</sup> Purposivism is an approach to statutory interpretation requiring a court to determine the purpose of a particular statute. *Id.* at 1898.

<sup>126</sup> *See* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26 (2006) (describing how textualists saw their approach as a means of constraining judges); Smith, *supra* note 124, at 1937.

<sup>127</sup> *See* Molot, *supra* note 126, at 26.

significant evidence regarding its meaning.<sup>128</sup> The location of text may actually be of limited significance, which can only be determined by looking at some legislative and drafting history.<sup>129</sup> Many textualists tend to ignore that the statutory text does not reflect a consistent underlying ideology.<sup>130</sup> In addition, certain academics warn that “[i]n its strongest version, textualism is the notion that a text can have a meaning independent of the intention of its author(s).”<sup>131</sup> Furthermore, “sincere textualists . . . claim to find a text’s ‘plain meaning’ [by making] assumptions about the authors’ intentions without being aware that they are doing so.”<sup>132</sup> A close reading may thus reflect the creativity of the interpreter.<sup>133</sup> Supporters of this view argue that the plain meaning of the statute may be used unless: “1) a literal application of the statutory language would be at odds with the manifest intent of the legislature; 2) a literal application of the statutory language would produce an absurd result; or 3) the statutory language is ambiguous.”<sup>134</sup> In such cases, the intention of the drafters controls, rather than the strict language.<sup>135</sup> What effect does § 521(i) have when its plain meaning is applied in bankruptcy?

### 1. *Textual Analysis of § 521(i)*

The dictionary provides a good starting point to begin to untangle the meaning of the words found in § 521(i).<sup>136</sup> The Supreme Court has determined that when words are not statutorily defined and are not terms of art, they are given their ordinary meaning, which is commonly a dictionary definition.<sup>137</sup> Dictionary definitions are not always clear, however, and words may have several alternative meanings. Thus, the context and the way the words are used become important.<sup>138</sup> Even when there is only one definition, the dictionary

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<sup>128</sup> See Treanor, *supra* note 114, at 493.

<sup>129</sup> *Id.* (examining textualist approach in light of historical evidence).

<sup>130</sup> See *id.*

<sup>131</sup> Braucher, *supra* note 42, at 98.

<sup>132</sup> *Id.*

<sup>133</sup> See Treanor, *supra* note 114, at 489.

<sup>134</sup> *In re Jass*, 340 B.R. 411, 415 (Bankr. D. Utah 2006); see also *United States v. Granderson*, 511 U.S. 39, 47 n.5 (1994) (dismissing an interpretation said to lead to an absurd result).

<sup>135</sup> *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989).

<sup>136</sup> See Molot, *supra* note 126, at 44.

<sup>137</sup> *FDIC v. Meyer*, 510 U.S. 471, 476 (1994). In the absence of a statutory definition, one must “construe a statutory term in accordance with its ordinary or natural meaning.” *Id.*

<sup>138</sup> See, e.g., *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 226–28 (1994) (examining the surrounding statutory language to resolve conflicting dictionary definitions of the word “modify”).

meaning may still cause confusion.<sup>139</sup> Nevertheless, dictionary definitions serve as an appropriate starting point in statutory interpretation.<sup>140</sup>

The most important clause of § 521(i) states that “[if a debtor] fails to file all of the information required under subsection (a)(1) within [forty-five] days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.”<sup>141</sup> Most of the confusion stems from the words “shall” and “automatic.” The principal definition of “shall” in *Black’s Law Dictionary* is: “Has a duty to; more broadly, is required to.”<sup>142</sup> Additionally, *Webster’s Dictionary* defines “shall” as “will have to; must” and, in law, “to express what is mandatory.”<sup>143</sup> The word “shall” imposes an obligation on the subject of a sentence and conveys a sense of a future duty. The use of “shall” ordinarily means that it is mandatory and not subject to judicial discretion.<sup>144</sup> If the word “may” was used instead, it would mean that particular action was permissive and up to the judge’s discretion.<sup>145</sup> Here, § 521(i) is quite unambiguous: the word “shall” means that a judge has no discretion to decide whether to act. Simply put, the judge must dismiss the case if a debtor does not meet the requirements of § 521(i).

Unfortunately, the word “automatically” unravels the apparent clarity of the meaning of the word “shall” and has produced a lot of discussion as to its meaning.<sup>146</sup> *Webster’s Dictionary* defines “automatic” as “acting or done

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<sup>139</sup> See *Smith v. United States*, 508 U.S. 223 (1993). Dissenting, Justice Scalia cut to the core:

To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, “Do you use a cane?” he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, *i.e.*, as a weapon.

*Id.* at 242.

<sup>140</sup> *Meyer*, 510 U.S. at 476.

<sup>141</sup> 11 U.S.C. § 521(i)(1) (2006).

<sup>142</sup> BLACK’S LAW DICTIONARY 1407 (8th ed. 2004).

<sup>143</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/shall> (last visited Jan. 2011).

<sup>144</sup> See *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (“[T]he mandatory ‘shall’ . . . normally creates an obligation impervious to judicial discretion.”).

<sup>145</sup> *Rastelli v. Warden, Metro. Corr. Ctr.*, 782 F.2d 17, 23 (2d Cir. 1986) (“The use of a permissive verb—‘may review’ instead of ‘shall review’—suggests a discretionary rather than mandatory review process.”).

<sup>146</sup> See *In re Lopez*, No. 09-31511-C, 2009 Bankr. LEXIS 3029, at \*1 (Bankr. W.D. Tex. Sept. 17, 2009); *In re Hall*, 368 B.R. 595, 598–99 (Bankr. W.D. Tex. 2007); *In re Riddle*, 344 B.R. 702, 702–03 (Bankr. S.D. Fla. 2006); *In re Fawson*, 338 B.R. 505, 510 (Bankr. D. Utah 2006).

spontaneously or unconsciously.”<sup>147</sup> Citing a dictionary, the court in *In re Fawson* noted that the word “automatic” means “having inherent power of action or motion; self-acting or self-regulating; mechanical.”<sup>148</sup> The court held that there was no ambiguity in the construction of the statute and therefore “[§] 521(i)(1) does not contemplate any independent action by the Court or any other party—the case is merely dismissed by operation of the statute itself.”<sup>149</sup> Thus the word “automatic” implies, by definition, that a case would be dismissed without a judicial or ministerial act, on its own accord after the passage of time. But the use of both “shall” and “automatically” creates an apparent contradiction in the statute, as it simultaneously mandates the court to dismiss a case and instructs the court that the case dismisses itself without action of the court.

The words “shall” and “automatic” both seem to limit judicial discretion by definition. As a result, § 521(i) seems to become very unforgiving and mandates that a case be dismissed as soon as the requirements for dismissal are met, without any involvement of a bankruptcy judge. As a result, a textualist interpretation of § 521(i) results in absolute dismissal if all the required information is not filed within forty-five days.<sup>150</sup> A plain meaning interpretation limits the number of cases that bankruptcy courts have to deal with and filters out debtors who simply wish to benefit from the automatic stay without having the required information for a bankruptcy proceeding.<sup>151</sup> Congress’s concern with the number of yearly bankruptcy filings due to the fact that bankruptcy relief was too readily available would be directly addressed.<sup>152</sup> A textualist approach to § 521(i) decreases the use of various loopholes and incentives that encourage opportunistic bankruptcy filings. Assuming that the most important provisions of § 521(i) have a discernable plain meaning, what effect would that have? The following cases show some of the results where bankruptcy courts read § 521(i) as unambiguous and gave judges no choice but to follow the plain meaning of the text as prescribed by Congress.

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<sup>147</sup> MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/automatic> (last visited Jan. 2011).

<sup>148</sup> *In re Fawson*, 338 B.R. at 510 n.9 (citing BLACK’S LAW DICTIONARY 169 (rev. 4th ed. 1951)).

<sup>149</sup> *Id.* at 510.

<sup>150</sup> *See* 11 U.S.C. § 521(i)(1) (2006); *In re Hall*, 368 B.R. at 599–600.

<sup>151</sup> *See* 11 U.S.C. § 521(i)(4); H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

<sup>152</sup> H.R. REP. NO. 109-31, at 1.

## 2. *Honest Debtors and Absolute Dismissal Under § 521(i)*

Many bankruptcy courts have held that they had no discretion to bypass or enlarge the forty-five day limit in which the debtor must file the information required by § 521(a)(1). These courts interpret the rule to mean that the debtor's case is automatically dismissed on the forty-sixth day unless the debtor or trustee files a timely request within the forty-five day time frame.<sup>153</sup> In *In re Wassah*, a chapter 13 debtor failed to file the necessary information within the required time limit.<sup>154</sup> The debtor argued that he was attempting to calculate his debt owed, but he never provided any excusable reason for his failure.<sup>155</sup> The debtor failed to file required documents, file a chapter 13 plan, attend a meeting of creditors, or provide the trustee with copies of tax returns and other mandatory documents. The court held that it was appropriate to uphold the dismissal orders because no reason was given as to why the debtor did not timely file the information.<sup>156</sup> This is a legitimate example of how the BAPCPA provisions sought to promote efficiency and reserve access to the bankruptcy courts only for those who are truly prepared. However, such ideal outcomes do not always occur.

Many courts believe that they have “no discretion but to follow the direction of Congress” and, in some instances, have dismissed bankruptcy cases of apparently honest debtors.<sup>157</sup> In *In re Catania*, the United States Bankruptcy Court for the Western District of New York dismissed the case “automatically” due to the debtor's failure to file all of the pay advices.<sup>158</sup> The debtor's attorneys noticed that the initially filed payment advices were incomplete.<sup>159</sup> The attorneys sought to correct their mistake within the allotted forty-five day time period; however, they again mistakenly filed the same incomplete set of documents.<sup>160</sup> Forty-five days passed without the complete

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<sup>153</sup> *In re Scalise*, No. 08-61739, 2008 Bankr. LEXIS 2983, at \*4 (Bankr. N.D.N.Y. Oct. 30, 2008).

<sup>154</sup> *In re Wassah*, 417 B.R. 175, 177 (Bankr. E.D.N.Y. 2009).

<sup>155</sup> *Id.* at 185.

<sup>156</sup> *Id.*

<sup>157</sup> *In re Catania*, 397 B.R. 667, 669 (Bankr. W.D.N.Y. 2008); *see also In re Neil*, No. 07-21107, 2007 Bankr. LEXIS 3479, at \*10 (Bankr. D. Utah Aug. 9, 2007); *In re Lovato*, 343 B.R. 268, 270 (Bankr. D.N.M. 2006) (“After the expiration of the time limits set forth in 11 U.S.C. § 521(i)(1), the Court is left with no discretion to allow the Debtor additional time within which to comply with the requirement for submission of payment advices.”); *In re Monroe*, No.06-02869-W, 2006 Bankr. LEXIS 3256, at \*4 (Bankr. D.S.C. Nov. 13, 2006); *In re Williams*, 339 B.R. 794, 795 (Bankr. M.D. Fla. 2006).

