By Elizabeth L. Gunn[1]

Following the Leader

Section 109(g)(2) Requires Only a Sequential Analysis for Purposes of Eligibility After a Voluntarily Dismissed Case

Section 109(g)(2) of the Bankruptcy Code was originally added by the 1984 amendments and, notably, was not modified in any substantive way by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) (which only modified subsections (f)(2) to (g)(2)). The language of subsection (g)(2) is entirely straightforward, prohibiting a debtor from being a debtor under title 11 if at any time in the preceding 180 days that debtor "requested and obtained the voluntary dismissal of the [previous] case following the filing of a request for relief from the automatic stay."[2]

Breaking the text down, each of the elements is required for the prohibition, and each requires only an objective analysis of the facts and circumstances in the proposed debtor's prior case to determine whether the element has been satisfied. There are objective questions. Did the proposed debtor request a voluntary dismissal in its prior case? Was the proposed debtor's prior case dismissed on their request for voluntary dismissal? Was a motion for relief from the automatic stay filed in the previous case? Did the request and dismissal follow the filing of the motion for relief? Applying an objective analysis of the dates of each element, if the answers to each of these questions is "yes," then the proposed debtor is subject to § 109(g)(2)'s 180-day bar from the eligibility to file a case under title 11.

Despite the presumptively straightforward language, courts have questioned the application of this simple formula due to the term "following." Since the passage of the 1984 amendments, and particularly since BAPCPA's passage and its additional limitations on debtors, a split of authority as to the definition of "following" has developed, with two primary schools of thought: a sequential analysis utilizing the definition of "after," or a more subjective, causal analysis utilizing the definition of "as a result of."

Admittedly, the sequential analysis can result in harsh results for debtors under some circumstances. However, this does not mean that words or additional subjective factors should be read into the Code. Applying a sequential application is consistent with both statutory interpretation as well as congressional intent.

The sequential position is further supported by the fact that voluntary dismissal is an absolute right of debtors in most cases, limited only where the debtor has previously converted the case. The debtor maintains total control over whether to voluntarily dismiss a case, and the potential bar to refiling must be taken into account when such dismissal is considered in a case where a motion for relief has been filed. In other words, a debtor can control whether he/she should be exposed to the potential bar found in § 109(g)(2); a substantive analysis of the underlying factual reasons why dismissal was sought is not, and should not be, required or necessary to determine whether § 109(g)(2) is applicable.

Congressional Intent Supports the Sequential Interpretation

The congressional record for § 109(g)(2) (formerly (f)(2)) provides insight into the purpose for inclusion of the section: It was one of the earliest proposed amendments to the Bankruptcy Code to help "control abusive multiple filings."[3] The congressional history further states that it is intended to "prohibit any party" from filing a petition who meets the requirements.[4]

Notably, there is no reference of an attempt to balance the rights of debtors or creditors — simply an intent to prohibit any debtor falling within the scope of its requirement from refiling for a period of 180 days. By prohibiting "any" debtor from refiling, Congress presumably chose the predictability and clarity for both creditors and debtors of a bright-line temporal rule over a subjective inquiry into causation. Further, despite an existing split in court analysis of the term "following" in § 109(g) at the time, in 2005 BAPCPA did not modify the text in any substantive way, even while adding numerous additional sections to the Code that required courts to utilize their discretion and/or address causation of a prior action. Such a provision was added to § 109, which provided courts with the ability to temporarily waive the eligibility requirement of a credit-counseling certificate under § 109(h).[5]

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1 The opinions expressed herein are provided as a result of the author's own experiences and not as a representative of the Attorney General or the Division of Child Support Enforcement, and some may have been adopted for the purposes of the debate in this Consumer Point/Counterpoint column.

2 11 U.S.C. § 109(g)(2).

3 S. Rep. 65, 98th Cong., 1st Sess. 74 (1983).

4 *Id.*

5 The court may waive the credit counseling certification in "exigent circumstances" that are "satisfactory to the court." *See* § 109(h)(3)(A).

