

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: December 14 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 05-76887
)	
Shane Allen Henderson,)	Chapter 13
Glynis Ingrid Henderson,)	
)	
Debtors.)	JUDGE MARY ANN WHIPPLE

ORDER STRIKING PETITION

This matter is before the court on Debtors’ Reply to the court’s order to show cause why the case should not be dismissed for their failure to file a Certificate of Credit Counseling as required by 11 U.S.C. § 521(b). [Doc. # 6]. In their Reply, Debtors request that the court grant them until December 1, 2005, to complete the consumer credit counseling required under 11 U.S.C. § 109(h), a provision of the Bankruptcy Code effective on October 17, 2005, the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Also before the court is Debtors’ subsequently filed Motion for Extension of Time for an additional thirty days to complete the required consumer credit counseling. [Doc. # 14]. For the reasons that follow, Debtors’ Motion for Extension of Time will be denied and their Chapter 13 petition will be stricken.

BACKGROUND

BAPCPA amended the Bankruptcy Code to include new eligibility requirements for individuals to be a debtor under the Bankruptcy Code. *See* 11 U.S.C. § 109(h). Section 109(h) provides in pertinent part as follows:

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

(2)(A) Paragraph (1) shall not apply with respect to a debtor who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved nonprofit budget and credit counseling agencies for such district are not reasonably able to provide adequate services to the additional individuals who would otherwise seek credit counseling from such agencies by reason of the requirements of paragraph (1).

....

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

- (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);
- (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and
- (iii) is satisfactory to the court.

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

(4) The requirements of paragraph (1) shall not apply with respect to a debtor whom the court determines, after notice and hearing, is unable to complete those requirements because of incapacity, disability, or active military duty in a military combat zone.

Under § 521(b) and Interim Bankruptcy Rule 1007(b)(3) and (c),¹ either a certificate from the approved credit counseling agency attesting to the fact that the debtor has received the required counseling, a certification under § 109(h)(3), or a request for a determination under § 109(h)(4) must be filed with an individual's voluntary petition.

FACTS

Debtors filed their Chapter 13 petition on November 8, 2005, after the effective date of BAPCPA. Thus, the new eligibility requirements of § 109(h) apply in this case. Debtors did not, however, file with their petition a certificate from an approved nonprofit budget and credit counseling agency, nor did they file a certification under § 109(h)(3) or a request for determination under § 109(h)(4). As a result, on November 10, 2005, the court entered an order to show cause why Debtor's petition should not be dismissed.

Debtors responded in their Reply to Order to Show Cause ("Reply"), signed only by their attorney, by requesting until December 1, 2005, to complete the required consumer credit counseling. The Reply indicates that Debtors filed for relief under Chapter 13 in order to avoid a sheriff's sale of their home scheduled to take place on November 10, 2005. Debtors had continued to attempt to negotiate with their secured creditor until on or about November 8, 2005, when, being unable to reach an accommodation, they realized that filing for relief under Chapter 13 was their only option to avoid the sheriff's sale and they contacted their attorney for assistance in doing so. The Reply further indicates that Debtors were unaware at that time of the requirement of consumer credit counseling.

Thereafter, before the court had again addressed Debtors' Reply, they filed a motion requesting an additional thirty day extension of time to complete the required consumer credit counseling. The motion indicates that Debtors had planned to complete the credit counseling after Thanksgiving but had not yet done so due to the fact that their teenage son was tragically killed in a traffic accident on Thanksgiving Day.

LAW AND ANALYSIS

A. Compliance under 11 U.S.C. § 109(h)

¹ The United States District Court for the Northern District of Ohio has promulgated [Amended] General Order 2005-11, adopting in their entirety the Interim Bankruptcy Rules, [including amendments], implementing BAPCPA. The Interim Rules apply to bankruptcy cases from October 17, 2005, until final rules are promulgated and effective under the regular Rules Enabling Act process.

Courts that have interpreted the provisions of § 109(h) have unanimously found the “essential import” of this section to be clear. See *In re Cleaver*, Case No. 05-46572, 2005 WL 3099686, *2 (Bankr. S.D. Ohio Nov. 17, 2005); *In re Laporta*, Case No. 05-90784, 2005 WL 3078507, *4 (Bankr.D. Minn. Oct. 27, 2005); *In re Hubbard*, 332 B.R. 285, 288 (Bankr. S.D. Tex. 2005); *In re Watson*, 332 B.R. 740, 745 (Bankr. E.D. Va. 2005); *In re Warden*, Case. No. 05-23750, 2005 WL 3207630 (Bankr. W.D. Mo. Nov. 22, 2005). Under §109(h), Congress has mandated that all individuals obtain counseling from an approved credit counseling agency within 180 days before filing their bankruptcy petition, subject to two exceptions and one exemption.