<sup>158</sup> *In re Catania*, 397 B.R. at 670.

<sup>159</sup> *Id.* at 668–69.

<sup>160</sup> *Id.* at 669.

required filing.<sup>161</sup> Again, the attorneys noticed their mistake and tried to immediately file the missing information, but it was too late.<sup>162</sup> Upon the Trustee's motion to dismiss, Judge Bucki held that the debtor's case was automatically dismissed according to § 521(i) because the debtor did not file all of the information required under § 521(a).<sup>163</sup>

The debtor argued that he made a good faith effort to comply with the necessary statutory provisions and that his counsel attempted to provide the missing information immediately after learning about the mistake.<sup>164</sup> The debtor also argued that "the missing advices contain[ed] no information that could possibly affect the course of case administration, and that dismissal would serve no meritorious purpose."<sup>165</sup> The court seemed sympathetic to the debtor's arguments, but it nevertheless enforced the automatic dismissal provision after considering Congress's intention and the statute's plain language.<sup>166</sup> Most importantly, the court acknowledged that the case was "already . . . dismissed automatically by operation of [§] 521(i)(1)" and that the trustee was only memorializing the dismissal.<sup>167</sup> The court further stated that the "Bankruptcy Code will produce results that strictly penalize debtors who would otherwise deserve a discharge."<sup>168</sup> Thus, a strict and rigid interpretation of § 521(i) prevented an honest debtor from receiving a bankruptcy discharge and a fresh start. A lack of judicial discretion resulted in weakening the values of BAPCPA and the policy goals of bankruptcy in general.

*In re Scalise* had a similar outcome, where miniscule mistakes and procedural irregularities led to dismissal of an honest debtor's case.<sup>169</sup> In *Scalise*, a chapter 7 debtor filed a voluntary petition and a statement indicating that he had attached payment advices required by § 521(a)(1)(B)(iv).<sup>170</sup> Then, it became apparent that one pay period was missing and thus the documents

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *In re Catania*, 397 B.R. 667, 669 (Bankr. W.D.N.Y. 2008).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* The debtor's counsel further argued that "dismissal would merely compel the needless exercise of filing a new bankruptcy petition, all at additional cost and the imposition of administrative burdens upon the bankruptcy system." *Id.*

<sup>166</sup> *Id.* at 670 ("The court does not doubt the debtor's intent to file all of the required payment advices. Unfortunately, the statute requires something more . . .").

<sup>167</sup> *Id.* at 669.

<sup>168</sup> *Id.*

<sup>169</sup> See *In re Scalise*, No. 08-61739, 2008 Bankr. LEXIS 2983, at \*5 (Bankr. N.D.N.Y. Oct. 30, 2008).

<sup>170</sup> *Id.* at \*1. Because the PDFs of the payment advices turned out to be unreadable, the debtor's attorney immediately filed another set of electronic copies of payment advices for five periods. *Id.* at \*1-2.

submitted did not include all pay stubs for the sixty days prior to the date of the filing.<sup>171</sup> The trustee requested that the case be dismissed, since more than forty-five days had passed and not all of the required payment advices were included.<sup>172</sup> In response, the debtor's attorney filed the missing payment period, fulfilling the requirements of § 521(a)(1)(B)(iv).<sup>173</sup> Thus, all the "information" § 521(i)(1) requires was provided to the court.<sup>174</sup>

The debtor argued that although not all of the payment advices were available, he had the same income for each of the periods.<sup>175</sup> In addition, the debtor argued that he made a good faith effort in his attempt to comply with the Code and that the failure to file one pay stub was "simply an oversight" which he remedied upon notice that it was missing.<sup>176</sup> The debtor also claimed that "no creditor or [party-in-interest] has been prejudiced by the lack of this one payment advice" and that re-filing would result in a greater expense to the bankruptcy court and an inconvenience to the creditor.<sup>177</sup>

The court acknowledged that the debtor made reasonable efforts to comply with § 521(a)(1)(B)(iv) of the Code.<sup>178</sup> However, the court noted that the statutory provisions did not permit any judicial discretion.<sup>179</sup> The court acknowledged that the dismissal of a case of an honest, albeit careless, debtor "may seem . . . harsh" but held that dismissal was "mandated by the statute."<sup>180</sup> The court noted that debtors have two "safety valves" to avoid the dismissal of the case.<sup>181</sup> However, only one "safety valve" was truly available to the debtor, as the other one requires initiation by the trustee.<sup>182</sup> The court claimed that § 521(i)(3) would have permitted the debtor to request an extension of the forty-five day period to file all required documents.<sup>183</sup> Not knowing that there

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<sup>171</sup> *Id.* at \*2.

<sup>172</sup> *Id.*

<sup>173</sup> *See id.* at \*3.

<sup>174</sup> *See id.*; 11 U.S.C. § 521(i)(1) (2006).

<sup>175</sup> *In re Scalise*, No. 08-61739, 2008 Bankr. LEXIS 2983, at \*3 (Bankr. N.D.N.Y. Oct. 30, 2008).

<sup>176</sup> *Id.* The later pay stub was representative of all of his payment advices throughout the sixty days prior to filing of the petition. *Id.* at \*5.

<sup>177</sup> *Id.* at \*3.

<sup>178</sup> *Id.* at \*4–5.

<sup>179</sup> *Id.* at \*5.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at \*4.

<sup>182</sup> *See id.* The trustee would have had to request that the case not be dismissed due to the debtor's good faith attempt to file all the required information. Here, the opposite happened and the trustee requested a dismissal of the case; thus, that "safety valve" was never available to the debtor. *Id.*; *see also* 11 U.S.C. § 521(i)(4) (2006).

<sup>183</sup> *In re Scalise*, 2008 Bankr. LEXIS 2983 at \*4.

was a missing stub, however, it would be nearly impossible to put such a “safety valve” into use.<sup>184</sup>

The two aforementioned cases, *Catania* and *Scalise*, are good examples in which an honest debtor, seeking relief through bankruptcy, had a case thrown out because the courts employed a strictly textual interpretation of § 521 and refused to use judicial discretion. Bankruptcy is meant to provide a procedure by which honest consumers can obtain a discharge of debt and a fresh start. Instead, the debtors in these two cases encountered further hardships and encumbrances by having to re-file their petitions.

### 3. Abuse and Problems of the Absolute Right to Dismissal Under § 521(i)

Through BAPCPA, Congress amended § 521 of the Code to expand debtors’ duties of financial disclosure by mandating that debtors file a list of creditors and other required financial information. As discussed earlier, a strictly textual interpretation of the newly adapted provision found in § 521(i) greatly limits judicial discretion and establishes an absolute right to dismissal. Courts look at the plain meaning of the statute and follow through with its technicality by dismissing any case in which the debtor fails, regardless of the reason for failure, to file all of the required information within the forty-five day deadline. In the hands of a dishonest debtor, the absolute right to dismissal seen in *Catania* and *Scalise* is a very powerful tool that can be used to manipulate the bankruptcy system to the debtor’s needs. Simply by withholding a document or two, a debtor is able to have his case dismissed.

A dishonest debtor can use § 521(i) in strategic ways. Numerous benefits flow to the debtor as soon as he files for bankruptcy. Most importantly, the automatic stay stops the collection process and prevents wage garnishment.<sup>185</sup> Also, the automatic stay prevents creditors from repossessing a debtor’s property and may even require creditors to return repossessed property.<sup>186</sup> As a result, the debtor gains valuable time to put his affairs in order and frustrate his creditors. If a debtor later decides that bankruptcy is no longer in his best interest, after forty-five days he may ask the court to dismiss the case based on

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<sup>184</sup> See *id.* It seems the court mentioned the “safety valves” in an attempt to reassure itself that it was indeed following the intent of Congress through its mechanical application of § 521. See *id.*

<sup>185</sup> See 11 U.S.C. § 362(a); *In re Suarez*, 149 B.R. 193, 195 (Bankr. D.N.M. 1993).

<sup>186</sup> See 11 U.S.C. § 362(a); *Transouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 681–82 (B.A.P. 6th Cir. 1999).

§ 521(i).<sup>187</sup> As a result, the debtor is able to avoid the possible consequences of a pending motion to dismiss the bankruptcy case with prejudice.

The consequences of dismissal may be minimal, since the case was dismissed automatically rather than by court order or judgment.<sup>188</sup> After enough time has passed, the debtor may once again file for bankruptcy and potentially get the discharge that he was after. The abuse of § 521(i) presents a moral hazard that benefits dishonest debtors who seek only to delay the collection attempts of creditors and frustrate the purposes of the bankruptcy system. Thus, the same technical interpretation of § 521(i) that limits judicial discretion to help honest debtors also limits judicial discretion to avoid abuse by dishonest debtors.

The following cases demonstrate the potential for abuse inherent in § 521(i) and the inability of courts to prevent the abuse. In *In re Hall*, the debtor filed numerous adversary proceedings against secured creditors claiming their liens to be invalid for “ridiculous and legally unsupportable reasons.”<sup>189</sup> The debtor filed a chapter 13 case, which was later dismissed. The debtor then filed a second chapter 13 case.<sup>190</sup> Only after the second chapter 13 case was converted to chapter 7 did the debtor file a motion to reflect that his case had already been automatically dismissed on the forty-sixth day after the petition.<sup>191</sup> The debtor claimed that he failed to comply with the provisions of § 521(a), since the documents he filed were incomplete.<sup>192</sup> During a hearing, the court was finally able to shed some light on the debtor’s extensive use of bankruptcy proceedings:

Primarily the Court found that the Debtor was not engaging in the pursuit of [c]hapter 13 for the legitimate purposes for which it existed, but it was simply part of his plan to frustrate his secured creditors in realizing upon their collateral as he had not paid them any payments in the first case and he had filed adversary proceedings

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<sup>187</sup> 11 U.S.C. § 521(i)(2).

<sup>188</sup> Usually, if a debtor files a second bankruptcy case within a year of a prior pending bankruptcy case, the automatic stay expires thirty days after the filing. *Id.* § 362(c)(3). Automatic dismissal also affects honest debtors because “an automatic statutory dismissal is not the kind of action contemplated by [Federal] Rule [of Civil Procedure] 60(b).” *In re Wilkinson*, 346 B.R. 539, 546 (Bankr. D. Utah 2006). Thus, no relief can be granted under Rule 60(b).

