

**CREDIT COUNSELING and
CASE DEFICIENCIES¹**
Lou Jones Breakfast Club January 13, 2009
Hon. Susan Kelley and Mike Maloney

Pre-petition Counseling

For cases filed after October 17, 2005, in order to qualify as debtors, individuals must receive an individual or group “briefing” from an approved non-profit budget and credit counseling agency prior to filing their petition.² The briefing must be received in the 180-day period preceding the date of filing and a minority of courts have held that this requirement is not satisfied unless the debtor receives the briefing at least one day before the day the petition is filed.³ Although more courts have interpreted the phrase to allow the debtor to receive the briefing the same day (although prior to the filing of the petition),⁴ the debtor should if possible obtain the briefing at least a day before the petition is filed to avoid this argument. This requirement may only be waived if the debtor is too mentally impaired to be capable of realizing and making rational financial decisions or too physically disabled to participate in an in-person, telephone, or internet briefing.⁵ The debtor may obtain a short extension of time to file the certificate of credit counseling, but only if the debtor certifies and describes exigent circumstances and states that the debtor requested credit counseling services from an approved agency, but was unable to obtain the briefing within five days.⁶

¹ Outline excerpted from Susan V. Kelley, *Ginsberg & Martin on Bankruptcy* (2009 Supplement to be published soon), published by Aspen Publishers. (www.Aspenpublishers.com)

² 11 U.S.C. §109(h). The pre-petition briefing requirement does not apply to debtors who reside in a district for which the U.S. Trustee determines that the approved non-profit budget and credit counseling agencies are not reasonably able to provide adequate services. A list of such districts can be found on the U.S. Trustee’s website, www.usdoj.gov/ust.

³ *In re Gossett*, 369 B.R. 361 (Bankr. N.D. Ill. 2007) (credit counseling on petition date untimely); *In re Cole*, 347 B.R. 70 (Bankr. E.D. Tenn. 2006) (receiving credit briefing the same day, but before the bankruptcy filing, was not sufficient); *In re Mills*, 341 B.R. 106 (Bankr. D.D.C. 2006) (credit briefing must be obtained not later than calendar day before the filing). Note that the same judge who decided *Mills* reversed his thinking in *In re Barbaran*, 365 B.R. 333 (Bankr. D.D.C. 2007).

⁴ *In re Francisco*, 390 B.R. 700 (B.A.P. 10th Cir. 2008); *In re Swanson*, 2006 Bankr. LEXIS 3639 (Bankr. D. Idaho Dec. 21, 2006); *In re Warren*, 339 B.R. 475 (Bankr. E.D. Ark. 2006).

⁵ Disability is very narrowly defined. *In re Tulper*, 345 B.R. 322 (Bankr. D. Colo. 2006) (debtor must be severely physically or mentally impaired and be unable to participate meaningfully in in-person, telephone or Internet briefing). The debtor may also obtain an exemption if on active military duty in a combat zone. See also Laura B. Bartell, *From Debtors’ Prisons to Prisoner Debtors: Credit Counseling for the Incarcerated*, 24 Bankr. Dev. J. 15 (2008).

⁶ Courts are divided on what constitutes “exigent circumstances” for purposes of the temporary waiver. *In re Rodriguez*, 336 B.R. 462 (Bankr. D. Idaho 2005) (impending foreclosure sale is not exigent circumstance); *In re Childs*, 335 B.R. 623 (Bankr. D. Md. 2006) (imminent foreclosure sale is exigent circumstance); *In re Dixon*, 338 B.R. 383 (B.A.P. 8th Cir. 2006) (inquiry into specific circumstances is required). Controversy also exists over the “five day” requirement. Compare *In re Giambrone*, 365 B.R. 386 (Bankr. W.D. N.Y. 2007) (test is not whether the agency can provide a counseling session within 5 days, but whether in the context of their circumstances, the debtors can complete within 5 days the counseling that must otherwise occur prior to that exigent moment when a bankruptcy filing is necessary); with *In re Dansby*, 340 B.R. 564, 567 (Bankr. D.S.C. 2006) (request must be made at least 5 days before the petition date absent extraordinary circumstances satisfactory to the court).

