

No Second Chances: How Courts Have Interpreted Section 109(g)(2) to Prohibit Debtors from Filing a Second Petition within 180 Days

Brian Adelman, J.D. Candidate 2015

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Introduction

In 1984, Congress enacted section 109(g)(2) of the Bankruptcy Code for the purpose of curbing the abuse of repetitive bankruptcy filings by debtors.¹ Section 109(g)(2) provides that an individual may not be a debtor if the debtor requested and obtained a voluntary dismissal of a previous bankruptcy case at any time in the preceding 180 days.² The typical scenario that section 109(g)(2) is intended to prevent is a debtor from voluntarily dismissing his bankruptcy case and subsequent refiling of a new case in order to prevent a creditor from acquiring relief from the automatic stay.³ The statute gives secured creditors a 180-day window to pursue state law remedies free from the automatic stay.⁴ Courts have struggled with the question of whether to apply section 109(g)(2) to factual situations that are within the provision's literal language but

¹ *Grossman v. Beal (In re Beal)*, 347 B.R. 87, 90 (E.D. Wis. 2006) (citing 130 Conf., Rec. 20, 088 (1984)).

² See 11 U.S.C. § 109(g)(2) (2006).

³ *In re Holder*, 151 B.R. 725, 727 (Bankr. D. Md. 1993).

⁴ *In re Beal*, 347 B.R. at 90; see also William L. Norton Jr. & William L. Norton III, *Norton Bankruptcy Law & Practice 2d* § 115.7 (2006) (stating that § 109(g)(2) was enacted to “defeat the practice observed in some jurisdictions of multiple refilings in an effort to overcome the grant of relief from the stay in a prior case”).

are not the type of situation that Congress intended to cover when it enacted section 109(g)(2).⁵ Although the language of section 109(g)(2) appears to be straightforward, courts are divided on its proper application.⁶

Courts have adopted three approaches for applying section 109(g)(2): (1) the mandatory approach, (2) the discretionary approach, and (3) the casual connection approach.⁷

Consequently, there is uncertainty for debtors, creditors, and trustees on how this provision is applied.⁸

This Article will discuss the different approaches courts have taken when applying section 109(g)(2). Part I will discuss the mandatory approach. Part II will discuss the discretionary approach. Part III will discuss the causal connection approach. Part IV will analyze the different approaches to interpreting section 109(g)(2).

I. The Mandatory Approach

Most courts that have considered the issue have applied the mandatory approach.⁹ Under the mandatory approach, courts hold that the meaning of section 109(g)(2) is plain and unambiguous, dictating a broad rule requiring that the court dismiss the second case.¹⁰ The

⁵ *In re Beal*, 347 B.R. at 91.

⁶ *In re Durham*, 461 B.R. 139, 141 (Bankr. D. Mass. 2011).

⁷ *In re Durham*, 461 B.R. at 141.

⁸ Ned W. Waxman, *Judicial Follies: Ignoring the Plain Meaning of Bankruptcy Code § 109(g)(2)*, 48 ARIZ. L. REV. 149, 150 (2006).

⁹ Ned W. Waxman, *Resolving the Split of Authority Concerning Code Section 109(g)(2)*, 10 Norton Bankruptcy Law Adviser 2 (2005); *Bigalk v. Federal Land Bank of St. Paul (In re Bigalk)*, 813 F.2d 189 (8th Cir. 1987); *Andersson v. Sec. Fed. Sav. Loan of Cleveland (In re Andersson)*, 209 B.R. 76, 77–79 (6th Cir. B.A.P. 1997); *In re Richardson*, 217 B.R. 479, 493 (Bankr. M.D. La. 1998).