<sup>189</sup> *In re Hall*, 368 B.R. 595, 601 (Bankr. W.D. Tex. 2007).

<sup>190</sup> *Id.* at 596.

<sup>191</sup> *Id.* at 598.

<sup>192</sup> *Id.* Although the debtor filed schedules of financial affairs as well as a chapter 13 plan within the required forty-five days, virtually every page of those documents contained “TBA” or “To Be Amended.” *Id.* at 596. Also, the filed documents contained no additional information except for his name and case number. *Id.*

challenging each of his secured creditor's liens upon what can only be described as the most spurious bases.<sup>193</sup>

Only after the debtor voluntarily converted his chapter 13 case to a chapter 7 did it become apparent that, while his case was pending as a chapter 13 case, he “executed deeds to the three pieces of real property, without notice to creditors or seeking [c]ourt authorization, conveying virtually all interest therein to a corporate entity which he controlled—KWI Legal Defense Fund, Inc.”<sup>194</sup> His adverse behavior did not stop there. At the hearings, assuming he showed up, the debtor refused to answer virtually every question, asserting his Fifth Amendment privilege against self-incrimination.<sup>195</sup>

Persuaded by the trustee, the court reluctantly entered an order to enjoin the debtor from taking any action in controlling or transferring the estate's property, enjoin the debtor from filing any adversary proceeding in relation to property of the estate, and sanction the debtor.<sup>196</sup> In response, the debtor moved the court to enter an order of dismissal, noting that his bankruptcy case had already been automatically dismissed on the forty-sixth day after the petition date under § 521(i)(1) due to his failure to comply with the provisions of § 521(a).<sup>197</sup>

Concerned that bad faith might be at play, the court assessed the legitimacy and motivation of the debtor's request for automatic dismissal.<sup>198</sup> The court then went through the statute looking for any provision that would keep the debtor in court.<sup>199</sup> However, the court found nothing in the statute that would provide it with the ability to exercise discretion.<sup>200</sup> Thus, the court had to dismiss the case based on the § 521(i) requirements.<sup>201</sup> The court noted that the

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 597.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 598.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 601–02.

<sup>199</sup> *Id.* at 599. Here, the court was looking for judicial discretion that might have been found solely within the text of the statute itself. *See id.*

<sup>200</sup> This court acknowledged that the court in *In re Parker* made excellent arguments as to why a debtor should not be able to take advantage of § 521(i) and its automatic dismissal provision if the debtor's case “starts going badly.” *Id.* at 599–600; *see In re Parker*, 351 B.R. 790, 800–02 (Bankr. N.D. Ga. 2006).

<sup>201</sup> *In re Hall*, 368 B.R. at 600. Although the case was dismissed, it nevertheless prohibited the debtor from filing any petition under title 11 for two years.

Relying upon the decision of the Supreme Court in *Marrama*, this Court concludes that when a debtor seeks an order confirming the dismissal of his case under § 521(i)(2) by reason of his own defalcation under § 521(a)(1), it is legitimate for the Court to inquire into the motivation and/or

only basis on which it could decline to enter an order for dismissal was if it was requested by the trustee within five days after a party-in-interest made such a request.<sup>202</sup> However, in this case, the debtor failed to comply with § 521(a) since his schedules and statement of financial affairs contained virtually no meaningful information.<sup>203</sup>

This is a clear case in which the debtor managed to manipulate the requirements of § 521 to force a dismissal. The debtor showed little regard for bankruptcy laws and proceedings. Instead, the debtor manipulated § 521 in an attempt to frustrate legitimate collection efforts by his secured creditors. *Hall* illustrates one of the biggest issues with § 521(i): an abusive and manipulative debtor can easily have his case automatically dismissed simply by declining to comply with the § 521(a)(1) filing requirement within the time allotted by § 521(i).

In a similar case, a United States Bankruptcy Court in Texas noted that “nothing in 11 U.S.C. § 521(i)(1) provides an exception for a debtor who may have filed his bankruptcy case in bad faith.”<sup>204</sup> In *In re Richardson*, the debtor filed a chapter 13 bankruptcy petition after learning that the state court ordered the debtor to pay twelve months of arrears as a condition to enjoining a foreclosure of the debtor’s home.<sup>205</sup> Other than her petition, the only document she filed was a motion asking the Court to waive the requirements for budget and credit counseling.<sup>206</sup> The debtor’s petition lacked schedules or statements as required by § 521(a).<sup>207</sup>

The forty-five day period passed, and the debtor failed to file the required documents.<sup>208</sup> Accordingly, the bankruptcy court entered an “Order Evidencing Automatic Dismissal of Chapter 13 Case of Individual Debtor(s) Pursuant to 11 U.S.C. § 521(i)(1).”<sup>209</sup> However, prior to the court’s entry of the

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good faith (or lack thereof) of the debtor in seeking such order; and, in the event the debtor is acting in bad faith, to properly condition such dismissal so that the debtor is not rewarded by his own malfeasance.

*Id.* at 602.

<sup>202</sup> *Id.* at 599. Additionally, the court must also find that the debtor attempted to file his payment advices in good faith, and it was in the best interest of the creditors to have the case administered. *Id.*

<sup>203</sup> *Id.* It was amended seven months later, but that was too late for the court to consider. *Id.*

<sup>204</sup> *In re Richardson*, No. 07-42881, 2008 Bankr. LEXIS 229, at \*6 (Bankr. E.D. Tex. Jan. 30, 2008).

<sup>205</sup> *Id.* at \*1–2.

<sup>206</sup> *Id.* at \*2.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at \*2–3.

<sup>209</sup> *Id.* at \*3.

automatic dismissal, Wells Fargo filed a motion to dismiss the case with prejudice based on the debtor's alleged bad faith.<sup>210</sup> Wells Fargo claimed that § 105(a) empowered the court to dismiss the debtor's case with prejudice.<sup>211</sup>

The court acknowledged that it did not seek to condone the use of § 521(i) by a debtor who sought to avoid the possible consequences of a pending motion.<sup>212</sup> However, it was not willing to dismiss the bankruptcy case with prejudice.<sup>213</sup> The court claimed there was nothing in § 521(i)(1) that it could use to except a debtor who may have filed his bankruptcy case in bad faith.<sup>214</sup> The judge recognized that one of Congress's goals in enacting the BAPCPA amendments was to replace judicial discretion with streamlined statutory standards and formulas.<sup>215</sup> Congress primarily wanted to reduce the number of bankruptcy filings, rather than provide increased protections for creditors.<sup>216</sup> The court held that the case was automatically dismissed on the forty-sixth day, and that the court had no discretion to amend the dismissal based on equitable principles.<sup>217</sup> The court simply stated that Wells Fargo should have served its motion to dismiss with prejudice before the expiration of the forty-five day deadline so that it could be considered by the court before the automatic dismissal of § 521(i)(1).<sup>218</sup> Although such a suggestion may be helpful for future cases, it is not applicable where a debtor files a surprise motion to dismiss his own case under § 521(i) due to his own intentional failure to file the required information.

The court was also reluctant to grant Wells Fargo's motion for dismissal with prejudice based on § 105(a).<sup>219</sup> According to the court, § 105(a) does not empower the court to: (1) vacate a dismissal that has occurred automatically as prescribed by § 521(i)(1); (2) alter the statutory penalty of § 521(i)(1); or (3)

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<sup>210</sup> *Id.* Wells Fargo seemed to ask for similar sanctions that the court in *In re Hall* imposed upon the debtor for his alleged bad faith actions in abusing the bankruptcy proceedings. See *In re Hall*, 368 B.R. 595, 599 (Bankr. W.D. Tex. 2007).

<sup>211</sup> *In re Richardson*, 2008 Bankr. LEXIS 229, at \*4.

<sup>212</sup> *Id.* at \*6.

<sup>213</sup> *Id.* at \*4.

<sup>214</sup> *Id.* at \*6.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at \*6–7. Although the judge claimed that BAPCPA did not increase protections for creditors, other courts and scholars claim the opposite. *In re Ott*, 343 B.R. 264, 266 (Bankr. D. Col. 2006). If taken as a whole, BAPCPA is full of creditor-friendly language to remedy a perceived imbalance in the Code favoring debtors. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, H.R. REP. NO. 109-31, at 2 (2005), reprinted in 2005 U.S.C.A.N. 88, 89.

<sup>217</sup> *In re Richardson*, 2008 Bankr. LEXIS 229, at \*7 n.2.

<sup>218</sup> *Id.* at \*7.

<sup>219</sup> *Id.* at \*4.

“judicially legislate perceived shortcomings in existing law.”<sup>220</sup> Thus, Congress made clear that failing to comply with § 521(a) results in automatic dismissal of the case as a matter of law—not by an action of the judge.<sup>221</sup>

The absurdity of § 521(i) was quickly captured in one of the more entertaining cases aptly named *In re Riddle*. Here, Chief Judge A. Jay Cristol contemplated what exactly Congress meant when it said that a case is “automatically dismissed” if the debtor fails to file the required information within forty-five days.<sup>222</sup> In an apparent tribute to Dr. Seuss’ legendary book “Green Eggs and Ham,” the judge observed:

I do not like dismissal automatic,  
It seems to me to be traumatic.  
I do not like it in this case,  
I do not like it any place.

As a judge I am most keen  
to understand, *What does it mean?*  
How can any person know  
what the docket does not show?

...

What does automatic dismissal mean?  
And by what means can it be seen?  
Are we only left to guess?  
Oh please Congress, fix this mess!  
Until it’s fixed what should I do?  
How can I explain this mess to you?<sup>223</sup>

The majority of bankruptcy courts have enforced the automatic dismissal provision of § 521(i) as absolute and not subject to judicial discretion.<sup>224</sup> Accordingly, these courts believe that the automatic dismissal language of

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<sup>220</sup> *Id.* (quoting *IRS v. Farrell (In re Farrell)*, 241 B.R. 348, 349 (Bankr. M.D. Pa. 1999)).

<sup>221</sup> *See* 11 U.S.C. § 362(c)(3)(B), (4)(B) (2006).

<sup>222</sup> *In re Riddle*, 344 B.R. 702, 702–03 (Bankr. S.D. Fla. 2006).

