Credit Counseling Requirements under Section 109(h)

By John Rao
National Consumer Law Center

A. Form of "Certification" for Credit Counseling Waiver

The term "certification," which had never been used in the Bankruptcy Code prior to 2005, appears in the 2005 Act on at least 26 occasions, in sections 109, 362, 524, 707, 1228 and 1328. No definition for the term was included in section 101, and the Rules Committee elected not to address the requirements of a certification in the Interim Bankruptcy Rules.[1] A division in the opinions has developed in regard to the term's application in §109.

***In re* Hubbard, 332 B.R. 285 (Bankr.S.D.Tex. 2005)(*Hubbard I); In re* Hubbard, 333 B.R. 373 (Bankr.S.D.Tex. 2005) (*Hubbard II*).**

In *Hubbard I*, the debtor filed an unverified motion seeking a waiver of the credit counseling requirement. The court found that the motion was defective since it did not contain an affidavit, declaration or certification. In *Hubbard II*, the court more explicitly described the form of waiver request by construing the word "certification" in § 109(h)(3) to mean the type of document referred to as a "certificate" in 28 U.S.C. § 1746. Thus, the debtor must file a certification which is signed by the debtor and in the form described in 28 U.S.C. § 1746, by using the language: "I declare (or certify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date)."[2]

***In re* Cleaver, 333 B.R. 430 (Bankr.S.D.Ohio 2005).**

Taking a different approach, the court in *In re* Cleaver looked to definitions of the word "certification" found in *Black's* and *Webster's* dictionaries.[3] Based on these definitions, the court found that the debtor's certification at a minimum should be a "written statement that the signer affirms or attests to be true." A motion filed by the debtor's counsel and also signed by the debtor, presumably to verify the facts alleged, was held to be a "certification."

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[1] On August 22, 2005, the Judicial Conference of the United States released Interim Rules intended to be used in bankruptcy cases from October 17, 2005, until final rules are promulgated under the regular Rules Enabling Act process.

[2] Hubbard, 333 B.R. at 376. *See also In re* LaPorta, 332 B.R. 879 (Bankr.D.Minn. 2005).

[3] Black's Law Dictionary defines "certification" as: "1. The act of attesting. 2. The state of having been attested. 3. An attested statement." Black's Law Dictionary 220 (7th ed.1999). Webster's Third New International Dictionary defines "certify" as: "to attest esp. authoritatively or formally." Webster's Third New International Dictionary 362 (2002).

***In re* Talib, 335 B.R. 417 (Bankr.W.D.Mo. 2005).**

Refusing to follow *Hubbard* and *LaPorta*, the court *In re* Talib held that the form of the certification under § 109(h)(3) is not controlled by 28 U.S.C. § 1746 and that the certification need not be a document containing a declaration under penalty of perjury. Although a similar word is used in 28 U.S.C. § 1746 ("certificate"), the term "certification" is not one of the precise referenced terms in that statute. In addition, the court noted that Bankruptcy Rule 1008 lists the documents in a bankruptcy case that must be verified or contain an unsworn declaration under penalty of perjury, and Rule 1008 was not amended to include a certification under section 109(h)(3).[4] Thus, a certification is sufficient if it is signed by the debtor and contains the required information.

Another rationale (not discussed in these cases) for finding that a § 109(h)(3) certification need not be a sworn statement is that Congress provided in new § 362(b)(23) that a landlord's "certification" relating to the automatic stay exception for illegal drug use and endangerment of the property must be "under penalty of perjury." The failure of Congress to include such language in § 109(h)(3), when it did so in another provision enacted at the same time, suggests that Congress intended counseling waiver certifications to be unsworn statements.

B. Waiver of Credit Counseling Requirement – 11 U.S.C. § 109(h)(3)

To be eligible under § 109(h)(3) for a waiver of the prepetition credit counseling requirement, each of the following three requirements must be satisfied: (1) the debtor's certification must describe exigent circumstances that merit a waiver; (2) the certification must state 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 (3) the certification must be satisfactory to the court.[5] Several initial decisions have sought to construe the "exigent circumstances" language.