¹⁰ *In re Sole*, 233 B.R. 347 (Bankr. E.D. Va. 1998) (citing *In re Andersson* 209 B.R. at 78; *In re Keziah*, 46 B.R. 551, 555 (Bankr. W.D.N.C. 1985)).

courts applying the mandatory approach opine that courts “must presume that a legislature says in a statute what it means and means in a statute what it says is there.”¹¹

Accordingly, these courts interpret section 109(g)(2) as an eligibility requirement mandating dismissal regardless of a debtor’s motives for filing a second case within the 180 days.¹² They assert that the word “following” has a temporal meaning within the statute requiring dismissal of any cases refiled within 180 days.¹³

For example, in *In re Andersson*,¹⁴ the debtors obtained a voluntary dismissal of their first chapter 13 case after a secured creditor had requested relief from the automatic stay.¹⁵ They filed a second chapter 13 case within 180 days of the dismissal of the first, to prevent the secured creditor from foreclosing on their house.¹⁶ Subsequently, the court dismissed the second case.¹⁷ The court held that section 109(g)(2) is mandatory “regardless of the debtor’s good faith or whether there was any connection between the debtor’s voluntary dismissal and the creditor’s request.”¹⁸ The court noted that the “plain meaning of legislation should be conclusive, except in the ‘rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’”¹⁹ Applying that principle when interpreting section

¹¹ *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

¹² See e.g., *In re Andersson*, 209 B.R. at 78; see also *Kuo v. Walton*, 167 B.R. 677, 679 (M.D. Fla. 1994); *In re Stuart*, 297 B.R. 665, 668 (Bankr. S.D. Ga. 2003) (stating Congress intended to make debtors who dismiss and refile ineligible, regardless of their subjective state of mind or intent).

¹³ *In re Richter*, No. 10-01260, 2010 WL 4272915 (Bankr. N.D. Iowa Oct. 22, 2010) (citing *In re Munkwitz*, 235 B.R. 766, 768 (Bankr. E.D. Penn. 1999)).

¹⁴ *In re Andersson*, 209 B.R. at 209.

¹⁵ 209 B.R. at 77 (“The bankruptcy court noted that [the secured creditor]’s motion was resolved by the parties prior to the scheduled hearing, although no agreed entry to that effect was ever submitted.”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 78–79.

¹⁹ *Id.* at 78 (quoting *U.S. v. Ron Pair Enters.*, 498 U.S. 235, 242 (1989)).

109(g)(2), the *Andersson* court stated that the “literal application of the statute comports with the drafter’s express intention to prevent repeated invocation of the automatic stay.”²⁰ Therefore, the court concluded that such an interpretation gives debtors a clear direction as to their eligibility.²¹

Similarly, in *In re Richardson*, the debtor dismissed his first bankruptcy case following a motion for relief from an automatic stay.²² The debtor tried to refile ten days later, and the court granted the creditor’s motion to dismiss the second case.²³ In interpreting section 109(g)(2), the court determined that the ordinary, common meaning of “following” is “after.”²⁴ Accordingly, the court held that the statute mandated dismissal of all cases which are filed within 180 days after the voluntary dismissal of a prior case if the voluntary dismissal was moved for and obtained after the filing of a motion for relief from stay.²⁵

Some of the courts adopting the mandatory approach have acknowledged that this approach creates a “blanket rule” that may be harsh, especially in cases where no abuse exists.²⁶ However, those courts conclude that such a blanket rule is sensible because the harm caused to the debtors, if any, was brought upon by the debtors themselves through their own decisions to voluntarily dismiss their first case.²⁷ Thus, the debtor is the one who decides whether the benefit of dismissal outweighs the detriment of the 180-day bar.²⁸

II. The Discretionary Approach

²⁰ *In re Andersson*, 209 B.R. at 78.

²¹ *Id.*

²² 217 B.R. at 481.

²³ *Id.*

²⁴ *Id.* at 487.

²⁵ *Id.*

²⁶ *In re Munkwitz*, 235 B.R. at 768-69 (citing *Idahoan Fresh v. Advantage Produce Inc.*, 157 F.3d 197, 202 (3d Cir.1998)).

²⁷ *Id.*

²⁸ *In re Andersson*, 209 B.R. at 79.