<sup>223</sup> *Id.* at 703. Fortunately, the debtors had in fact filed all of the information required by § 521(a)(1), so the case was not automatically dismissed pursuant to § 521(i)(1). *Id.*

<sup>224</sup> *See In re Catania*, 397 B.R. 667, 669 (Bankr. W.D.N.Y. 2008); *In re Lovato*, 343 B.R. 268, 270 (Bankr. D.N.M. 2006) (“Debtor’s case must be dismissed because BAPCPA leaves the Court with no discretion to fashion any reasonable or equitable solution.”); *In re Ott*, 343 B.R. 264, 268 (Bankr. D. Colo. 2006) (holding that the court has no discretion under § 521(i) other than to dismiss a case where the documents were not filed within forty-five days and no timely request to extend the time for such filing was made); *In re Williams*, 339 B.R. 794, 795 (Bankr. M.D. Fla. 2006) (explaining that under BAPCPA, the court has no discretion to extend a debtor’s time for filing).

§ 521(i)(1) would have no meaning or effect if the case was not dismissed until requested by a party-in-interest.<sup>225</sup> Therefore, they have continually held that the case is indeed automatically dismissed on the forty-sixth day, unless the Court has either extended the time on a timely request by the debtor or a timely motion by the trustee within the forty-five day period.<sup>226</sup>

Section 521 is neither clear nor mechanical. For example, since a bankruptcy case gets to be automatically dismissed by the mere passage of time, it is difficult to say which way a case was dismissed.<sup>227</sup> This causes confusion in the system. Additionally, neither the trustee nor the judge knows whether any information is missing until a party-in-interest requests an order of dismissal, since just by looking at the documents it cannot be determined whether all the “information” was fully submitted.<sup>228</sup> The debtor himself is the person most likely to know whether the information has been fully submitted. Because “[a] request for an order memorializing the automatic dismissal of a case is unlikely until after [forty-five] days after the petition,”<sup>229</sup> it is only after the court acts on the request that it becomes apparent whether all the information is available and whether that case has been automatically dismissed.

Although § 521 was “designed to prevent abuses by debtors who do not take their responsibilities seriously and fail to provide the Court and interested parties with the information necessary to administer a bankruptcy case,” a textual reading of § 521 can create more problems than § 521 was meant to solve.<sup>230</sup> Most importantly, a strict reading of § 521(i) would allow debtors to “test the waters.”<sup>231</sup> This allows abusive debtors to minimize their exposure to creditors while also abusing the power of the automatic stay. Simply withholding certain documents required under § 521 can have the case

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<sup>225</sup> See *In re Ott*, 343 B.R. at 268. One of the rules of statutory construction states that one provision should not be interpreted in such a manner that it would contradict or render another provision of the same statute inconsistent or meaningless. See *DirectTV v. Hoa Huynh*, 503 F.3d 847, 853 (9th Cir. 2007).

<sup>226</sup> See *In re Lovato*, 343 B.R. at 270; *In re Catania*, 397 B.R. at 670.

<sup>227</sup> See *Lundin*, *supra* note 67, at 15–16.

<sup>228</sup> *Id.* “Based on software and recommendations from the [U.S. Courts’] Administrative Office, it is likely that many bankruptcy courts will establish ‘internal’ procedures for tracking the documents filed in consumer bankruptcy cases to identify cases in which ‘information’ is missing after the [forty-five]-day period in new § 521(i).” LUNDIN & BROWN, *supra* note 80, § 388.1[20]. “A review of the docket will not, for example, necessarily inform as to whether debtor received pay advices during the requisite period.” *In re Parker*, 351 B.R. 790, 801 (Bankr. N.D. Ga. 2006).

<sup>229</sup> *Lundin*, *supra* note 67, at 15–16.

<sup>230</sup> *In re Parker*, 351 B.R. at 800.

<sup>231</sup> *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1119 (9th Cir. 2009).

automatically dismissed, frustrating the trustee, creditors, and the judicial system.<sup>232</sup>

Additionally, the debtor can intentionally use the automatic dismissal when faced with an objection to a discharge due to a material omission or error on his schedules.<sup>233</sup> He may simply claim that under § 521(i) not all the information was submitted and that caused the resulting errors and omissions on the schedules.<sup>234</sup> After correcting the problems, the debtor may simply re-file and obtain a discharge. Thus, an automatic dismissal without a court order allows the debtor to return to court immediately. Once back in court, the debtor is again protected by the automatic stay and continues to frustrate creditors who are unable to collect. Some creditors may even have to go into bankruptcy themselves, since they did not plan on the debtor withholding payment for such a prolonged time.

Similarly, if the trustee learns of a preferential transfer to a third party sixty days before the filing of the case that was not disclosed on the petition, the third-party-in-interest can use § 521 to have the case automatically dismissed.<sup>235</sup> This would require dismissal of any preference action commenced by the trustee.<sup>236</sup> The bankruptcy judge in *In re Parker* noted that “[t]he debtor can then re-file when the preference has sufficiently aged to be unavoidable.”<sup>237</sup> Such blatant abuse of § 521 goes against what Congress tried to achieve when it enacted BAPCPA.<sup>238</sup>

Section 521 also seems to create additional avenues for chapter 7 debtors to dismiss their cases.<sup>239</sup> Normally, an individual who files a chapter 13 petition has the right to dismiss the case at any time, but a case under chapter 7 can only be dismissed for cause after notice and a hearing.<sup>240</sup> In a chapter 7 case, the courts consider the interest of the creditors, trustee, and all the other parties involved.<sup>241</sup> The courts tend to have a lot of discretion in ruling on a motion to

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<sup>232</sup> *Id.*

<sup>233</sup> See 11 U.S.C. § 521(a)(1), (i)(1) (2006); *In re Hall*, 368 B.R. 595, 596 (Bankr. W.D. Tex. 2007).

<sup>234</sup> See 11 U.S.C. § 521(i); *In re Hall*, 368 B.R. at 600–01.

<sup>235</sup> 11 U.S.C. § 521(i)(2); *In re Parker*, 351 B.R. at 801.

<sup>236</sup> *In re Parker*, 351 B.R. at 802.

<sup>237</sup> *Id.*

<sup>238</sup> See H.R. REP. NO. 109-31, at 3 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 92.

<sup>239</sup> See 11 U.S.C. § 707(a)(3); *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8, 13 (1st Cir. 2009); *Smith v. Geltzer (In re Smith)*, 507 F.3d 64, 72 (2d Cir. 2007); *In re Withers*, No. 06-42098 TM, 2007 WL 628078, at \*3 (Bankr. N.D. Cal. Feb. 26, 2007).

<sup>240</sup> See 11 U.S.C. § 707(a); *In re Withers*, 2007 WL 628078, at \*3.

<sup>241</sup> See *In re Smith*, 507 F.3d at 72–73.

dismiss a chapter 7 bankruptcy case by equitably evaluating the best interests of the parties and whether there is any prejudice to the creditors as a result of the dismissal.<sup>242</sup> However, § 521 removes all judicial discretion and allows for a chapter 7 debtor to dismiss the case without a court hearing and without showing cause.<sup>243</sup> One court noted that “[t]o give a chapter 7 debtor the absolute right to cause the automatic dismissal of the case forty-five days after it is filed would represent a dramatic change in the law and would open the door to abuse.”<sup>244</sup>

While dishonest debtors are able to benefit from a strict interpretation of § 521, honest but unfortunate debtors are sometimes penalized.<sup>245</sup> For example, § 521 places an unintentional burden on debtors that have been affected by disasters.<sup>246</sup> The document requirements and time limitation of § 521 provide quite a significant burden for disaster victims seeking a chapter 7 discharge.<sup>247</sup> Michael Anthony Sabella noted that “[a]ccess to these documents is extremely limited for disaster victims that file for bankruptcy immediately following the disaster because their financial records and documents may be missing or destroyed.”<sup>248</sup> As a result, it becomes difficult or impossible for debtors to fulfill the requirements of § 521 within the allotted forty-five days, no matter their diligence. Without judicial discretion, a court would neither be able to limit an absolute right to dismissal nor consider whether enough information has been collected to allow a debtor to proceed with filing for bankruptcy.<sup>249</sup>

A strict interpretation of § 521 leads to many unintended consequences—such as an absolute right of dismissal—which encourage abuse of the bankruptcy system by dishonest debtors and leads to unfavorable outcomes for honest but unfortunate debtors. Based on the bankruptcy courts’ equitable powers and Congress’s intent in enacting BAPCPA, it is unlikely that Congress intended to create a procedure that would allow a debtor to file for bankruptcy and receive all the benefits that automatically accompany such a filing and then voluntarily escape once the debtor decides that filing for

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<sup>242</sup> *See id.*

<sup>243</sup> *In re Acosta-Rivera*, 557 F.3d at 11.

<sup>244</sup> *See In re Withers*, 2007 WL 628078, at \*3.

<sup>245</sup> Sabella, *supra* note 94, at 328.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 333.

<sup>248</sup> *Id.* at 335.

<sup>249</sup> *Id.* at 348–49. *Contra* *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1119 (9th Cir. 2009); *In re Parker*, 351 B.R. 790, 800 (Bankr. N.D. Ga. 2006).

bankruptcy is no longer to his advantage.<sup>250</sup> It is alarming that so many bankruptcy courts interpret § 521(i) as a hard and rigid mechanical deadline.

#### 4. *Limiting the Absolute Right to Dismissal Under § 521(i)*

Courts realized the issues that an absolute right to automatic dismissal creates and tried to remedy the situation by softening the textual approach and reexamining congressional intent. These courts insist that cases are not in fact automatically dismissed upon the mere passage of time.<sup>251</sup> Instead, the dismissal of a case requires proactive steps by a party-in-interest. The party must move for dismissal and show that the requisite documents have not been filed.<sup>252</sup> The court in *CFCU Community Credit Union v. Pierce* noted:

Were 521(i)(1)'s automatic dismissal truly automatic, it would create an odd result: if a bankrupt failed to comply with § 521(a)(1), but no-one perceived the deficiency, discharge might still be granted, even though—unbeknownst to anyone—the case had been dismissed. Section 521(i)(2) adds to the confusion since it requires a court to file an order for an automatic discharge. Yet if the discharge were truly automatic, an order would be unnecessary.<sup>253</sup>

In the case of *In re Lopez*, the court struggled to make sense of §§ 521(i)(1) and 521(i)(2).<sup>254</sup> Judge Leif M. Clark reasoned that if Congress truly intended for the case in question to be automatically dismissed on the forty-sixth day, it would have provided that “the case is dismissed effective on the [forty-sixth] day.”<sup>255</sup> In other provisions of the Code, “effective” is the word used by Congress to express that an event occurs on its own without an order of the court.<sup>256</sup> Thus, a case should not be deemed dismissed unless a party-in-interest moves to dismiss under § 521(i). This approach reconciles § 521(i)(2), which states that “a [party-in-interest] may request the court to enter an order

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<sup>250</sup> See 11 U.S.C. § 521(i) (2006); *In re Warren*, 568 F.3d at 1119; *Segarra-Miranda v. Acosta-Rivera* (*In re Acosta-Rivera*), 557 F.3d 8 (1st Cir. 2009); *In re Parker*, 351 B.R. at 801; H.R. REP. NO. 109-31, at 2 (2005), reprinted in 2005 U.S.C.A.N. 88, 89.