Debtors do not allege any facts indicating that they suffer from an incapacity or disability or are on active duty in a combat zone such as to invoke the exemption provided in § 109(h)(4), nor any facts indicating that a determination that approved credit counseling agencies were not reasonably available such as to invoke the exception under § 109(h)(2). Although not specifically cited by Debtors, § 109(h)(3) provides for a temporary exception from the prepetition credit counseling requirement if all of the following conditions are satisfied:

- a. The debtor submits a certification to the Court regarding the exception; and
- b. The certification describes exigent circumstances that merit a waiver of the credit counseling requirement; and
- c. The certification states that the debtor requested credit counseling services from an approved agency, but was unable to obtain the services during the five-day period beginning on the date on which the debtor made the request; and
- d. The certification is satisfactory to the Court.

Hubbard, 332 B.R. at 288; *Cleaver*, 2005 WL 3099686 at *4; *Laporta*, 2005 WL 3078507 at *2. In addition, even if all of the above conditions are satisfied, under § 109(h)(3)(B), forty-five days is the maximum amount of time that a debtor may be permitted to obtain the required credit counseling postpetition.

In *Cleaver*, the court addressed whether an impending sheriff’s sale of the debtor’s home constituted exigent circumstance under § 109(h)(3). The court noted that it could be argued that such an exigency is self-created since foreclosures in Ohio typically involve a judicial process that lasts several months before a sheriff’s sale actually takes place. Nevertheless, the court explained that “it is difficult to conceive of any exigent circumstances related to bankruptcy that would not involve impending creditor actions. Absent some sort of immediate collection activity, there is no urgency affecting the timing of a bankruptcy filing.” *Cleaver*, 2005 WL 3099686 at *4. Thus, the court found that “the immediacy of the foreclosure sale . . . appears to be exactly the sort of exigent circumstance

contemplated by the statute.” *Id.*; *see also In re Hubbard*, Case No. 05-95017, 2005 WL 3117215, * 4 (Bankr. S.D. Tex. Nov. 16, 2005) (finding exigent circumstances where a debtor faces the imminent loss of the family home or of her sole means of transportation); *In re Wallert*, Case No. 05-90789, 2005 WL 3099679, * 2 (Bankr. D. Minn. Nov. 17, 2005) (impending sheriff’s sale of debtor’s home constitutes exigent circumstance). This court agrees and finds that, to the extent Debtors faced the impending loss of their home through a foreclosure sale, exigent circumstances existed.

Nevertheless, Debtors have not satisfied the requirements under § 109(h)(3). That section requires debtors to submit to the court “a certification” describing exigent circumstances and stating facts relevant to their attempt to obtain credit counseling. The Bankruptcy Code and the Interim Rules do not define the term “certification.” However, courts interpreting this section thus far have, at a minimum, required a written statement signed by the debtor that sets forth the relevant facts. *See Cleaver*, 2005 WL 3099686 at * 3 (stating that a certification is, at a minimum, a written statement that the signer affirms or attests to be true and finding that a motion signed by both the debtor and his counsel qualifies as a certification under § 109(h)(3)); *Hubbard*, 2005 WL 3117215 at *2-3 (finding that a motion containing language that “Debtors would respectfully certify to this Court . . .” but signed only by debtors’ counsel does not constitute a certification); *Laporta*, 2005 WL 3078507 at * 2 (finding that, under federal law, 28 U.S.C. § 1746 requires a certification to be subscribed and signed by the declarant and “must contain the declarant’s statement that the content of the document is true and correct, with an acknowledgment that the declarant is under the penalty of perjury in making the statement”).

In this case, no written statement setting forth facts relevant to the § 109(h)(3) exception was signed by Debtors. Instead, a motion describing exigent circumstances was signed only by Debtors’ attorney. Debtors have, therefore, not satisfied the requirement of a certification “satisfactory to the court.” *See* 11 U.S.C. § 109(h)(3)(A).

The critical problem the court finds is not, however, the form of the request filed with the court; that could potentially be cured like other sometimes untimely or nonconforming filings, such as schedules or a statement of affairs. In addition to certifying exigent circumstances, Debtors must certify that they tried to obtain credit counseling before they filed their petition. The language of § 109(h)(3)(A) is in the conjunctive, not the disjunctive. Debtors have not shown and, based on the representations of counsel, cannot show that they were unable to obtain credit counseling services during the 5-day period beginning on the date on which they made a request for such services as

required under § 109(h)(3)(A)(ii). Indeed Debtors have not established that they even requested services from an approved credit counseling agency. And the court finds that Debtors are unable to do so, given their representation in their Reply that they were unaware of the consumer credit counseling requirement before November 8, 2005, the date their petition was filed. While § 109(h)(3)(A)(ii) may produce ambiguity in some circumstances, *see Cleaver*, 2005 WL 3099686 at *5, there is no doubt that Congress expects debtors to try to obtain credit briefing services *before* they seek relief from the court through a temporal exemption based on exigent circumstances. It is clear that Debtors did not do so. In this case, then, there is no ambiguity in the application of § 109(h)(3)(A)(ii).