Courts adopting the discretionary approach construe section 109(g)(2) as leaving the courts with the discretion not to dismiss the debtor's second case if the creditor is not unfairly prejudiced, a dismissal would be illogical, or when the creditor acts in bad faith.²⁹ Under this discretionary approach, section 109(g)(2) does not mandate that the court dismiss the second bankruptcy case if the result would be absurd, inequitable, or unfair when the literal language of the statute operates more inclusively than Congress intended.³⁰

The courts adopting the discretionary approach are concerned with rewarding creditors acting in bad faith while punishing debtors who are acting in good faith. While also not effectuating Congress's intent to curb abuse by debtors.³¹ These cases rely on equitable discretion as the basis for creating an exception to the otherwise strict application of the language of section 109(g)(2).³²

For example, in *In re Hutchins*, the debtor filed a chapter 13 case and subsequently defaulted on her mortgage payments.³³ After the parties had resolved two motions for relief from automatic stay that were filed by a mortgagee, the court entered an order providing for automatic relief from automatic stay if the debtor defaulted, which the debtor subsequently did.³⁴ After the default, the debtor voluntarily dismissed her case and refiled in order to prevent

²⁹ *In re Richter*, No. 10-01260, 2010 WL 4272915, at *3.

³⁰ *In re Richardson*, 217 B.R. at 482; *see also* Home Sav. Of Am. F.A. v. Luna (*In re Luna*), 122 B.R. 575, 577 (B.A.P. 9th Cir. 1991); *In re Santana*, 110 B.R. 819, 822 (Bankr. W.D. Mich. 1990).

³¹ *In re Richardson*, 217 B.R. at 482; *see also In re Luna*, 122 B.R. at 577 (holding mechanical application of section 109(g)(2) would reward creditors for acting in bad faith and punish debtors for acting in good faith).

³² *In re Richter*, No. 10-01260, 2010 WL 4272915, at *3.

³³ 303 B.R. 503, 505 (Bankr. N.D. Ala. 2003).

³⁴ *Id.*

foreclosure.³⁵ In response, the mortgagee moved to dismiss the second case pursuant to section 109(g)(2).³⁶ Applying the discretionary approach, the court denied the mortgagee’s motion.³⁷

The court stated that the debtor was not attempting to avoid paying her obligations through refileing, but instead had simply run into unforeseen financial difficulties.³⁸ The debtor was current on the mortgage and trustee payments.³⁹ The debtor had “substantial equity in her home” and was working at the time.⁴⁰ She also had filed a plan proposed to pay all claims in her cases in full.⁴¹ As such, the court refused to apply strictly section 109 because it determined that such an application would lead to an absurd result.⁴² In particular, the court was concerned with several scenarios where a mandatory dismissal would run contrary to Congress’ intention.⁴³ For example, if a debtor moved for the voluntary dismissal of her case one to two years after secured creditor moved for relief from stay would still invoke section 109(g)(2).⁴⁴ In such a situation, the debtor may have faced unforeseen circumstances and may honestly need to dismiss the first case and file again, rather than trying to avoid the relief from stay.⁴⁵ The court noted that Congress did not intend section 109(g)(2) to prevent all repetitive filings, just abusive filings.⁴⁶

Likewise, *In re Howard* provides another example of a court applying section 109(g)(2) in a way that provides an honest debtor with a fresh start provided by bankruptcy.⁴⁷ In *In re*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *In re Hutchins*, 303 B.R. at 509.

³⁹ *Id.* at 506.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *In re Hutchins*, 303 B.R. at 509.

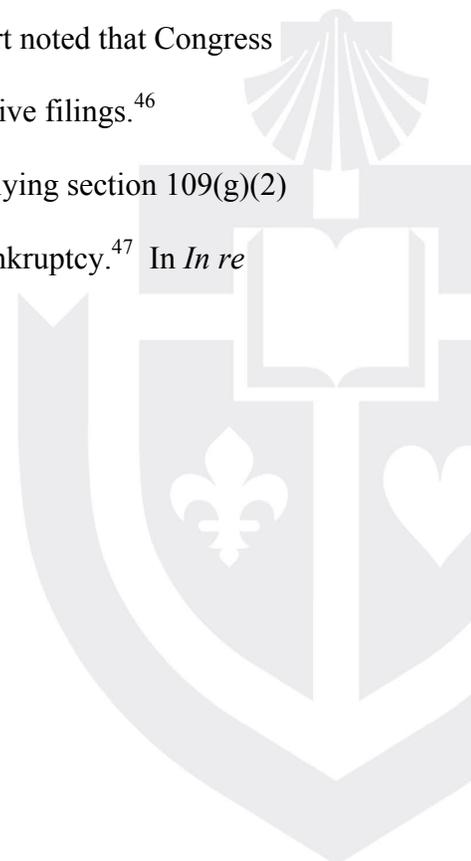
⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 510.