<sup>251</sup> See *In re Lopez*, No. 09-31511-C, 2009 Bankr. LEXIS 3029, at \*8 (Bankr. W.D. Tex. Sept. 17, 2009); *In re Spencer*, No. 06-00314, 2006 WL 3820702, at \*2 (Bankr. D.D.C. Dec. 22, 2006).

<sup>252</sup> *In re Spencer*, 2006 WL 3820702, at \*2.

<sup>253</sup> *CFCU Cmty. Credit Union v. Pierce*, No. 06-CV-6595-CJS, 2009 WL 2163107, at \*2 (W.D.N.Y. July 17, 2009).

<sup>254</sup> *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*1-9.

<sup>255</sup> *Id.* at \*3 (quoting *In re Spencer*, 388 B.R. at 423).

<sup>256</sup> *Id.* Judge Martin Teel of the Bankruptcy Court for the District of Columbia cites examples in §§ 362(h), 365(p)(1), 365(p)(3), 521(a)(6), and 551. “Presumably, Congress intended a different meaning when it used the words ‘shall be automatically dismissed’ in § 521(i)(1).” *In re Spencer*, 388 B.R. at 423.

dismissing the case.”<sup>257</sup> Otherwise, if the case were automatically dismissed, § 521(i)(2) would have no meaning.<sup>258</sup> Simply put, “if no one moves for an order of dismissal pursuant to [§] 521(i), the case does *not* stand dismissed. Instead, it proceeds . . . .”<sup>259</sup> Thus, if a request is made by a party-in-interest, the court has no choice other than to “dismiss a case upon a showing that the specified events have occurred.”<sup>260</sup> Only when a party-in-interest moves to dismiss is the case “automatically” dismissed without the intervention of the court.<sup>261</sup>

A bankruptcy court in the Southern District of Iowa used such reasoning when it concluded that the court should not act *sua sponte* where no party-in-interest filed a § 521(i)(2) request for it to enter an order of dismissal.<sup>262</sup> In *In re Jackson* the debtor made an error and misnumbered his payment advices.<sup>263</sup> As a result, he was one credit advice short on the forty-fifth day after filing the petition and thus failed to satisfy § 521(a)(1)(B)(iv).<sup>264</sup> The court issued an order dismissing the case, and the debtor moved for reinstatement on the basis of excusable neglect.<sup>265</sup>

Although the court reinstated the case, it was not on the basis of excusable neglect.<sup>266</sup> Rather, the court decided that it was time to abandon the current *sua sponte* approach in favor of a stricter construction of § 521(i)(1).<sup>267</sup> The stricter construction requires a motion to dismiss by a party-in-interest pursuant to § 521(i)(2).<sup>268</sup> In changing its interpretation of § 521, the court wanted to make sure that the interpretation would not be construed in a manner that could lead to absurd results.<sup>269</sup> Thus, despite the “automatic” language in the statute, the court decided that it should not dismiss the case *sua sponte* without a motion

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<sup>257</sup> *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*3 n.2.

<sup>258</sup> *Id.* at \*3 n.3. It also cannot be read as simply confirming the dismissal, since it would merely mirror the language found in § 362(j), which states that “[o]n request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated.” 11 U.S.C. § 362(j) (2006).

<sup>259</sup> *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*9.

<sup>260</sup> *Id.* at \*3.

<sup>261</sup> *Id.* at \*3–4.

<sup>262</sup> *In re Jackson*, 348 B.R. 487, 500 (Bankr. S.D. Iowa 2006) (holding that where a debtor fails to timely file required documents the case is deemed automatically dismissed on the forty-sixth day only if requested by the party-in-interest).

<sup>263</sup> *Id.* at 489.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 489, 500.

<sup>267</sup> *Id.* at 493.

<sup>268</sup> *Id.* at 500.

<sup>269</sup> *Id.* at 493.

by a party-in-interest.<sup>270</sup> The “automatic” language of § 521(i)(1) became qualified by subparagraph (2), which requires a motion.<sup>271</sup>

Therefore, some courts believe that the “language should be construed to mean that the court has no discretion but to dismiss a case upon a showing that the specified events have occurred.”<sup>272</sup> This means that the order itself dismisses the case rather than confirming the dismissal.<sup>273</sup> Although this approach attempts to reconcile the confusing language of § 521, it barely changes the potential for abuse by dishonest debtors.<sup>274</sup> In a way, this approach diminishes the meaning of “automatic.” The case is not dismissed automatically, but rather someone has to initiate the dismissal so that the case may be “automatically” dismissed. The courts in *Lopez* and *Jackson* merely qualified the meaning of “automatic” so that other provisions, namely § 521(i)(2), could coexist with the rest of the statute.<sup>275</sup> In doing so, a debtor may still withhold information required by § 521(a)(1) and guarantee the case’s dismissal as long as he, or another party-in-interest, brings it to the court’s attention.<sup>276</sup> The courts realized that by using a narrow reading of the text in § 521, various sections of the same provision contradict each other.<sup>277</sup> If a narrow reading forces courts to qualify certain language in order to make the statute usable, then there is clearly a lack of “plain meaning” and a textualist approach to interpreting § 521(i) is not appropriate. An expansive approach

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<sup>270</sup> *Id.*

<sup>271</sup> See 11 U.S.C. § 521(i)(1), (2) (2006).

<sup>272</sup> *In re Lopez*, No. 09-31511-C, 2009 Bankr. LEXIS 3029, at \*3 (Bankr. W.D. Tex. Sept. 17, 2009); see also *In re Spencer*, No. 06-00314, 2006 WL 3820702, at \*2 (Bankr. D.D.C. Dec. 22, 2006) (holding dismissal is effective upon order, otherwise provisions of § 521(i)(2), allowing dismissal on motion of party-in-interest, would be moot). *Contra In re Fawson*, 338 B.R. 505, 511 (Bankr. D. Utah 2006) (“Section 521(i)(2) requires an affirmative act from the Court but only upon request of a [party-in-interest.] This affirmative act does not imply discretion not to dismiss the case, nor does this affirmative request change the legal effect of § 521(i)(1). The debtor’s case is simply dismissed.”).

<sup>273</sup> See *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*8; *In re Jackson*, 348 B.R. at 500.

<sup>274</sup> The court in *Jackson* acknowledged that, as written, the statute can be taken advantage of:

[A] debtor who gambled on no one noticing an intentionally omitted payment advice could bring the “exit bankruptcy wild card” to the attention of the Court after an unfavorable ruling on an objection to exemption or on an objection to discharge. The trustee would not be able to counter such a request with a motion brought under paragraph (4) because the trustee would not be able to establish the debtor attempted in good faith to file the missing payment advice.

*In re Jackson*, 348 B.R. at 499.

<sup>275</sup> *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*2–5; *In re Jackson*, 348 B.R. at 497–98.

<sup>276</sup> *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*8; *In re Jackson*, 348 B.R. at 499.

<sup>277</sup> See 11 U.S.C. § 521(a)(1), (i)(2) (2006); *In re Jackson*, 348 B.R. at 493.

involving greater judicial discretion is necessary to overcome the problems that an absolute right to dismissal presents.

*B. Judicial Discretion to “Order Otherwise”*

This Comment will now examine a small number of courts that realized Congress did not intend an absolute right to dismissal and that a certain amount of judicial discretion is necessary.<sup>278</sup> This minority view, led by the First and Ninth Circuits, looked not only at Congress’s intent, but also at the history of the statute.<sup>279</sup> Using their judicial discretion, the courts were able to interpret the statute in various ways that follow through with Congress’s intent, BAPCPA’s goals, and the tenets of bankruptcy.

Led by two circuit court decisions, a growing number of courts have moved away from a strictly textual interpretation of the statute.<sup>280</sup> These courts realized that a plain meaning interpretation of § 521(i) is not readily apparent, no matter how you qualify the text. This view holds that the court has judicial discretion pursuant to § 521(a)(1) to “order otherwise” regarding the statutorily required information after the forty-five day period has expired.<sup>281</sup>

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<sup>278</sup> See *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1119 (9th Cir. 2009); *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8, 14 (1st Cir. 2009); *In re Withers*, No. 06-42098 TM, 2007 WL 628078, at \*4 (Bankr. N.D. Cal. Feb. 26, 2007); *In re Parker*, 351 B.R. 790, 802 (Bankr. N.D. Ga. 2006).

<sup>279</sup> See *In re Warren*, 568 F.3d at 1119; *In re Acosta-Rivera*, 557 F.3d at 14.

<sup>280</sup> See *In re Warren*, 568 F.3d at 1119; *In re Acosta-Rivera*, 557 F.3d at 14; *In re Withers*, 2007 WL 628078, at \*2; *In re Parker*, 351 B.R. at 802.

<sup>281</sup> Section 521(a)(1) provides:

(a) The debtor shall—

(1) file—

(A) a list of creditors; and

(B) *unless the court orders otherwise*—

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures;

(iii) a statement of the debtor’s financial affairs and, if section 342(b) applies, a certificate . . . ;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition . . . .

11 U.S.C. § 521(a)(1) (emphasis added).

Textualists argue that under the canon *expressio unius est exclusio alterius*<sup>282</sup> the exclusion of “order otherwise” from the language of § 521(i), despite its inclusion in § 521(a), means that the court cannot “order otherwise” with regard to the forty-five day time limit of § 521(i). In other words, the court is only allowed to “order otherwise” during the forty-five days following the filing of a debtor’s petition. After that, the court must dismiss the case.<sup>283</sup> It is important to keep in mind that Congress must sometimes limit the language as a compromise to get certain bills passed.<sup>284</sup> Accordingly, Congress does not always exclude language on purpose. Instead, one must look at legislative intent for assistance in interpreting the law.

The judicial power to “order otherwise” in § 521 predates BAPCPA.<sup>285</sup> When Congress amended § 521, it left the language intact.<sup>286</sup> Some courts regard such congressional silence with great deference.<sup>287</sup> A recent decision from the First Circuit “ordered otherwise” in an attempt to curb abusive conduct.<sup>288</sup> In *In re Acosta-Rivera*, a chapter 13 case was converted to a chapter 7 case, after which the trustee proposed a settlement of a discrimination suit that would have paid all of the debtor’s creditors in full and provided a surplus to the debtors.<sup>289</sup> The debtors had not originally scheduled this cause of action, and they disclosed it at a later time in a second amendment to their schedules.<sup>290</sup> The debtors were not satisfied with the proposed settlement and moved to dismiss, arguing that they failed to comply with the requirements of § 521(a) within forty-five days.<sup>291</sup>

The First Circuit held that the bankruptcy court had discretionary authority to waive the § 521(a) requirements because § 521(a)(1)(B) begins, “The debtor

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<sup>282</sup> A canon of negative implication meaning “the inclusion of one thing suggests the exclusion of all others.” ESKRIDGE ET AL., *supra* note 119, at 263.