Because Debtors have not complied with the prepetition credit counseling requirement under § 109(h)(1) and are not entitled to any exception under § 109(h), they are not eligible to be debtors under the Bankruptcy Code. 11 U.S.C § 109(h)(1). *See Hubbard*, 2005 WL 3117215 at * 8 (finding that eligibility to be a debtor is determined as of the petition date). The court recognizes that this a harsh result, especially for Debtors who are not only facing the loss of their home but are also struggling to cope with the tragic loss of their son. However, Congress has left the court no discretion. *Watson*, 332 B.R. at 747 (finding no discretion to permit an extension of time to obtain credit counseling where debtor failed to satisfy the requirements of § 109(h)(3)(A)); *Wallert*, 2005 WL 3099679 at *5 (finding that because the requirements of the statute are so clear and so exacting on their face and dovetail with a rational divination of congressional intent, it is not open to the court to depart from their express terms); *Laporta*, 2005 WL 3078507 at *4 (finding the court lacks authority to ignore the Congressional intent clearly expressed in the provisions of § 109(h)). Given Congress' clear intent that an individual who does not satisfy the credit counseling requirements under § 109(h) "may not be a debtor" under Title 11, and given Debtors' failure to comply with the only provision authorizing them to obtain such counseling postpetition, this court now has no authority to grant Debtors leave to obtain postpetition credit counseling, not to mention postpetition credit counseling to be completed beyond the maximum 45-day period set forth in § 109(h)(3)(B).² Debtors' Motion for Extension of Time will therefore be denied.

² The court wants to emphasize, again, that it is not the form of the requested extension or the lack of any filing relating to credit counseling with the petition as required by Interim Rule 1007(b)(3) and (c) that makes Debtors ineligible for relief. The procedural requirements of documenting filing eligibility under § 521(b) and Interim Rule 1007(b)(3) or eligibility for an exemption under § 109(h)(3) and (4) are separate matters from being able to meet the underlying substantive eligibility requirements for commencing a case or obtaining an exemption from those requirements.

B. Consequence of Non-Compliance with 11 U.S.C. § 109(h)

This court generally dismisses cases in which debtors have failed to file documents required under the Bankruptcy Code and Rules. However, Debtors' failure to file the certificate required under § 109(h)(1) and § 521(b) or the certification under § 109(h)(3)(A) is qualitatively different from a debtor's failure to file documents such as bankruptcy schedules or a statement of financial affairs. Congress' placement of the requirements relating to consumer credit counseling in § 109 is significant as that section governs the fundamental requirements of "[w]ho may be a debtor" under Title 11. In addition, the dismissal of a bankruptcy case under BAPCPA has implications substantially different than the dismissal of a pre-BAPCPA case. *Hubbard*, 2005 WL 3117215 at * 8; *see, e.g.*, 11 U.S.C § 362(c)(3) and (4) (adding provisions altering the applicability of the automatic stay in cases involving individual debtors who had one or more cases pending within the previous year that were dismissed). Thus, the court must determine the appropriate consequence of non-compliance with § 109(h).

In contrast to some of the other requirements imposed by BAPCPA, *cf.* 11 U.S.C. §§ 521(a), (i)(1) and 1307(c)(10) and (e), Congress has not directed what should occur if the requirements of § 109(h) are not met. Nor do the Interim Rules provide direction to the court in that regard. This issue was addressed by the court in *Hubbard*. Pursuant to 11 U.S.C § 301(a), a case "is commenced by the filing with the bankruptcy court of a petition under such chapter *by an entity that may be a debtor* under such chapter." As discussed above, § 109(h) expressly provides that "an individual may not be a debtor under this title" unless the individual complies with the requirements of that section. Because the debtors in *Hubbard* had failed to obtain prepetition credit counseling and were not entitled to extend the date by which they could obtain such counseling, the court concluded that they were not eligible to be debtors under Title 11 and, thus, that the filing of their petitions did not commence cases under Chapter 13. *Hubbard*, 2005 WL 3117215 at * 8. Because no case was commenced under § 301, the court found that there was no case to dismiss. *Id.* Although the court acknowledged its pre-BAPCPA practice of dismissing cases that were filed by ineligible debtors, it noted that such dismissals previously had the same effect as "striking" a petition. *Id.* However, since BAPCPA, the effect of a dismissal and of refileing a case after dismissal has substantially changed. The court therefore found the proper consequence of the debtors' failure to comply with the requirements of § 109(h) was that the petition be stricken, rather than dismissed. *Id.*

This court agrees with the reasoning in *Hubbard*. Because Debtors did not succeed in

commencing a case under § 301, there is no Chapter 13 case for the court to dismiss in the first instance. The court, therefore, will strike Debtors' petition. Should Debtors commence a case after having obtained credit counseling, the impact of having previously filed this petition and having it stricken will be determined there if necessary.

THEREFORE, cause not having been shown for the foregoing reasons,

IT IS ORDERED that Debtors' Motion for Extension of Time be, and hereby is, **DENIED**;
and

IT IS FURTHER ORDERED that Debtors' Chapter 13 petition be, and hereby is, **STRICKEN** of record and shall be treated as void.