⁴⁷ Waxman, *supra* note 8, at 156.



Howard, the debtors moved to voluntarily dismiss their chapter 13 case after a secured creditor moved for relief from automatic stay, which was resolved by the parties.⁴⁸ In motion, the debtors indicated that they intended to refile immediately after under chapter 7 for the purpose of discharging medical expenses incurred during the first case.⁴⁹ The chapter 13 trustee objected, not to the dismissal, but to the extent that the debtors would be allowed to refile notwithstanding section 109(g)(2).⁵⁰

In deciding the debtors' motion, the *Howard* court found that the mortgagee would not be prejudiced by the second case.⁵¹ Accordingly, the court reasoned that applying section 109(g)(2) would lead to "absurd results that could not have been intended by Congress."⁵² The court concluded that it would be reasonable and sensible for the statute to apply on a case by case basis.⁵³ Therefore, the court held that "immediately upon presentation of evidence of the [d]ebtors' voluntary surrender of their interest in their residence to the mortgagee, an order [would] be entered granting the Debtors' motion to dismiss, without the bar to re-filing of [section] 109(g)(2)."⁵⁴

III. The Causal Connection Approach

Courts adopting the causal connection approach interpret section 109(g)(2) as requiring some relationship between a debtor's request for a voluntary dismissal of the previous case and the creditor's request for relief from the automatic stay in that case.⁵⁵ This approach stakes out a

⁴⁸ 311 B.R. 230, 231 (Bankr. E.D. Wis. 2004).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 232.

⁵² *Id.*

⁵³ *In re Howard*, 311 B.R. at 232.

⁵⁴ *Id.*

⁵⁵ *See In re Copman*, 161 B.R. 821, 824 (Bankr. E.D. Mo. 1993); *see also In re Sole*, 233 B.R. 347, 350 (Bankr. E.D. Va. 1998); *In re Duncan*, 182 B.R. 156, 159 (Bankr. W.D. Va. 1995).

middle ground between the other two approaches.⁵⁶ The courts applying the causal connection approach reason that section 109(g)(2) was enacted for the “sole purpose of curbing abusive repetitive bankruptcy filings by debtors seeking to overcome the grant of relief to a creditor from a stay in a prior case” and that the statutory language is a direct response to that concern.⁵⁷ This rationale is not invoked if the debtor dismissed the first case for a reason that is completely unrelated to the creditor’s motion for relief from the automatic stay.⁵⁸ Therefore, under the causal connection approach, a court will not dismiss the debtor’s second case in such a situation.

For example, in *In re Duncan*, the court did not dismiss a debtor’s second case when the dismissal of the first case was entirely unrelated to the creditor’s motion for relief from automatic stay.⁵⁹ In *In re Duncan*, after the court granted the creditor’s motion for relief from the automatic stay, the debtor dismissed her case in order to get credit for a new car and refiled seventy-seven days later.⁶⁰ The creditor then moved to dismiss the second case, arguing that the debtor was ineligible to be a debtor under section 109(g)(2).⁶¹ In denying the creditor’s motion, the court found the debtor dismissed her case for “reasons entirely independent of the [creditor’s] motion for relief from [the automatic] stay.”⁶²

The *Duncan* court reasoned that if the debtor intended to abuse the system it would have been much easier for her to have dismissed her case and waited for the creditor’s foreclosure notice before refileing.⁶³ In addition, the court opined that the plain language of section 109(g)(2) supported the application of the causal connection approach. In particular, the court focused on

⁵⁶ *In re Durham*, 461 B.R. at 142.

⁵⁷ *In re Beal*, 347 B.R. at 92 (citing S.Rep. No. 65, 98th Cong. 1st Sess. 74 (1983)).

⁵⁸ 2 Collier on Bankruptcy 109.08 at 109-53 (15th ed. rev. 2004).

⁵⁹ *In re Duncan*, 182 B.R. at 160.

⁶⁰ *Id.* at 157, 160.

⁶¹ *Id.* at 157.

⁶² *Id.* at 160.