Proof of Exigent Circumstances

***In re* Cleaver, 333 B.R. 430 (Bankr.S.D.Ohio 2005).**

In *In re* Cleaver, the debtor filed a motion indicating that his bankruptcy had been filed on an emergency basis because of a pending sheriff's sale of his home that was "scheduled for tomorrow." The court initially noted that although several of the waiver requirements in § 109(h)(3) were clear, the statute was ambiguous on the scope of "exigent circumstances." Finding no definition in the Bankruptcy Code, the court referred to *Black's Law Dictionary*, which defines the phrase as "[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures...."[6] Although the debtor may have had sufficient opportunity to obtain

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[4] *See* Fed. R. Bankr. P. 1008.

[5] *See In re* Gee, 332 B.R. 602 (Bankr.W.D.Mo. 2005).

[6] Black's Law Dictionary 236 (7th ed.1999).

counseling and seek bankruptcy relief before the sale, given that judicial foreclosures in Ohio take many months to complete, the court nevertheless found that the imminent sale satisfied the "exigent circumstances" requirement:

> It can be argued that the exigency in this case is self-created. After all, foreclosures in Ohio follow a lengthy judicial process, typically lasting several months before the gavel finally falls at a sheriff's sale. Mr. Cleaver might have filed his bankruptcy a week, two weeks, or even a month earlier thus allowing sufficient time to obtain the briefing. However, the common reality is that many debtors file at the last minute just before a foreclosure sale or the loss of their money or possessions to creditors. Furthermore, it is difficult to conceive of any exigent circumstances related to bankruptcy that would not involve impending creditor action. Absent some sort of immediate collection activity, there is no urgency affecting the timing of a bankruptcy filing. Consequently, the immediacy of the foreclosure sale in this case appears to be exactly the sort of exigent circumstance contemplated by the statute.[7]

***In re* LaPorta, 332 B.R. 879 (Bankr.D.Minn. 2005).**

The *pro se* debtor in *In re* LaPorta filed a statement with her petition noting that she had checked the United States Trustee's website to locate a counseling agency and determined that "what is listed was beyond the territory I can afford to travel for time and distance, and gas prices." She filed a separate document stating that her automobile "was up for repossession." The court held that the debtor was not entitled to a waiver under § 109(h)(3) because she never actually made a request for services to an approved agency. In a more troubling finding, the court questioned whether the debtor had established exigent circumstances because her chapter 7 filing would only "defer the enforcement" of the automobile lien, predicting that the lender would eventually obtain stay relief. The court suggested that there would need to be some showing by the debtor that the automobile lender was willing to make "significant concessions" on the loan arrearage, since otherwise "there is nothing to support a conclusion that the Debtor must file now to gain some permanent benefit…." Requiring the debtor to prove some "permanent benefit" resulting from the bankruptcy filing or forecast the postpetition treatment of a secured creditor would seem to go well beyond the plain meaning of "exigent circumstances" and surely is not contemplated by § 109(h)(3).

***In re* Dixon, 338 B.R. 383 (8th Cir.BAP 2006).**

The debtor did not obtain prepetition counseling and filed a certification stating that his home was scheduled for foreclosure at 12:00 p.m. on November 10, 2005, and that he had contacted an attorney to inquire about whether the sale could be stopped the day before at 6:30 p.m. He also stated that he called a counseling agency and was

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[7] *In re* Cleaver, 333 B.R. at 435; *see also In re* Hubbard, 333 B.R. 377 (Bankr.S.D.Tex. 2005)(*Hubbard III*)(automobile repossession and pending foreclosure sale deemed sufficient exigent circumstances but not "upcoming sequestration hearing" involving automobile where debtor failed to allege specific facts describing emergency).

advised that it would be two weeks before they could provide counseling by phone and twenty-four hours by Internet, and that he did not have a computer to access the Internet. The bankruptcy court denied the waiver, finding that the debtor was given sufficient advance notice of the pending foreclosure, since Missouri law requires twenty days notice of a foreclosure sale. Significantly, the BAP concluded that it would review the court's determinations as to the first two prongs of the test, the existence of exigent circumstances and compliance with the request for services requirements, based on an abuse of discretion standard. The BAP not surprisingly was unwilling to substitute its judgment for that of the bankruptcy court and therefore affirmed.