Under BAPCPA, with very limited exceptions, an individual must receive a credit briefing *before* filing a bankruptcy petition under any chapter. New §109(h) provides that an individual may not be a debtor, unless he or she receives the briefing from an approved non-profit budget and credit counseling agency during the 180-day period preceding the date of the filing of the petition.⁷ The briefing may be conducted over the telephone or via the Internet, and F.R.B.P. 1007 requires the debtor to file a certificate from the agency describing the counseling services with the petition or within 15 days thereafter.⁸ The certificates are dated, and most courts will dismiss petitions if the date of the credit counseling certificate is more than 180 days before the date of the petition.⁹ Some courts have focused on the language in the requirement that the briefing must be received in the 180 days prior to the “date” of the petition, and held that the debtor cannot file if the briefing is received the same day as the petition.¹⁰ The majority rule appears to be that as long as the briefing is received prior to the filing of the petition, it may be received the same day.¹¹ Clearly the best practice would be to obtain the briefing at least one day before the day of the petition, to avoid this controversy.

The briefing requirement may be temporarily delayed, but only if the debtor submits a certification that is satisfactory to the court. The certification must (1) describe “exigent circumstances” meriting a short-term exemption; and (2) 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 the debtor made the request. The vast majority of courts have required dismissal of the case if the debtor has not at least attempted to obtain the counseling before filing the petition.¹² Some courts have established a high standard of exigent circumstances, finding that if the debtor has

⁷ *In re Wilson*, 346 B.R. 59, 62 (Bankr. N.D.N.Y. 2006) (“Few sections of the newly enacted BAPCPA have been as uniformly misunderstood as §109(h)(3)(A), perhaps because the whole concept of compelling an individual already buried in a financial morass to undergo credit counseling during the 180 day period pre-filing, as a condition precedent to actually filing a petition, makes about as much sense as requiring spouses locked in a bitter divorce proceeding to attend a marriage counseling seminar before a judge can sign a decree dissolving their marriage.”). *But see* *Warren v. Wirum*, 378 B.R. 640 (N.D. Cal. 2007) (since § 109(h) does not contain “jurisdictional” language, debtor can be judicially estopped from seeking dismissal based on his own failure to obtain counseling); *In re Manalad*, 360 B.R. 288 (Bankr. C.D. Cal. 2007) (briefing requirement is not jurisdictional and dismissal for failure to comply not mandated).

⁸ Exhibit D to the petition, entitled “Individual Debtor’s Statement of Compliance with Credit Counseling Requirement,” warns: “You must be able to check truthfully one of the five statements regarding credit counseling listed below. If you cannot do so, you are not eligible to file a bankruptcy case, and the court can dismiss any case you do file. If that happens you will lose whatever filing fee you paid, and your creditors will be able to resume collection activities against you.” The form makes it clear that each spouse in a joint case must complete and attach a separate Exhibit D. Note that under a pending amendment to F.R.B.P. 1007, the 15-day period is expected to become a 14-day period effective December 1, 2009.

⁹ *See, e.g., In re Dyer*, 381 B.R. 200 (Bankr. W.D.N.C. 2007) (court had no authority under § 105 to keep case where counseling certificate was dated 185 days prior to petition).

¹⁰ *In re Gossett*, 369 B.R. 361 (Bankr. N.D. Ill. 2007); *In re Mills*, 341 B.R. 106 (Bankr. D.D.C. 2006).

¹¹ *In re Francisco*, 390 B.R. 700 (B.A.P. 10th Cir. 2008); *First Shore Fed. Sav. & Loan Ass’n v. Hudson* (*In re Hudson*), 352 B.R. 391 (Bankr. D. Md. 2006).

¹² *In re Falcone*, 370 B.R. 462 (Bankr. D. Mass. 2007) (collecting cases). *But see In re Manalad*, 360 B.R. 288 (Bankr. C.D. Cal. 2007) (dismissal for failure to comply with credit briefing requirement is not mandated). A few courts have “stricken” rather than dismissed the debtor’s petition. *See, e.g., In re Elmendorf*, 345 B.R. 486 (Bankr. S.D.N.Y. 2006); *In re Carey*, 341 B.R. 798 (Bankr. M.D. Fla. 2006), but the majority dismiss the case. *See, e.g., In re Tomco*, 339 B.R. 145 (Bankr. W.D. Pa. 2006)

advance knowledge of the threatened creditor action, the debtor has not met the burden.¹³ Other courts hold that exigent circumstances exist when the debtor is not able to obtain a briefing within five days of a request, and faces immediate creditor action, such as a wage garnishment, foreclosure or repossession.¹⁴ A few early courts interpreted the “five day” requirement to mean that the debtor must attempt to obtain the credit counseling at least five days prior to the petition.¹⁵ If the court approves the certification, the debtor must file the credit briefing certificate within 30 days of the date of the petition, or, with additional approval of the court, within 15 days after that deadline expires.