⁶³ *Id.*

the word “following” in section 109(g)(2).⁶⁴ The court interpreted the word “following” to mean “to be the result of,” based on the Webster’s Dictionary definition.⁶⁵ Therefore, from that definition, the court determine it was clear that the “proper and natural” interpretation of section 109(g)(2) was one that prevents a debtor from refiling only when the debtor voluntarily dismissed a prior bankruptcy case in “response” to a motion for relief from stay.⁶⁶ Under the casual connection approach, this determination can be made by looking at the circumstances surrounding the creditor’s motion and the debtor’s dismissal.⁶⁷ The court concluded that if there is a connection between the dismissal and the motion, then the refiled case will be dismissed⁶⁸; if not, the debtor will be free to refile.⁶⁹ The court opined that this approach was in line with the congressional intent.⁷⁰ Indeed, the court found that section 109(g)(2) evidences an intent of broad inclusion and limited exclusion of persons from the protection afforded by the Bankruptcy Code.⁷¹

IV. Implications of Applying Different Approaches

The issue of whether a debtor is strictly prohibited from filing a second bankruptcy case within 180 days of voluntarily dismissing their first case still remains uncertain.⁷² Bankruptcy courts nationwide have adopted the three different approaches.⁷³ This split leaves debtors,

⁶⁴ *In re Duncan*, 182 B.R. at 159.

⁶⁵ *Id.* (quoting Webster’s II New Riverside Univ. Dictionary 493 (1988)).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

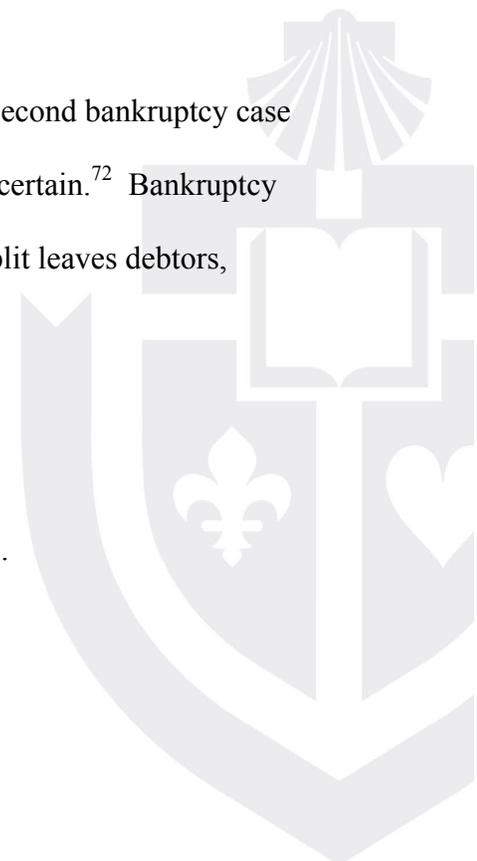
⁶⁹ *In re Duncan*, 182 B.R. at 159.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Waxman, *supra* note 8, at 150.

⁷³ *In re Durham*, 461 B.R. at 141.



creditors, and trustees with little guidance on how this provision will be applied,⁷⁴ since it can vary even within a single federal district.⁷⁵

A debtor must be wary when deciding to voluntarily dismiss her case in jurisdictions that apply the mandatory approach since she will have her second case dismissed, even if the first dismissal was unrelated to a secured creditor's motion for relief from the automatic stay stay. Simply put, courts applying the mandatory approach do not consider the reasons why a debtor dismissed the first case,⁷⁶ and will dismiss the debtor's second case regardless of her subjective state of mind or intent.⁷⁷

In jurisdictions applying the discretionary approach or casual connection approach, however, courts can consider the underlying reasons and facts behind the dismissal.⁷⁸ For example, in a jurisdiction following the discretionary approach, a debtor can take solace that if she suffers from an unforeseen circumstance, like a medical emergency, she may be able to dismiss their first case and file a second case.⁷⁹ Courts have the discretion of not applying section 109(g)(2) to a debtor in that situation, since they not trying to avoid the relief from stay through a refiling.⁸⁰

Similarly, in a jurisdiction applying the casual connection approach, a debtor will be able to dismiss their first case and file a second case if the voluntary dismissal of the first case is unrelated to the creditor's request for relief from stay.⁸¹ As long as a debtor dismisses their case

⁷⁴ Waxman, *supra* note 8, at 150.

