

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 22 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 05-76951
)	
Peter E. Bartholomy,)	Chapter 13
)	
Debtor.)	
)	JUDGE MARY ANN WHIPPLE

ORDER STRIKING PETITION

This matter came before the court for hearing on Debtor’s Motion for Waiver of Debt Counseling Prior to Filing (“Motion”) [Doc. # 2]. Debtor requests a waiver of the prepetition 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”), and that he be permitted to obtain such counseling postpetition. Counsel for Debtor appeared in person. For the reasons that follow, Debtor’s Motion will be denied and his 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.

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.

Debtor filed his Chapter 13 petition on December 14, 2005, after the effective date of BAPCPA. Thus, the new eligibility requirements of § 109(h) apply in this case. In his motion, signed only by Debtor's attorney, Debtor states that he sought the advice of counsel on December 14, 2005, at which time he learned of the credit counseling requirement of § 109(h). He further states that he could not complete the credit counseling before an impending sheriff's sale that was scheduled for 10:00 a.m. that same day. At the hearing, Debtor's counsel indicated that credit counseling had been requested but could not be obtained before the sheriff's sale of Debtor's residence.

LAW AND ANALYSIS

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

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.

Debtor does not allege any facts indicating that he suffers from an incapacity or disability or is 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). Instead, Debtor relies on § 109(h)(3), which 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.

This court, as well as other courts, have found that, to the extent a debtor faced the impending loss of his home through a foreclosure sale, as Debtor faced in this case, exigent circumstances existed. See *In*

re Henderson, Case No. 05-76887 (Bankr. N.D. Ohio Dec. 14, 2005); *In re Cleaver*, Case No. 05-46572, 2005 WL 3099686, *4 (Bankr. S.D. Ohio Nov. 17, 2005); *In re Hubbard*, Case No. 05-95017, 2005 WL 3117215, * 4 (Bankr. S.D. Tex. Nov. 16, 2005); *In re Wallert*, Case No. 05-90789, 2005 WL 3099679, * 2 (Bankr. D. Minn. Nov. 17, 2005). Nevertheless, Debtor has 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 Debtor. Instead, a motion describing exigent circumstances was signed only by Debtor’s attorney. Debtor has, 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, Debtor must also certify that he requested credit counseling before he filed his petition but could not obtain such counseling during the five-day period beginning on the date of his request. The language of § 109(h)(3)(A) is in the conjunctive, not the disjunctive. Debtor has not shown and, based on the representations of counsel, cannot show that he was unable to obtain credit counseling services during the five-day period beginning on the date on which he made a request for such services as required under § 109(h)(3)(A)(ii).

Although a reasonable interpretation of § 109(h)(3)(A)(ii) would allow a debtor to immediately file his petition, rather than waiting for five days to elapse, if he ascertained that credit counseling would not be available prospectively for five days, *see Cleaver*, 2005 WL 3099686 at *5, that is not what occurred in

this case. Although Debtor's counsel indicated that Debtor had requested the required credit counseling, he also represented to the court that Debtor could not certify that counseling could not be obtained during the five-day period beginning on the day of his request.

Because Debtor has not complied with the prepetition credit counseling requirement under § 109(h)(1) and is not entitled to any exception under § 109(h), he is not eligible to be a debtor 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. 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 Debtor's failure to comply with the only provision authorizing him to obtain such counseling postpetition, this court now has no authority to grant him leave to obtain postpetition credit counseling.

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, a debtor's 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).

In a previous case, this court considered the appropriate consequence of non-compliance with § 109(h). *See Henderson*, Case No. 05-76887. The court considered 11 U.S.C. § 301, which provides that 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” 11 U.S.C. § 301 (emphasis added). Because § 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, the court concluded that the debtor did not succeed in commencing a case under § 301. As such, the court found that there was no Chapter 13 case for the court to dismiss and that the appropriate consequence was to strike the petition. *Henderson*, Case No. 05-76887 (citing *Hubbard*, 2005 WL 3117215 at * 8).

Similarly, in this case, because Debtor 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 Debtor’s petition. Should Debtor 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 Debtor’s Motion [Doc. # 2] be, and hereby is, **DENIED**; and

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