Request for Services

***In re* Gee, 332 B.R. 602 (Bankr.W.D.Mo. 2005).**

Unlike the "exigent circumstances" language, courts have found the balance of the waiver section provisions to be clear and have felt compelled to enforce them as written.[8] In *In re* Gee, the debtor filed a chapter 13 petition and certification requesting a temporary waiver of the counseling requirement based on a foreclosure sale of the debtor's home scheduled for 2:00 p.m. on the filing date. Although the court easily found that exigent circumstances existed, the debtor's certification was fatally defective in that it failed to state that counseling services were requested and unable to be obtained within a five-day period.[9]

***In re* Davenport, 335 B.R. 218 (Bankr.M.D.Fla. 2005).**

The debtor in *In re* Davenport, argued that her failure to satisfy the strict requirements of the statute could be excused on equitable grounds. The debtor established that exigent circumstances existed at the time the petition was filed, by showing that a creditor was attempting to repossess the family's automobile and only means of transportation. However, the debtor did not certify that she had requested credit counseling before filing. Instead, the debtor urged the court to use its equitable powers to waive the requirement, arguing that she had actually completed the counseling after the case was filed. The court held that it could not disregard the three requirements in section 109(h)(3) and dismissed the case.

***In re* Watson, 332 B.R. 740 (Bankr.E.D.Va. 2005).**

A similar result was reached when the debtor in a chapter 11 case argued, after his request for a waiver under section 109(h)(3) had been rejected for failure to request counseling services prepetition, that the counseling requirement was unconstitutional. The debtor in *In re* Watson contended that the counseling requirement denied equal

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[8] *In re* Hubbard, 332 B.R. 285, 288 (Bankr.S.D.Tex. 2005) (*Hubbard I*)("The Court sees no ambiguity in the statute.").

[9] *See also In re Cleaver*, 333 B.R. 430 (Bankr.S.D.Ohio 2005); *In re Talib*, 335 B.R. 417 (Bankr.W.D.Mo. 2005); *In re Wallert*, 332 B.R. 884 (Bankr.D.Minn. 2005); *In re Warden*, 2005 WL 3207630 (Bankr.W.D.Mo. Nov 22, 2005); *In re Randolph*, 2005 WL 3408043 (Bankr.M.D.Fla. Dec 02, 2005).

protection of the law to individuals such as himself who operate businesses as sole propreitorships rather than corporations. Finding that an individual operating a business was not a suspect class and that a rational basis existed for Congress' enactment of the counseling requirement, the court rejected the equal protection argument.

***In re* Hubbard, 333 B.R. 377 (Bankr.S.D.Tex. 2005)(*Hubbard III*).**

The court *In re* Hubbard applied the plain language doctrine of statutory construction to another provision in section 109(h)(3). The United States Trustee argued that the debtor must personally make the request for counseling services before seeking a waiver under § 109(h)(3). The court found no support for this position in the statute and held that an attorney may make the request as the debtor's agent, provided that it is made on behalf of the debtor in the case and not simply a general inquiry. The Unites States Trustee also argued that the debtor may not contact only one counseling agency, suggesting that the debtor would have been able to obtain prepetition counseling had he contacted more of the seven approved agencies in the district. The court also rejected this argument based on the plain wording of the statute, noting that § 109(h)(3)(A)(ii) simply requires that the debtor had "requested credit counseling services from ***an*** approved … agency …," and therefore does note require a debtor to "scour the field before determining that credit counseling is unavailable."[10]

C. Counseling on the "Date of Filing"

***In re Warren*, 339 B.R. 475 (Bankr.E.D.Ark. 2006).**

To be an eligible debtor under § 109(h), the debtor must obtain a credit counseling briefing "during a 180-day period preceding the *date of the filing* of the petition." The chapter 13 Trustee in *In re Warren* argued that the case should be dismissed because the debtor received counseling on the day the petition was filed and that the statutory language requires that the counseling be received at least one day before the filing date. In construing the word "date," the court noted that although Back's Law Dictionary defines "date" to mean a particular calendar day, it also suggests that the word is used to reference a specific time on that day. In addition, the court noted that the common usage of the word "encompasses [both] concepts," and that courts have applied both constructions depending upon the legal context in which it is used. On this point, the *Warren* court referred to a California state court opinion, *Anderson v. State Personnel Bd.*, 103 Cal.App.3d 242, 248, 162 Cal.Rptr. 865 (1980), in which it was "opined that the rule interpreting 'date' to include a specific time limitation 'properly applies only to those cases ... in which impairment of property or other interests would occur if absolute adherence to the time specification was not achieved.'"