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The result of application of the sequential analysis of § 109(g)(2) to apply to both the (presumably abusive) serial filer and the honest-but-unfortunate debtor does not — and should not — circumscribe the text's clear and straightforward nature. As one court noted, the sequential analysis to § 109(g)(2) is inclusive to all debtors, "rendering ineligible both debtors who intentionally and unintentionally frustrated their creditors' rights."[6] While in certain circumstances the sequential application of § 109(g)(2) might seem harsh, Congress chose to utilize overbroad methods in order to implement its intent and policies.

The Debtor Controls Whether § 109(g)(2) Is Applicable

In voluntary bankruptcy cases, the debtor controls the date, timing and chapter under which they file. Creditors are involuntary participants in the process and must "dance the dance" chosen by the debtor. In chapter 11, 12 and 13 cases, at least initially, the debtor controls the ability to propose a plan and the treatment that creditors will receive under such a plan. The motion for relief from the stay is one of the few affirmative steps that a creditor might choose to take (after paying the requisite fee for that right) to assert its dissatisfaction with how it is being treated during the pendency of a case.

Section 109(g)(2) does not apply to a situation where a debtor files to voluntarily dismiss a case and a subsequent motion for relief is filed. The prohibition is only applicable to those situations where a relief motion has been filed prior to the motion to dismiss. At that point, the debtor should have all the information necessary to make an informed decision as to whether to remain in the case and attempt to resolve issues (or possibly to see if the case can be dismissed another way; the limitation is only applicable to voluntary dismissals) or to voluntarily dismiss a case but face a 180-day period during which creditors may exercise their state court remedies. By subsequently arguing that such a prohibition is harsh or in some way an unintended unfairness, a debtor ignores the underlying fact that throughout the entire process they have controlled their access and use of the bankruptcy process, and had complete control over when and whether to file a voluntary motion to dismiss.

A creditor should be able to rely on the sequence of events in a prior bankruptcy case to provide a straightforward analysis of what, in light of a voluntary dismissal, the impact of a subsequent refiling of a bankruptcy case might have on their rights. The sequential interpretation of § 109(g)(2) allows such an analysis without the need for a creditor to hypothesize or guess as to the debtor's subjective intent in dismissing a previous case where a motion for relief was filed. This is particularly true for a creditor who was not subject to the prior case, and therefore not privy to many or any of the facts necessary to conduct such a subjective guess. To impute a causation requirement into the Code removes any element of predictability and subjects creditors to added expense and risk.

To utilize a causal analysis would inject a subjective and complex factual text into the Bankruptcy Code without textual or congressional support for such a reading. A debtor should be responsible for completing its legal due diligence and analysis prior to seeking to dismiss a case, and should be held to the consequences thereof. Section 109(g)(2) should not be read to allow for a "do-over" or *de facto* reconsideration of such decision when such dismissal comes with unanticipated or unintended consequences.

A court will not grant a debtor's motion to dismiss because a motion for relief is pending; the motion will be considered and granted on its own merit only after a debtor makes the determination to and voluntarily files such a motion. Just as a debtor must take on the benefits and burdens of filing a case under title 11, in a case where a motion for relief is filed the debtor must also face the benefits and burdens of voluntarily dismissing the same case.

The language of § 109(g)(2) is clear: Any petition filed by a debtor within 180 days of the voluntary dismissal of a case in which a motion for relief was filed should not be accepted by the court or should be dismissed, as the debtor fails the eligibility requirements of § 109. This eligibility requirement should be treated with an objective analysis similar to the rest of the eligibility requirements found in § 109. abi

6 *In re Gibas*, 543 B.R. 570, 593 (E.D. Wis. 2016); *see also In re Guerrero*, 540 B.R. 270 (Bankr. S.D. Tex. 2015).