<sup>283</sup> *In re Hall*, 368 B.R. 595, 599 (Bankr. W.D. Tex. 2007).

<sup>284</sup> ESKRIDGE ET AL., *supra* note 119, at 264.

<sup>285</sup> See *In re Acosta-Rivera*, 557 F.3d at 12 n.6. The pre-BAPCPA version of § 521(1) provided that “[t]he Debtor shall . . . file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor’s financial affairs.” *Id.* at 12.

<sup>286</sup> *Id.* at 12; see 11 U.S.C. § 521(a)(1)(B).

<sup>287</sup> See *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1117–18 (9th Cir. 2009); *In re Acosta-Rivera*, 557 F.3d at 12.

<sup>288</sup> See *In re Acosta-Rivera*, 557 F.3d at 14.

<sup>289</sup> *Id.* at 10. Trustee’s proposal “would have satisfied all allowed claims; thus, neither the creditors nor the trustee needed the missing . . . information.” *Id.* at 11.

<sup>290</sup> *Id.* at 10.

<sup>291</sup> *Id.*

shall file [required documents] . . . unless the court orders otherwise . . . .”<sup>292</sup> The court acknowledged that its reading of the statute would not always decrease the number of bankruptcy filings, but was reluctant to interpret BAPCPA’s limits on judicial discretion in a way “that would encourage rather than discourage bankruptcy abuse.”<sup>293</sup> Because the statutory language did not clearly reflect this, an alternate interpretation was necessary. The court found that “Congress, in enacting BAPCPA, was not bent on placing additional weapons in the hands of abusive debtors.”<sup>294</sup> A mechanical reading of the statute failed to harmonize the purpose and intent of the statute.

The First Circuit observed that Congress intended for bankruptcy courts to have discretion in determining whether any missing information is actually required.<sup>295</sup> If any of the required information was irrelevant or extraneous, the court could “order otherwise” and deny the dismissal motion of a debtor’s case.<sup>296</sup> Thus, the court held that whenever “there is no continuing need for the information or a waiver is needed to prevent automatic dismissal from furthering a debtor’s abusive conduct, the court has discretion to take such an action.”<sup>297</sup> The use of the “order otherwise” clause allows the courts to use some judicial discretion to recognize and deal with debtors who seek to manipulate the bankruptcy proceedings.<sup>298</sup>

Adopting the First Circuit’s approach in *Acosta-Rivera*, the Ninth Circuit in *In re Warren* held that the § 521 automatic dismissal may be waived after the forty-five day deadline.<sup>299</sup> After the chapter 7 trustee discovered potential nonexempt assets, the debtor moved to voluntarily dismiss his own case in order to avoid the freezing of a \$93,000 bank account to pay for belated child support.<sup>300</sup> The debtor claimed that his case should be dismissed because he had not timely filed the required payment advises.<sup>301</sup>

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<sup>292</sup> *Id.* at 14–15.

<sup>293</sup> *Id.* at 13.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 14; *see also In re Parker*, 351 B.R. 790, 802 (Bankr. N.D. Ga. 2006) (“It is the trustee and the creditors who are in the best position to determine whether they have sufficient information to proceed.”).

<sup>296</sup> *In re Acosta-Rivera*, 557 F.3d at 14.

<sup>297</sup> *Id.* The ruling was not unlimited and the court stated explicitly that it was not deciding whether a bankruptcy court had “unfettered discretion to waive the disclosure requirements *ex post*.” *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1119 (9th Cir. 2009).

<sup>300</sup> *Id.* at 1115.

<sup>301</sup> *Id.* The debtor also argued that he had not obtained prepetition credit counseling and was thus ineligible to be a debtor. *Id.*

The court worried that the debtor wanted to get out of chapter 7 based on his own failures and misconduct.<sup>302</sup> The court acknowledged that although the decision conflicted with the majority of other bankruptcy court decisions,<sup>303</sup> it nevertheless agreed with the First Circuit that “bankruptcy court[s] retain[] discretion to waive the § 521(a)(1) filing requirement even after the § 521(i)(1) filing deadline has passed.”<sup>304</sup> Section 521(a)(1), which grants courts the power to “order otherwise,” does not give the Court a timeline as to when it must enter such an order.<sup>305</sup> Also, nowhere in § 521(a)(1) does it state that there is a time limit within which a court may “order otherwise.”<sup>306</sup>

One of the most important observations in *Warren* was that § 521(i)(1)’s filing requirement is not directed at courts, but at debtors.<sup>307</sup> Thus, the courts are freed from limitations on their power and concrete statutory ambiguity is established, allowing for alternative interpretations of § 521.<sup>308</sup> The court regarded with great deference Congress’s decision not to change § 521’s grant of power to bankruptcy courts to “order otherwise.”<sup>309</sup>

Congressional silence in this regard was a confirmation that a strict deadline was not appropriate and that it could not apply and limit the bankruptcy court’s existing authority.<sup>310</sup> Allowing otherwise would invite frivolous filings because mere inaction by the debtor would be enough to guarantee the dismissal of the case. According to the Ninth Circuit, such a reading was consistent with Congress’s primary intent to limit abusive bankruptcy filings.<sup>311</sup>

Another example of how the right amount of judicial discretion prevented an abusive debtor from succeeding is *Parker*, from the bankruptcy court in the Northern District of Georgia.<sup>312</sup> After the chapter 7 trustee took action to sell

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<sup>302</sup> *Id.* at 1119.

<sup>303</sup> The rulings in *Warren* and *Acosta-Rivera* have actually become the majority view among the circuit courts, despite the numerous bankruptcy and district court cases following the absolute right to automatic dismissal. *Id.*; Segarra-Miranda v. Acosta-Rivera (*In re Acosta-Rivera*), 557 F.3d 8, 14 (1st Cir. 2009).

<sup>304</sup> *In re Warren*, 568 F.3d at 1117 (quoting *In re Acosta-Rivera*, 557 F.3d at 9).

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*; see also 11 U.S.C. § 521(a)(1) (2006).

<sup>307</sup> *In re Warren*, 568 F.3d at 1117.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 1113; see also Segarra-Miranda v. Acosta-Rivera, (*In re Acosta-Rivera*), 557 F.3d 8, 14 (1st Cir. 2009).

<sup>310</sup> *In re Warren*, 568 F.3d at 1118.

<sup>311</sup> *Id.*

<sup>312</sup> *In re Parker*, 351 B.R. 790, 801 (Bankr. N.D. Ga. 2006).

the debtor's houseboat, the debtor claimed that the case was automatically dismissed.<sup>313</sup> The court "ordered otherwise" and denied the debtor's motion to dismiss after it concluded that it was not in the best interest of the creditors or the estate to dismiss the case.<sup>314</sup>

Most importantly, the bankruptcy court in *Parker* found that dismissal under § 521 was not a ministerial act and the court must review the docket and enter an order of dismissal.<sup>315</sup> The court noted, "A review of the docket will not, for example, necessarily inform as to whether debtor received pay advices during the requisite period."<sup>316</sup> It further found that since § 521(i) does not dictate the time period in which the court can "order otherwise," it could excuse the filing requirements in a case at any time under appropriate circumstances, before or after the forty-five day period pursuant to § 521(a)(1)(B).<sup>317</sup> The court also noted that § 521(a) requires information, not actual documents, thus making the court's interpretation of § 521 even more congruent with its holding.<sup>318</sup> The exercise of judicial discretion and judgment is necessary in order to determine whether the "information" required by § 521(a)(1) has been met.<sup>319</sup> A certain amount of judicial discretion is necessary to determine whether all the information required for the bankruptcy proceedings was attained. The Honorable Keith M. Lundin noted that "[i]nformation is a soft word that can't be determined using a checklist of documents that can or must be filed in a bankruptcy case."<sup>320</sup> The determination itself acts as a gatekeeper, making sure that an honest debtor is not penalized for minor technicalities. Likewise, it halts dishonest debtors trying to escape bankruptcy proceedings when doing so is not in the best interest of the creditors or the trustee.<sup>321</sup>

In coming to their conclusions, the courts that followed the "order otherwise" premise focused not only on the intent of Congress in enacting

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<sup>313</sup> *Id.* at 799 (debtor claimed that the case was automatically dismissed after forty-five days because he failed to file payment advices and to comply with the credit counseling certificate requirements of § 109(h)).

<sup>314</sup> *Id.* at 802.

<sup>315</sup> *Id.* at 801.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 800.

<sup>319</sup> *Segarra-Miranda v. Acosta-Rivera, (In re Acosta-Rivera)*, 557 F.3d 8, 14 (1st Cir. 2009).

<sup>320</sup> Lundin, *supra* note 67, at 15.

<sup>321</sup> *See In re Acosta-Rivera*, 557 F.3d at 14; *In re Parker*, 351 B.R. at 801.

§ 521, but also on the history of the statute itself.<sup>322</sup> The courts relied heavily on the “order otherwise” language found in § 521(a)(1)(B):

The grant of judicial power to “order[] otherwise” predated BAPCPA. In overhauling [§] 521, Congress left this familiar language intact. We do not regard that as a mere fortuity. Nor do we think that a slip of the pen accounts for the fact that the provision does not now contain an explicit deadline for ordering otherwise. In this context, we have a high regard for congressional silence.<sup>323</sup>

Since a certain amount of flexibility existed before BAPCPA and post-BAPCPA, one could reasonably infer that Congress intended for the judiciary to retain some amount of power to respond to unforeseen constraints in the statutory language.<sup>324</sup> A basic principle of statutory interpretation is that courts should consider, if possible, every clause and word of a statute, while avoiding any construction that would suggest that the legislature was ignorant of the meaning of the language it used.<sup>325</sup> Thus, there is a “general presumption” that “when Congress alters the words of a statute, it must intend to change the statute’s meaning.”<sup>326</sup> Although this reasoning is plausible, such an interpretation heavily assumes that Congress means what it says and that any statutory silence was purposefully intended. However, Congress cannot directly and explicitly address every issue that may arise. One must look at the broader picture to see what Congress tried to accomplish with the new amendments to the Code. In this case, Congress’s main purpose in enacting BAPCPA was to prevent abusive bankruptcy filings.<sup>327</sup>

Judicial discretion to “order otherwise” also solves the problem of honest debtors having their cases dismissed due to accidental omissions in providing the required information, such as payment advices.<sup>328</sup> In *In re Miller*, the

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<sup>322</sup> See *In re Acosta-Rivera*, 557 F.3d at 12; *In re Parker*, 351 B.R. at 802.

