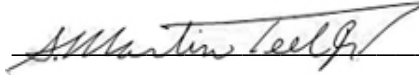


The order below is hereby signed.

Signed: January 19, 2006.



  
S. Martin Teel, Jr.  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLUMBIA

In re )  
 )  
KEITH N. JONES, ) Case No. 05-02409  
 ) (Chapter 13)  
Debtor. )

OPINION RE TRUSTEE'S MOTION TO DISMISS  
BASED ON 11 U.S.C. § 109(h) INELIGIBILITY

On December 2, 2005, the debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. Rather than file a certificate from a U.S. Trustee-approved non-profit budget and credit counseling agency verifying completion of the requisite § 109(h) pre-petition credit counseling, the debtor instead filed a Certification of Exigent Circumstances (Docket Entry "DE" No. 6, filed December 2, 2005) asking this court to waive the requirement that he obtain budget and credit counseling during the 180-days prior to the filing of his bankruptcy case. On December 7, 2005, the Chapter 13 trustee moved to have the case dismissed on § 109(h) ineligibility grounds (DE No. 12). On December 27, 2005, the debtor responded to the trustee's motion by reiterating the points raised in his Certification of Exigent

Circumstances and further stating that he had since sought out and completed the requisite credit counseling (DE No. 26). Indeed, on December 27, 2005, the debtor filed a Certificate of Completion of Credit Counseling reflecting that he received the requisite credit counseling services on December 21, 2005 - almost three weeks after the filing of his petition (DE No. 25).

In his Certification of Exigent Circumstances, the debtor states as follows:

I, Keith N. Jones, request a waiver of the requirement to obtain budget and credit counseling during the 180-day period prior to filing based on exigent circumstances. I am filing on an emergency basis to protect my home from foreclosure sale scheduled for December 7, 2005. I am filing pro se and had no knowledge of the 180-day rule. I am filing Chapter 13 and do not seek to discharge any debt, instead to pay them in full. I will respectfully comply with any requirement for counseling and I ask for advice from the Court seeking approved counseling.

By this certification, the debtor seeks to invoke the exigent circumstances waiver of § 109(h)(3) based upon (1) the imminent foreclosure sale of his home, and (2) his lack of knowledge concerning the pre-petition credit counseling requirement. The debtor does not contend that he attempted, but was unable, to obtain pre-petition credit counseling. To the contrary, the debtor's certification states that he was unaware of the credit counseling requirement and provides the debtor's assurance that he will (on a forward going basis) complete the necessary counseling. Although the debtor has since completed the credit

counseling required under § 109(h)(1), the exigent circumstances waiver is available only to those debtors who seek to obtain credit counseling pre-petition. Accordingly, the court determines that the putative debtor in this case is ineligible to be a debtor under Chapter 13 and this case shall be dismissed accordingly.

I

Section 109 of 11 U.S.C. sets forth the eligibility requirements for being a debtor in bankruptcy. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), which went into effect on October 17, 2005,<sup>1</sup> amended the Bankruptcy Code by introducing, *inter alia*, the new eligibility requirement of § 109(h) which requires, subject to certain limited exceptions, that all individuals filing for bankruptcy obtain credit counseling from an approved non-profit budget and credit counseling agency during the 180-day period preceding the date of the filing of the individual's bankruptcy petition. 11 U.S.C. § 109(h). Specifically, 11 U.S.C. § 109(h) provides that:

- (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

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<sup>1</sup> Although most provisions of the BAPCPA were effective as of October 17, 2005, select provisions went into effect upon the law's enactment on April 20, 2005.

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. For the purposes of this paragraph, incapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and "disability" means that the debtor is so physically impaired as to be

unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing required under paragraph (1).

The debtor concedes that he did not obtain credit counseling prior to filing his voluntary petition, as required under § 109(h)(1). Likewise, the debtor does not contend that § 109(h) is inapplicable because he is incapacitated, disabled, or on active military duty, or because the District of Columbia is a district in which the United States trustee has determined that approved budget and credit counseling agencies are unable to reasonably provide the necessary counseling services. Thus, the only remaining basis upon which the debtor may establish that he is eligible to be a debtor in bankruptcy notwithstanding his failure to complete credit counseling prior to filing his petition is by demonstrating the applicability of the exigent circumstances waiver provided for in § 109(h)(3)(A).<sup>2</sup>

According to the plain meaning of the statute, debtors seeking an extension of time to comply with § 109(h)(1)'s credit counseling requirement under the exigent circumstances waiver provided for under §109(h)(3)(A) must satisfy all three requirements enumerated under that subsection of the statute.