In refusing to dismiss the debtor's case, and holding that the words "date of filing" mean the specific day, month, year, and time of day the petition was filed, the court stated that the precise time a petition is filed is a critical factor in many bankruptcy determinations, often potentially affecting property interests. It also found no reason to

[10] Hubbard, 333 B.R. at 387.

believe that Congress intended a different application of the phrase for purposes of § 109(h), particularly since there is no reference to a one-day waiting period in the legislative history.

***In re Mills*, 2006 WL 1071679 (Bankr.D.Dist.Col. Apr 20, 2006).**

In refusing to follow *Warren*, the court in *Mills* found that the common and accepted statutory usage of the word "date" does not include time of day, except for example where a contract includes a specific reference to a time within a day. On this point, the court found that the *Warren* court "misreads severely" the *Anderson* opinion, noting that the holding in *Anderson* actually "contradicts" the Warren courts reading of § 109(h). The court also found that the legislative history does not express a position either way on the timing issue, and therefore the statute must be construed as written.

D. Failure to File Counseling Certificate – 11 U.S.C. § 521(b)(1)

***In re* Sukmungsa, 333 B.R. 875 (Bankr.D.Utah 2005).**

The debtors filed their chapter 13 petition without checking either the box certifying that they had received credit counseling or the box indicating they were requesting a waiver. Pursuant to a local rule, the court clerk entered an order dismissing the case. The debtors filed a motion to vacate the dismissal under Fed.R.Civ.P. 60(b) and Fed.R.Bankr.P. 9024 on the grounds of excusable neglect. They claimed to have received counseling three days prior to filing, but the certificate from the approved agency they filed to support this position indicated that the briefing was conducted 7 days postpetition. A corrected certificate was later filed stating that the briefing had been held six days prepetition. Based on the inconsistent filings, "inconclusive testimony," and the court's apparent disbelief that the debtors had actually obtained the briefing, the court found that the debtors had failed to show excusable neglect by a preponderance of the evidence.

E. Effect of Noncompliance – Should Case Be Dismissed or Stricken?

Decisions Favoring Strike:

***In re* Hubbard, 333 B.R. 377 (Bankr.S.D.Tex. 2005)(*Hubbard III*).**

Prior to the 2005 Act, courts routinely "dismissed" cases that were filed by debtors who were ineligible under § 109, primarily because dismissing a case had the same effect as "striking" a petition. However, because a dismissal under the 2005 Act has "significantly different implications," the *Hubbard* court concluded that no case is commenced under § 301 for a debtor who is not eligible to be a debtor under § 109(h), and therefore there is no case to "dismiss." Instead, the court held that such cases are to be "stricken." The obvious implication which the court did not discuss concerns whether the prior case should count as a case pending but dismissed within the year for the stay limitation provisions under § 362(c)(3) and (c)(4).

***In re* Rios, 336 B.R. 177 (Bankr.S.D.N.Y. 2005).**

The court in *Rios* found a textual basis for concluding that a petition filed by an ineligible debtor should be stricken. It noted that § 301(a) provides that a "voluntary case … is commenced by the filing … of a petition … by an entity that may be a debtor…." Because no case is commenced by an ineligible debtor, the matter must be "stricken" as being *void ab initio*. The court also noted that Congress did not amend sections 707, 1112, 1208, and 1307 to add ineligibility under section 109(h) as a ground for dismissal. To bolster its statutory construction arguments, the court concluded, based on passages from the legislative history (House Report), that Congress intended credit counseling to expand, not limit, the debtor's options. The court stated that "[i]t is therefore apparent that Congress did not intend the credit-counseling requirement to limit the availability or extent of bankruptcy relief for debtors, which dismissal would accomplish, and thus, dismissal is inappropriate."