<sup>323</sup> *In re Acosta-Rivera*, 557 F.3d at 12.

<sup>324</sup> See *id.*

<sup>325</sup> ESKRIDGE ET AL., *supra* note 119, at 254.

<sup>326</sup> *United States v. Wilson*, 503 U.S. 329, 336 (1992) (holding that the deletion of a reference to the Attorney General in a statute was not significant because the reference “was simply lost in the shuffle” of a comprehensive statutory revision that had various unrelated purposes); see also *Stone v. INS*, 514 U.S. 386, 397 (1995) (“When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.”).

<sup>327</sup> *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1118 (9th Cir. 2009); see *In re Acosta-Rivera*, 557 F.3d at 13.

<sup>328</sup> See *Miller v. Cameron (In re Miller)*, 383 B.R. 767, 772–73 (B.A.P. 10th Cir. 2008) (noting that very strict and technical requirements unnecessarily burden an honest debtor and may preclude him from bankruptcy).

debtor failed to file one of four pay stubs.<sup>329</sup> However, he filed a chart which extrapolated the information on the missing pay stub.<sup>330</sup> Additionally, the fourth pay stub included all the year-to-date payment information.<sup>331</sup> The bankruptcy court had concluded, using a technical interpretation of the statute, that the debtor failed to meet the requirements of § 521(a)(1)(B)(iv) because he never filed the third pay stub.<sup>332</sup> The court reasoned that the statute required the debtor to file copies of payment advices received directly from the employer, or any other evidence of payment that was also received directly from the employer.<sup>333</sup> Thus, the information provided by the debtor did not comply because it was not directly received from the employer, but rather consisted of speculation by the debtor.<sup>334</sup>

The Bankruptcy Appellate Panel for the Tenth Circuit viewed that such a hypertechnical application of the statutory code unnecessarily read additional requirements into the statute.<sup>335</sup> It concluded that § 521(a)(1)(B)(iv) allows the debtor to file either payment advices or another form of evidence of payment, which may include year-to-date payment information.<sup>336</sup> The judge noted that although the debtor's chart was not created by the employer, the year-to-date information provided was.<sup>337</sup> The chart provided a simple mathematical calculation by subtracting the fourth pay period amounts from the year-to-date information.<sup>338</sup> The bankruptcy court refused to consider the calculation due to its hypertechnical reading of the statute.<sup>339</sup> However, the appellate court took into account that the necessary information, rather than the documents, was submitted and that the debtor filed the extrapolated chart in good faith.<sup>340</sup> Based on general principles of providing a bankruptcy procedure that allows for discharge and a fresh start, the appellate court used its equitable powers to refuse to automatically dismiss the case.<sup>341</sup>

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<sup>329</sup> *Id.* at 769.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*

<sup>335</sup> *Id.* at 771.

<sup>336</sup> *Id.*

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 769.

<sup>339</sup> *Id.* at 771.

<sup>340</sup> *Id.* at 771–72.

<sup>341</sup> *Id.* at 772.

### C. Reconciling § 521

The resolution for courts to “order otherwise” follows from multiple analytical techniques of interpretation of § 521. Some courts reason that § 521(i) lacks plain meaning and thus judicial discretionary authority is needed to interpret § 521(i) to reduce manipulation of the bankruptcy process. Other courts support the view that when Congress’s intentions and purposes are understood, the use of judicial discretionary authority in interpreting § 521(i) may further the goals of BAPCPA. However, bankruptcy courts may have equitable powers pursuant to § 105(a) to achieve proper results in making their determinations.<sup>342</sup>

#### 1. Section 105(a)—Powers of the Bankruptcy Court

As mentioned earlier, in *Richardson*, the court was asked to use its equitable powers under § 105(a) to dismiss the debtor’s case with prejudice.<sup>343</sup> However, the court noted that § 105(a) does not empower the court to: (1) vacate a dismissal that has occurred automatically as prescribed by § 521(i)(1); (2) alter the statutory penalty of § 521(i)(1); or (3) “judicially legislate perceived shortcomings in existing law.”<sup>344</sup> Section 105(a) states:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.<sup>345</sup>

At first glance, it seems that § 105(a) preserves judicial discretion and can be used throughout the Code to enforce court orders and prevent the abuse of bankruptcy proceedings.<sup>346</sup> Thus, § 105(a) empowers a court to take action to prevent an abuse of process.<sup>347</sup> However, certain courts have warned that such power has limitations.<sup>348</sup> As the Court of Appeals for the Second Circuit noted,

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<sup>342</sup> See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 375 (2007).

<sup>343</sup> *In re Richardson*, No. 07-42881, 2008 Bankr. LEXIS 229 (Bankr. E.D. Tex. Jan. 30, 2008); see 11 U.S.C. § 105(a) (2006).

<sup>344</sup> *In re Richardson*, 2008 Bankr. LEXIS 229, at \*4 (citing *In re Farrell*, 241 B.R. 348, 349 (Bankr. M.D. Pa. 1999)).

<sup>345</sup> 11 U.S.C. § 105(a).

<sup>346</sup> See *id.*

<sup>347</sup> See *id.*

<sup>348</sup> See *In re Brickey*, 363 B.R. 59, 64 (Bankr. N.D.N.Y. 2007).

§ 105(a) provides “the power to exercise equity in carrying out the *provisions* of the Bankruptcy Code, rather than to further the purposes of the Code generally, or otherwise to do the right thing.”<sup>349</sup>

In *Marrama v. Citizens Bank of Massachusetts*, the U.S. Supreme Court held that bankruptcy courts may use § 105(a) to achieve a proper result in making their decisions.<sup>350</sup> Since *Marrama*, other courts have held that bankruptcy courts may use § 105(a) to “achieve a result that the Code clearly required.”<sup>351</sup> So what is preventing courts from using their judicial discretion with § 105(a) to deal with § 521(i)?<sup>352</sup> Perhaps it is the fear that using § 105(a) to limit “automatic dismissal” would constitute judicial activism.<sup>353</sup> But what if § 521(i) is simply inconsistent as written? In that case, it would be better if the courts were aware of discrepancies and subordinated their judgment and discretion to the broader purposes of BAPCPA and bankruptcy law in general. That way there would be a consistent body of law, rather than various judicial loopholes through which judges have to jump to get the equitable result that BAPCPA intended.

## 2. Proposed Solutions

Certain possible solutions exist at multiple levels of bankruptcy proceedings, with the ultimate solution being a change in the statutory language. The perplexing concept of automatic dismissal lacks the requirement that bankruptcy courts enter orders. As Judge Lundin noted, “[I]t suggests just the opposite—that something has happened in a bankruptcy case that does not require court action.”<sup>354</sup> All solutions proposed here involve halting abusive debtors from escaping bankruptcy proceedings at will, while still maintaining Congress’s wish for reduced filings.<sup>355</sup>

The most immediate solution can be implemented by the judges themselves, which includes following the First and Ninth Circuits whenever

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<sup>349</sup> *Smart World Tech., LLC v. Juno Online Serv., Inc. (In re Smart World)*, 423 F.3d 166, 184 (2d Cir. 2005) (quoting *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart)*, 351 F.3d 86, 91–92 (2d Cir. 2003)).

<sup>350</sup> *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 382 (2007).

<sup>351</sup> *Perez v. Peake*, 373 B.R. 468, 488 (S.D. Tex. 2007).

<sup>352</sup> See 11 U.S.C. § 521(i).

<sup>353</sup> *In re Ott*, 343 B.R. 264, 267 n.7 (Bankr. D. Colo. 2006) (“The court . . . must be careful in exercising any power, on its own initiative, under 11 U.S.C. § 105(a), to extend the time limits and ‘automatic’ operation of 11 U.S.C. § 521(i) so as to refrain from impermissible ‘judicial activism.’”).

<sup>354</sup> LUNDIN & BROWN, *supra* note 80, § 388.1[23].

<sup>355</sup> See H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

dealing with the complex implications of § 521.<sup>356</sup> Although the use of judicial discretionary authority to “order otherwise” in these opinions is not perfect, it provides the best immediate method for dealing with the unclear and contradicting language of § 521(i).<sup>357</sup> This reasoning prevents dishonest debtors from abusing the bankruptcy proceedings and diminishes the application of invisible administrative provisions while retaining BAPCPA’s intent of ejecting debtors who were actually not fully prepared for bankruptcy proceedings.

In some jurisdictions, local rules allow for a different solution. Some local rules permit a debtor to file a “certificate of compliance,” which affirms that the information required by § 521(a)(1) was filed within the forty-five days required by § 521(i).<sup>358</sup> Once the certificate is filed, “a rebuttable presumption arises . . . that automatic dismissal is not appropriate under § 521(i). A party that disagrees can overcome the presumption after notice and a hearing in the bankruptcy court.”<sup>359</sup> Because the rule requires a hearing, the issues presented by § 521(i) are reviewed by bankruptcy judges rather than automatically dismissed. The fact that some courts have implemented such a solution insinuates that § 521(i) does indeed need judicial attention, rather than invisible administrative process.<sup>360</sup>

Similarly, other courts, such as the U.S. Bankruptcy Court of Northern District of Georgia, provide a waiver clause with the form confirming the bankruptcy plan. Specifically, the form states:

Because no party in interest has filed a request for an order of dismissal pursuant to 11 U.S.C. § 521(i)(2) and because the parties in interest should not be subjected to any uncertainty as to whether this case is subject to automatic dismissal under § 521(i)(1), Debtor is not required to file any further document pursuant to § 521(a)(1)(B) to avoid an automatic dismissal and this case is not and was not subject to automatic dismissal under § 521(i)(1).<sup>361</sup>

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<sup>356</sup> See generally *Wirum v. Warren (In re Warren)*, 568 F.3d 1113 (9th Cir. 2009); *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8 (1st Cir. 2009).

<sup>357</sup> See, e.g., *In re Warren*, 568 F.3d 1113; *In re Acosta-Rivera*, 557 F.3d 8; see also 11 U.S.C. § 531(i).

<sup>358</sup> LUNDIN & BROWN, *supra* note 80, § 388.1[22].

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* at § 388.1[23].

<sup>361</sup> E.g., Order That this Case is Not Subject to Dismissal Under 521(i)(1), *In re Riddle*, No. 11-40013-pwb (Bankr. N.D. Ga. Mar. 31, 2011).