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<sup>2</sup> The exigent circumstances waiver does not exempt debtors from the credit counseling requirement. Rather, it excuses debtors from the requirement that credit counseling occur pre-petition, and gives the debtor until 30 days after the petition date, subject to a 15-day extension by the court for cause, to satisfy the requirement. 11 U.S.C. § 109(h)(3)(B).

See In re Watson, 332 B.R. 740, 745 (Bankr. E.D. Va. 2005) (holding that under the plain meaning of the statute, § 109(h)(3)(A) must be read as requiring the debtor to satisfy all three requirements listed under that subsection).

First, § 109(h)(3)(A)(i) requires the debtor to show that there are exigent circumstances meriting a waiver of the credit counseling requirement. The court will assume, without deciding, that the debtor has met this requirement because the imminent foreclosure sale of the debtor's home likely constitutes exigent circumstances meriting a waiver. See In re Hubbard, 333 B.R. 377, 384 (Bankr. S.D. Tex. 2005) ("When a prospective debtor faces a loss of the family home unless immediate relief is granted under the Bankruptcy Code, exigent circumstances exist."). But see In re Talib, 2005 WL 3272411, \*3 (Bankr. W.D. Mo., December 1, 2005) (expressing doubt that the mere fact of an imminent foreclosure sale constitutes exigent circumstances meriting a waiver, and observing that "the focus should be not so much on the imminence of the event that threatens the debtor with loss of property and requires filing of the petition for relief in order to invoke the automatic stay, but on the reasons why the debtor was unable to obtain the required credit counseling prior to having to file for relief.").

Second, § 109(h)(3)(A)(ii) requires that the debtor's certification of exigent circumstances state that the debtor

requested credit counseling services from an approved non-profit budget and credit counseling agency prior to the filing of his petition, but was unable to obtain the necessary services within five days of the request. The debtor's certification of exigent circumstances does not allege any pre-petition efforts to obtain credit counseling, and instead expresses the debtor's prior lack of knowledge concerning the credit counseling requirement and a willingness to pursue and complete such counseling post-petition.

Under the plain meaning of the statute, the exigent circumstances waiver is unavailable to the debtor because he failed to seek credit counseling pre-petition, and he is thus ineligible to be a debtor under Chapter 13 of the Bankruptcy Code. See In re Wallert, 322 B.R. 884, 888 (Bankr. D. Minn. 2005)(only debtors who actually try to obtain counseling services pre-petition are eligible to be debtors); In re Talib, 2005 WL 3272411, \*5 (Bankr. W.D. Mo., December 1, 2005) (debtor who sought pre-petition counseling and was advised that she could obtain credit counseling within two days from the date of her request but not before the pending foreclosure on her house was ineligible for the exigent circumstances waiver because such counseling would have fallen within the five-day waiting period established by the statute); In re Watson, 332 B.R. 740, 747 (Bankr. E.D. Va. 2005) (under the plain meaning of § 109(h)(3)(A), a debtor's failure to seek credit counseling pre-

petition renders him ineligible for the exigent circumstances exemption and the court is without discretion to extend the deadline); In re Cleaver, 333 B.R. 430, 435-36 (Bankr. S.D. Ohio 2005) (ineligibility for the exigent circumstances exemption based upon failure to seek credit counseling pre-petition cannot be cured by seeking credit counseling post-petition); In re Gee, 332 B.R. 602, 604 (Bankr. W.D. Mo. 2005) (debtor ineligible for exigent circumstances exemption under § 109(h)(3)(A) because he did not allege that he requested credit counseling services prior to the filing of his petition and was unable to obtain them within five days); In re Hubbard, 333 B.R. 377, 387 (Bankr. S.D. Tex. 2005) ("Section 109(h) requires that a debtor either receive or unsuccessfully request credit counseling prior to filing a petition in order to be eligible as a debtor.").

The third and final requirement of § 109(h)(3)(A) is that the certification of exigent circumstances be satisfactory to the court. 11 U.S.C. § 109(h)(3)(A)(iii). Because the debtor's request for waiver must be denied under § 109(h)(3)(A)(ii), the court does not address this provision.

## II

For all of these reasons, the court determines that the debtor is ineligible to be a debtor under Chapter 13 of the Bankruptcy Code. Accordingly, the court shall grant the trustee's motion to dismiss and such dismissal shall be made