In re Salazar, 339 B.R. 622 (Bankr.S.D.Tex. 2006)

The court in *Salazar* found that sections 109(h), 302, and 362(a), read together, establish that no stay exists for a petition filed by debtors ineligible under § 109(h). It relied upon the following syllogism:

- Individuals who have not received counseling and who do not qualify for a waiver are not eligible to be debtors - § 109(h);
- A joint case is commenced by "an individual that may be a debtor," so only eligible individuals may file a petition - § 302;
- Section 362 states that "a petition filed under section 301, 302 or 303 ... operates as a stay ..."- § 362(a). Without the filing of a petition under § 302, the automatic stay provisions in § 362 are not invoked.

Although the court did not refer to specific examples in the legislative history, it suggested that its conclusion that the automatic stay does not come into effect was supported by a sort of plausibility test for viewing Congressional intent. The court noted that "[i]t is implausible to believe that Congress specifically identified people to exclude from the bankruptcy process, yet permitted those same people to benefit from bankruptcy's most powerful protection: the automatic stay."

The court was also not moved by arguments that its ruling would result in uncertainty for interested parties. It stated that the "Court is unaware of any reason that precludes Congress from creating a level of uncertainty pending a final determination by the Court." It noted that the Code provides examples where uncertainty is followed by court-determined outcomes, *e.g.*, retroactive annulment of the stay; actions in violation of stay that may later be declared void. This result may be "better than certainty that produces an undesirable outcome."

Decisions Favoring Dismiss:

***In re* Tomco, 339 B.R. 145 (Bankr.W.D.Pa. 2006).**

In response to the argument made in *Rios* that Congress did not amend sections 707, 1112, 1208, and 1307 to add ineligibility under section 109(h), the court in *Tomco* found that there was no need for an amendment. The use of the term "includes" in these sections makes clear that cause for dismissal is not limited to the enumerated items found in those sections. The court also found that the word "may" in § 301 means "might." Thus, the key "operative event which triggers the commencement of a bankruptcy case, and this Court's jurisdiction, is the filing of a petition." It noted that the court's jurisdiction is granted under title 28, not title 11. The court also relied upon the statutory construction doctrine relating to surplusage. If the filing by an ineligible debtor is void *ab initio* and no automatic stay is invoked, then there would have been no need for Congress to add § 362(b)(21)(A) in the 2005 Act to create a stay exception for debtors ineligible under § 109(g).[11]

***In re* Ross, 338 B.R. 134 (Bankr.N.D.Ga. 2006).**

In finding that dismissal was appropriate, the court in *Ross* relied upon pre-BAPCPA decisional law. It noted, for example, that the majority view is that the filing of a chapter 13 petition by a debtor later found ineligible under § 109(e) nevertheless commences a case and invokes the jurisdiction of the court. The court stated that it was also concerned about the uncertainty that would exist until the court determines whether the debtor was in fact eligible: "If every case is subject to being dismissed as void ab initio at a later time, creditors and other parties will face enormous uncertainty. They will not know whether a valid case exists without investigation." As another important implication in finding that § 109(h) is not jurisdictional, the court noted that if a party in interest fails to timely challenge a counseling waiver request or § 109(h) eligibility, the party may be barred from later challenging the debtor's eligibility pursuant to the doctrines of waiver, estoppel, or res judicata.

***In re* Seaman, 2006 WL 988271 (Bankr.E.D.N.Y. Mar 30, 2006).**

The court in *Seaman* found that a case commenced by the filing of a petition can not be a nullity since the issue of a debtor's eligibility can only be made after the court makes such a determination. As in *Ross*, the court was also concerned about the uncertainty problem and the need for an orderly procedure: "Dismissal of a case filed by an ineligible petitioner comports with the due process rights given to all parties in a bankruptcy proceeding and avoids uncertainty with respect to the petitioner's status and the existence of the automatic stay."

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[11] *See also In re* Ross, 338 B.R. 134 (Bankr.N.D.Ga. 2006).