⁷⁵ *Id.*; compare *In re Copman*, 161 B.R. at 824 (applying casual connection approach), with *In re Richter*, No. 10-01260, 2010 WL 4272915, at *8 (applying discretionary approach).

⁷⁶ See e.g., *In re Andersson*, 209 B.R. at 78.

⁷⁷ *In re Stuart*, 297 B.R. at 668.

⁷⁸ See *In re Howard*, 311 B.R. at 231–32; see also *In re Sole*, 233 B.R. at 349–50.

⁷⁹ *In re Howard*, 311 B.R. at 231.

⁸⁰ *In re Hutchins*, 303 B.R. at 509.

⁸¹ See *In re Copman*, 161 B.R. at 824.

for reasons completely unrelated to the creditor's motion for relief from stay, the debtor will be able to refile within 180-day period proscribed by section 109(g)(2).⁸²

Importantly, regardless of which approach is applied, court will hold that under section 109(g)(2), a debtor cannot use a second filing as a way to circumvent an order granting a secured creditor's motion for relief from the automatic stay in the debtor's first case.⁸³ For example, in *In re Rivera*, the court denied the filing of a second case where the debtor was clearly trying to overcome the court's granting of relief from stay.⁸⁴ In *In re Rivera*, the court granted the creditor a relief from stay after the failed to file a timely response to the motion.⁸⁵ Subsequently, the debtor voluntarily dismissed his bankruptcy case and, on the same day, filed a new chapter 13 case.⁸⁶ The bankruptcy court granted the creditor's motion to dismiss the second petition pursuant to section 109(g)(2).⁸⁷ The Bankruptcy Appellate Panel of the First Circuit affirmed, holding that it did not need to adopt any particular approach because the case clearly fell with section 109(g)(2) under any of the approaches.⁸⁸ The BAP stated that this case was exactly why Congress enacted section 109(g)(2) in order to prevent abusive repetitive filings by debtors to avoid the relief from stay.⁸⁹ Thus, as *Rivera* demonstrates, a court will most likely dismiss a debtor's second bankruptcy case if the court finds that she dismissed her first bankruptcy case in direct response to a secured creditor's motion for relief from the automatic stay.

Conclusion

⁸² See *In re Durham*, 461 B.R. at 142.

⁸³ *In re Rivera*, 494 B.R. 101, 107 (B.A.P. 1st Cir. 2013).

⁸⁴ *Id.* at 104

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *In re Rivera*, 494 B.R. at 106.

⁸⁹ *Id.* at 105.

When voluntarily dismissing a bankruptcy case, a debtor must be mindful of the court’s interpretation of section 109(g)(2). First, courts applying the mandatory approach consider the language of section 109(g)(2) to be unambiguous, and therefore, those courts hold that the statute requires that the court dismiss the case regardless of the debtor’s motives in refiling.⁹⁰ Second, under the discretionary approach, courts have discretion not to dismiss the case so long as “the creditor is not unfairly prejudiced, a dismissal would be absurd or illogical, or when the creditor acted in bad faith.”⁹¹ Finally, under the casual connection approach, courts interpret section 109(g)(2) as requiring that the court dismiss the second case if there is some relationship between a debtor’s request for a voluntary dismissal and a creditor’s request for relief from the automatic stay.⁹²

No matter which approach is applied, section 109(g)(2) will be interpreted to prevent a debtor from using a second filing as a way to overcoming a motion from relief of stay.⁹³ Finally, secured creditors can take some solace in the fact that courts will interpret 109(g)(2) in such a way that prevents a debtor from repeatedly dismissing his case and refiling in an attempt to continually frustrate the creditor’s legitimate attempts to foreclose on its collateral.⁹⁴

⁹⁰ *Id.* at 106 (citing *In re Andersson*, 209 B.R. at 78).

⁹¹ *Id.* (citing *In re Richter*, No. 10-01260, 2010 WL 4272915 at 3*).

⁹² *Id.* (citing *In re Copman*, 161 B.R. at 824).

⁹³ *In re Rivera*, 494 B.R. at 107.

⁹⁴ *See In re Beal*, 347 B.R. at 90 (stating congress enacted section 109(g)(2) for the purpose of curbing abusive repetitive bankruptcy filings by debtors).