

Tanvir Alam, *Fraudulent Advisors Exploit Confusion in the Bankruptcy Code: How In Pari Delicto Has Been Perverted to Prevent Recovery for Innocent Creditors*, 77 AM. BANKR. L. J. 305 (2003)

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AUTOMATIC DISMISSAL UNDER § 521(i) AFTER BAPCPA: MUCH DANGER AHEAD

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As amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), 11 U.S.C. § 521(i) mandates "automatic" dismissal on the 46th day of any individual Chapter 7 or Chapter 13 case in which the "information" required by § 521(a)(1) has not been filed. Implementation of this bizarre new provision is encouraging bankruptcy judges and bankruptcy court clerks to embrace procedures that are not consistent with the judicial function. You should care because debtors, creditors and trustees are at risk as BAPCPA unfolds after October 17, 2005.

This article is not about what is wrong with new § 521(i). That is a different, longer discussion. More immediate than the many conceptual and technical problems with § 521(i) is the off-Code implementation underway in the bankruptcy courts.

Section 521(a)(1) requires debtors to file a list of creditors and, *unless the court orders otherwise*, to also file: a schedule of assets and liabilities; a schedule of current income and current expenditures; a statement of financial affairs; a § 342(b) certificate; payment advices for the 60 days before the petition; a statement of monthly net income, and a statement of reasonably anticipated increases in income or expenditures over the year following the petition.

Under new § 521(i), if the *information* required by § 521(a)(1) is not filed by the 45th day after the petition, dismissal of the case is "automatic" on the 46th day. By request from the debtor within the 45 days, the bankruptcy court can allow up to 45 addi-

tional days to file the information required by § 521(a)(1). On timely motion of the trustee, the court can "decline to dismiss" if the debtor made a good faith attempt to file the 60 days of payment advices (too weird). Any party in interest can request the bankruptcy court to enter an order of dismissal and the court "shall" enter that order within five days of a request.

There is a lot of potential controversy in new § 521(i). Fundamentally, no one is certain what an "automatic" dismissal is. There is dispute whether "automatic" includes the entry of an order by the bankruptcy court. The possibility that a party in interest will request an order of dismissal under new § 521(i)(2) suggests to some that no order is included in an automatic dismissal; it suggests to others that orders will be routinely entered as part of every automatic dismissal.

The determination of whether the "information" required by § 521(a)(1) is filed in the case requires the exercise of judgment. Information is a soft word that can't be determined using a checklist of documents that can or must be filed in a bankruptcy case. For example, perhaps a debtor only filed 30 days of pay stubs for purposes of § 521(a)(1)(B)(iv): Is the "information" required still "filed" if Schedule I reveals monthly income that is consistent with the 30 days of pay stubs and this information is consistent with the yearly income revealed in the statement of affairs? The predicate for an automatic dismissal under § 521(i)—that information is missing from the file—can and will be a contested issue in consumer bankruptcy cases.

Automatic cannot mean instantaneous and invisible because of other amendments to § 521 by BAPCPA. Courts may "order otherwise" under § 521(a)(1), changing the information that must be filed to satisfy § 521(i). There is no statutory limit on the timing of a request for the bankruptcy court to order otherwise. The statute does not preclude a bankruptcy court from "ordering otherwise" after 45 days after the petition. This is likely to be a litigated issue when a creditor requests an order under § 521(i)(2) memorializing an automatic dismissal and the debtor responds with a request that the bankruptcy court order otherwise with respect to some aspect of the information required by § 521(a)(1).

Debtors can file motions under § 521(i)(3) at or near the end of the 45-day period that would not be acted on by the bankruptcy court until after the

45-day period has ended. Anyone looking only at the docket sheet can't know whether the case is a candidate for automatic dismissal.

Trustees may not know there is missing information until, perhaps, a creditor requests an order of dismissal. A request for an order memorializing the automatic dismissal of a case is unlikely until after 45 days after the petition. Section 521(i)(3) gives the trustee an opportunity to request that the case not be dismissed anytime a creditor requests an order memorializing the dismissal. No one looking just at the docket sheet can know with certainty whether the case was "automatically" dismissed until after the court acts on a trustee's request that the case not be dismissed—a request that could come anytime a creditor asks for an order memorializing the automatic dismissal.

The point of this discussion is obvious: New § 521(i) is not simple or mechanical; it is packed with interlocking procedures, potential motions, timing that can change, and judgments that are not ministerial.

The Administrative Office of the United States Courts has instructed the clerks of bankruptcy courts across the nation to prepare internally for the task of monitoring the papers filed in all individual Chapter 7 and Chapter 13 cases filed on and after October 17, 2005, to identify cases that are "deficient" for purposes of the automatic dismissal in new § 521(i). Someone in the clerk's office—perhaps the "case manager"—will be responsible under the AO's vision to apply a checklist in each case as required documents are filed. If 45 days pass and a box has not been checked, some sort of "notice of deficiency" will be generated by the CM/ECF system flagging the case as ready for dismissal under new § 521(i).

At that point, some courts and clerks' offices intend to generate an "internal" order of dismissal that will be entered on the docket to memorialize the automatic dismissal of the case under § 521(i). Variations on this process include that the notice of deficiency will move internally to a bankruptcy judge who—presumably? hopefully? perhaps?—will review the file and either enter or not enter an order of dismissal. A third variation is that the notice of deficiency will be sent by the ECF system

to the debtor, to the U.S. Trustee, and perhaps to other parties in interest in anticipation that someone will take action in the case.

Under all of these systems, the bankruptcy court clerk is initiating an internal procedure that either results in the entry of an order of dismissal based on an invisible judgment that information required by § 521(a)(1) is missing or the process generates a signal to parties in interest that § 521(i) is in play.

It is reported anecdotally that some bankruptcy courts already monitor the filing stream in consumer cases to notice or "show cause" cases for dismissal if documents are not timely filed. New § 521(i) demands that all bankruptcy courts take a new look at any such procedures. "Automatic" dismissal is a new world—it is a statutory death sentence without benefit of judge or jury that will be carried out invisibly based on judgments by employees of clerks' offices. The newest release of CM/ECF software streaming into clerks' offices everywhere is packed with new flags and whistles to enable the automatic dismissal of bankruptcy cases, untouched by human intervention.

The bankruptcy community should resist any effort to reduce § 521(i) to a ministerial process. It is the essence of the judicial function to determine whether the grounds for dismissal of a case are present. There must be meaningful notice and opportunity for the debtor and other parties in interest to influence the exercise of that judgment.

Procedures can be designed to respect the automatic dismissal of cases without engaging bankruptcy judges and bankruptcy court clerks as investigators and litigators. Some courts are considering local rules that will require notice and opportunity for a hearing before a bankruptcy case is "automatically" dismissed. Other courts are considering local rules that would permit individual debtors to file a certificate raising an evidentiary presumption that all the information required by § 521(a)(1) was filed within 45 days of the petition. These courts are searching for procedures that will flesh out the new concept of automatic dismissal with appropriate regard for the statutory and due process rights of debtors, trustees and other parties in interest.