Although the form tries to remedy the problems that § 521(i) creates, by the time the plan is created and the form is issued, it may be too late. If a dishonest debtor keeps track of the deadlines, the debtor may nevertheless have already filed a motion for dismissal.<sup>362</sup>

The difficulties that arise in interpreting § 521 could be resolved if Congress were to amend the Code. Section 521(i) should be amended to provide some judicial involvement so that an entry of a court order by a party-in-interest would only be possible after an opportunity for a hearing.<sup>363</sup> Such a change would prevent dishonest debtors from taking advantage of the bankruptcy proceedings while fulfilling Congress's intention to remove debtors who fail to fulfill the disclosure obligations.

### 3. *Due Process Concerns*

Automatic dismissal may not make sense or be required to accomplish the goals of BAPCPA.<sup>364</sup> The concept of "automatic" raises many concerns as discussed above. The court in *Fawson* spelled out some of these concerns:

If the case were not dismissed under § 521(i)(1) until a [party-in-interest] made a § 521(i)(2) request, then what effect would the automatic dismissal language of § 521(i)(1) have? None. The same absurd result would occur were the Court to find that the phrase "Subject to paragraphs (2) and (4)" found at the beginning of § 521(i)(1) required that the Court wait until a [party-in-interest] filed a § 521(i)(2) request before dismissing a case. Were this the intended procedure, courts would have cases languishing on their dockets that were "effectively dismissed" on the [forty-sixth] day. But trustees might continue to administer the case because everyone is awaiting a § 521(i)(2) request. Such an absurd result could not have been what Congress intended.<sup>365</sup>

In addition to the aforementioned problems, the fact that a case can be dismissed automatically raises due process concerns.<sup>366</sup> If a case is truly automatically dismissed because of § 521(i)(1), then it was done so without a court order. That means that there was no judicial determination that the debtor has, in fact, failed to file those documents.<sup>367</sup> An issue arises in this case

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<sup>362</sup> See 11 U.S.C. § 521(i) (2006).

<sup>363</sup> *In re Lopez*, No. 09-31511-C, 2009 Bankr. LEXIS 3029, at \*7 (Bankr. W.D. Tex. Sep. 17, 2009).

<sup>364</sup> See H.R. REP. NO. 109-31, at 2 (2005), reprinted in 2005 U.S.C.C.A.N. 88, 89.

<sup>365</sup> *In re Fawson*, 338 B.R. 505, 511 (Bankr. D. Utah 2006).

<sup>366</sup> LUNDIN & BROWN, *supra* note 80, § 388.1[8].

<sup>367</sup> *Id.*; see also Lundin, *supra* note 67, at 15.

because there is no way for a trustee, or even a debtor, to move for a reconsideration of the automatic dismissal. How would any party-in-interest know that the case had been dismissed? This raises due process concerns.<sup>368</sup> However, courts have been reluctant to deal with this issue and have either failed to dismiss the case or not addressed the due process issue.<sup>369</sup>

Section 521(e)(2)(B) provides that “the court shall dismiss the case unless the debtor demonstrates that the failure to [provide required tax returns] is due to circumstances beyond the control of the debtor.”<sup>370</sup> It is unclear why Congress chose a qualified dismissal in the context of tax returns rather than an automatic dismissal as described by § 521(i). Perhaps the difference between payment advices and tax returns is significant enough that each deserve a different treatment in dismissal.<sup>371</sup> Either way, such due process concerns affect every debtor who is going through bankruptcy. A strict and rigid application of § 521(i) requirements leads to unfavorable outcomes and potential constitutional concerns for honest debtors while allowing dishonest debtors to manipulate the system. Ideally, changing the statutory text to require a judicial order to dismiss a case would address due process concerns, but allowing some judicial discretion also helps to promote the values of BAPCPA and bankruptcy law in general.

## CONCLUSION

Many courts rely on legislative history when examining the meaning of the statute. However, at least one court found, and commentators agree, that legislative history is not available for certain parts of the Code.<sup>372</sup> Barely any Senate or conference reports exist on BAPCPA which courts could use to identify congressional intent.<sup>373</sup> Also, the House Report is not instructive

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<sup>368</sup> See *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*7.

<sup>369</sup> See *Miller v. Cameron (In re Miller)*, 383 B.R. 767, 772 (B.A.P. 10th Cir. 2008); *In re Lopez*, 2009 Bankr. LEXIS 3029, at \*6.

<sup>370</sup> 11 U.S.C. § 521(e)(2)(B) (2006).

<sup>371</sup> Maybe the two provisions were written by different groups; a tax group wrote the tax provision and a creditor group wrote the pay stub provision. Due to a lack of legislative history, it is hard to tell. See *In re Nance*, 371 B.R. 358, 366 (Bankr. S.D. Ill. 2007); Thomas F. Waldron & Neil M. Berman, *Principled Principles of Statutory Interpretation: A Judicial Perspective After Two Years of BAPCPA*, 81 AM. BANKR. L.J. 195, 217 (2007).

<sup>372</sup> See *In re Nance*, 371 B.R. at 366 (“The legislative history regarding the proper calculation of projected disposable income is virtually non-existent.”).

<sup>373</sup> *Id.*; Waldron & Berman, *supra* note 370, at 217 (“[T]here is no joint conference committee report, . . . no Senate Judiciary Committee Report, . . . no floor statements from the floor managers that might be

regarding Congress's intent and merely tracks the language of BAPCPA.<sup>374</sup> Since BAPCPA's legislative history is thin, the intent of the legislation is often unclear.<sup>375</sup>

Thus, it is no surprise that many courts choose to rely on a textual approach to interpret § 521(i).<sup>376</sup> Such an interpretation establishes an absolute right to dismissal which invites potential abuse of the bankruptcy system.<sup>377</sup> Curiously, a textualist interpretation also creates hardships for honest, but perhaps unfortunate debtors, who forget to file one piece of documentation.<sup>378</sup> The main purpose of the Code is to provide a procedure by which honest consumers are entitled to a bankruptcy discharge and a fresh start.<sup>379</sup> Through bankruptcy, these honest debtors can "reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life.'"<sup>380</sup> However, a technical application of the Code does not limit such opportunity to the "honest but unfortunate debtor."<sup>381</sup> Instead, it opens up a safety hatch for a dishonest debtor who seeks to use the Code to his own unfair advantage.

In enacting BAPCPA, Congress stated that "[t]he purpose of the bill is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors."<sup>382</sup> Thus, in support of creditor interests, BAPCPA was meant to "respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system."<sup>383</sup> Indeed, Congress passed BAPCPA in response to the growing number of filings in cases of abuse of bankruptcy

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considered akin to a conference committee report or even consistent Senate and House committee reports to consult.").

<sup>374</sup> *In re Nance*, 371 B.R. at 366; Waldron & Berman, *supra* note 370, at 217 ("[T]he House Judiciary Committee Report is often a mere repetition of the text of BAPCPA.").

<sup>375</sup> See Braucher, *supra* note 42, at 97.

<sup>376</sup> See, e.g., *In re Richardson*, No. 07-42881, 2008 Bankr. LEXIS 229, at \*6 (Bankr. E.D. Tex. Jan. 30, 2008); *In re Hall*, 368 B.R. 595, 602 (Bankr. W.D. Tex. 2007).

<sup>377</sup> See, e.g., *In re Richardson*, 2008 Bankr. LEXIS 229, at \*6.

<sup>378</sup> *In re Catania*, 397 B.R. 667, 670 (Bankr. W.D.N.Y. 2008); *In re Scalise*, No. 08-61739, 2008 Bankr. LEXIS 2983, at \*5 (Bankr. N.D.N.Y. Oct. 30, 2008); see also Sabella, *supra* note 94, at 333.

<sup>379</sup> See *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) ("The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" (citing *Grogan v. Garner*, 498 U.S. 279, 286, 287 (1991))).

<sup>380</sup> *Grogan*, 498 U.S. at 286 (quoting *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934)).

<sup>381</sup> *Marrama*, 549 U.S. at 367.

<sup>382</sup> See H.R. REP. NO. 109-31, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89.

<sup>383</sup> See *id.*

procedures by dishonest debtors.<sup>384</sup> Section 521 was meant to directly address these issues.<sup>385</sup>

In theory, an automatic dismissal by § 521(i) would decrease the number of cases that the courts must hear if the debtor was not fully prepared to file his bankruptcy case. This would prepare the bankruptcy courts only for those debtors who truly are ready to seek a fresh start. It would also force debtors and their attorneys to be more meticulous about their filings.<sup>386</sup> Everything was meant to be mechanical in nature, thus minimizing a court's interference and overall discretionary authority. However, limiting the bankruptcy courts' discretionary authority in § 521(a)(1) encourages bankruptcy abuse. An abusive and manipulative debtor can easily have his case automatically dismissed by declining to comply with the § 521(a)(1) filing requirement.<sup>387</sup> In contrast, allowing bankruptcy courts the discretion to waive the § 521(a)(1) filing requirement even after the filing deadline has passed discourages abusive bankruptcy filings.<sup>388</sup> Using its discretionary authority, the court may decline to dismiss the debtor's case if it determines that the debtor is abusing and manipulating the bankruptcy system.<sup>389</sup> Thus, because § 521(i) lacks a single plain meaning, the use of judicial discretionary authority in interpreting § 521(i) reduces manipulation of the bankruptcy process and furthers the goals of BAPCPA.

Hopefully, the circuit court decisions in *Acosta-Rivera* and *Warren* will provide an appropriate template for other bankruptcy courts to use. Although this method is not perfect, the use of judicial discretionary authority to "order otherwise" is the best method currently available for dealing with the unclear and contradicting language of § 521(i). The best solution would be for Congress to rewrite that particular Code section to require an automatic hearing for dismissal, rather than allowing for a sua sponte dismissal.

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<sup>384</sup> See *id.*

<sup>385</sup> See *id.*

<sup>386</sup> See 4 COLLIER ON BANKRUPTCY, *supra* note 60, ¶ 521.03.

<sup>387</sup> *Wirum v. Warren (In re Warren)*, 568 F.3d 1113, 1118 (9th Cir. 2009).

<sup>388</sup> See, e.g., *id.*; *Segarra-Miranda v. Acosta-Rivera (In re Acosta-Rivera)*, 557 F.3d 8, 14 (1st Cir. 2009).

<sup>389</sup> See, e.g., *In re Warren*, 568 F.3d at 1118; *In re Acosta-Rivera*, 557 F.3d at 14.

Rewriting the section would eliminate due process issues and allow courts to deal with unique and unforeseen circumstances on a case-by-case basis.

MANTAS VALIUNAS\*

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