The debtor also may seek a complete waiver of the credit briefing requirement, but the grounds for such an exemption are extremely limited. Section 109(h)(4) states that the briefing is not required if the debtor is unable to complete the requirement because of incapacity, disability or active military duty in a combat zone. Incapacity is defined as an impairment due to mental illness or deficiency rendering the debtor unable to realize and make rational decisions with respect to his or her financial responsibility. 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. Unlike the requirements for a temporary waiver, only a handful of cases have construed the standards for a complete exemption of the credit briefing requirement.¹⁶

Automatic Dismissal Documents

In addition to the petition, various other forms and documents are required by 11 U.S.C. §521 and Bankruptcy Rule 1007. After the 2005 Act, the filing requirements of §521(a)(1) took on new and critical importance. Under new §521(i), if an individual debtor fails to file the “information” required by §521(a)(1) within 45 days after the date of the filing of the petition, the case “shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.”¹⁷ Under §707(a), the U.S. Trustee

¹³ See, e.g., *In re DiPinto*, 336 B.R. 693 (Bankr. E.D. Pa. 2006) (debtor's imminent loss of home not exigent circumstances, as debtor had ample notice of scheduled foreclosure). See also Victoria L. VanZandt, *The Exigent Circumstances Exception to the Pre-Petition Credit Counseling Requirement under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Exigent or Extreme*, 6 DePaul Bus. & Comm. L.J. 265 (2008).

¹⁴ *In re Romero*, 349 B.R. 616 (Bankr. N.D. Cal. 2006) (collecting cases and holding that the threat of serious creditor action before credit counseling can be obtained is sufficient to establish exigent circumstances).

¹⁵ *In re Afolabi*, 343 B.R. 195 (Bankr. S.D. Ind. 2006) (statute is designed to encourage debtors to seek counseling at least five days before seeking bankruptcy relief). *But see In re Giambrone*, 365 B.R. 386 (Bankr. W.D.N.Y. 2007) (test is not whether the agency can provide a counseling session within 5 days, but whether in the context of their circumstances, the debtors can complete within 5 days the counseling that must otherwise occur prior to that exigent moment when a bankruptcy filing is necessary).

¹⁶ See, e.g., *In re Trembulak*, 362 B.R. 205 (Bankr. D.N.J. 2007) (debtor died after case filed); *In re Tulper*, 345 B.R. 322 (Bankr. D. Colo. 2006) (debtors were senior citizens with severe mobility problems, deafness and tremors). Whether an incarcerated debtor qualifies for a waiver is the subject of dispute. Compare *In re Vollmer*, 361 B.R. 811 (Bankr. E.D. Va. 2007) (permanent waiver justified) with *In re Rendler*, 368 B.R. 1 (Bankr. D. Minn. 2007) (no waiver, incarceration is not disability). See also Laura B. Bartell, *From Debtors' Prisons to Prisoner Debtors: Credit Counseling for the Incarcerated*, 24 Bankr. Dev. J. 15 (2008).

¹⁷ Courts are divided on the application of the requirement. Compare *In re Wojda*, 371 B.R. 656 (Bankr. W.D.N.Y. 2007) (holding pay advices provided sufficient information); *In re Brickey*, 363 B.R. 59 (Bankr.

may move for dismissal of a case in which the documents required by §521(a)(1) are not filed within 15 days after the petition, and some courts by local rule or case management order will dismiss a case if required documents are not filed within 15 days after the petition.¹⁸ Although an extension of the deadlines for filing the schedules and other documents may be sought and obtained, attention to prompt and complete compliance with the filing requirements is crucial.¹⁹

The documents required by §521(a)(1) include a list of creditors,²⁰ schedules of assets and liabilities, a schedule of current income and expenditures, including a statement of “current monthly income,”²¹ a statement of financial affairs, a certification of the debtor’s attorney or petition preparer that the debtor has received the information required by §342(b),²² a statement of the amount of monthly net income and a statement disclosing any reasonably anticipated increase in income and expenses.²³ All of these documents are official forms.²⁴ In addition, §521(a)(1) requires the debtor to file copies of all payment advices or other evidence of payment received from any employer within 60 days before the date of the filing of the petition.²⁵ Increasingly, debtors are invoking the automatic dismissal requirements to claim that cases they no longer wish to pursue should be dismissed.²⁶ Faced with this obvious manipulation of the statute, some courts have ruled the automatic dismissal requirements may be avoided by retroactively entering an order excusing compliance with § 521(a)(1).²⁷

N.D.N.Y. 2007) (finding inadvertent failure to submit two in a series of pay advices was not cause for dismissal); *with In re Miller*, 371 B.R. 509 (Bankr. D. Utah 2007) (finding no room for substantial compliance, case dismissed when all pay advices were not filed). For an analysis of the issues surrounding the effective date of the automatic dismissal, *see In re Spencer*, 388 B.R. 418 (Bankr. D.D.C. 2008).

¹⁸ *See In re Adibi*, 2007 Bankr. LEXIS 1901 (Bankr. S.D. Tex. May 24, 2007).

¹⁹ 11 U.S.C. §521(i)(3); F.R.B.P. 1007(c).

²⁰ F.R.B.P. 1007(b). The names and addresses of all creditors is required. This list is commonly called the “matrix,” and courts often require the list of creditor names and addresses to be provided electronically, even in districts without mandatory electronic filing. Consult local rules.

²¹ 11 U.S.C. §707(b)(2)(C). This is the “means test” filed on form B22A for Chapter 7 and B22C for Chapter 13.

²² This is the notice explaining the various forms of relief under the Bankruptcy Code and warning the debtor of the penalties for making false statements. If the debtor is unrepresented, the clerk of the bankruptcy court provides the notice. A separate document is not required for this certification by the debtor’s attorney; it is part of the petition as Exhibit B.

²³ 11 U.S.C. §521(a)(1); F.R.B.P. 1007(b)(1).

²⁴ F.R.B.P. 1007(a)(1).

²⁵ 11 U.S.C. §521(a)(1)(B)(iv). Some jurisdictions have adopted local rules to provide that the payment advices are to be turned over to the trustee, rather than filed with the court. As to what constitutes a “payment advice,” *see In re Reynolds*, 370 B.R. 393 (Bankr. N.D. Okla. 2007); *In re Miller*, 371 B.R. 509 (Bankr. D. Utah 2007).

²⁶ *See Warren v. Wirum*, 378 B.R. 640 (N.D. Cal. 2007) (although sympathetic to the fact that the statute allows debtors to manipulate the system and “test the waters” of bankruptcy, court held dismissal was required).

²⁷ *See In re Spencer*, 388 B.R. 418, 429 (Bankr. D.D.C. 2008).

Tax Returns

No later than seven days before the §341 meeting of creditors, the debtor must provide the trustee with a copy of the Federal income tax return (or a transcript of such return) for the debtor's most recent tax year.²⁸ At the same time, the debtor must provide the tax return or transcript to any creditor that requests it, and if the debtor fails to comply with these requirements, on motion of the trustee or the creditor, the court is required to dismiss the case unless the debtor demonstrates that the failure to provide the return or the transcript is due to circumstances beyond the debtor's control.²⁹ Section 521(f) provides that on request of the court, U.S. Trustee, or any party in interest in an individual's case under Chapter 7, 11 or 13, the debtor shall provide copies of each Federal income tax return (or transcript) required to be filed during the pendency of the debtor's case, including amendments.

All of the statements and tax returns required to be filed with the court by § 521 are to be available to the trustee, the U.S. Trustee and any party in interest, subject to privacy protections of BAPCPA.³⁰ In order to ensure confidentiality and prevent identity theft, no tax information filed with the bankruptcy court or otherwise provided by the debtor is to be available to the public via the Internet, Public Access to Court Electronic Records (PACER) or the Case Management / Electronic Case Filing (CM/ECF) System. Accordingly, when filing this information electronically via CM/ECF, debtors are required to select the “tax information event” from the CM/ECF event list. Selecting this event limits access to the filed tax information to those users assigned “court” logins (i.e. judicial officers and court employees). All other users (including PACER users) will be limited to viewing a docket event on the docket report indicating that tax information has been filed. These other users will not be able to open and view the tax information. Debtors providing tax information should redact personal information as set forth in the Judicial Conference’s Policy on Privacy and Public Access to Electronic Case Files. To comply, the debtor should take the following steps to redact personal identifiers in any tax information filed with the bankruptcy court or provided to the trustee or any creditor, in either electronic or paper form:

- **Social Security Numbers.** If an individual’s social security number is included, only the last four digits should appear.
- **Names of Minor Children.** Only the initials of a minor child’s name should be used.
- **Dates of Birth.** Only the year of an individual’s date of birth should appear.

²⁸ 11 U.S.C. §521(e)(2)(A).

²⁹ See *Casey v. Perkins* (*In re Casey*), 2007 U.S. Dist. LEXIS 32611 (D.N.J. May 3, 2007) (most recently filed tax return is required; § 521(e)(2)(A)(i) does not require debtor to complete and file returns); *In re Moser*, 347 B.R. 471 (Bankr. W.D.N.Y. 2006) (returns given to attorney who neglected to turn them over constituted circumstances beyond debtor’s control); *In re Merrill*, 340 B.R. 671, 672 (Bankr. D.N.H. 2006).

³⁰ Section 315(c) of BAPCPA mandates that the Director of the Administrative Office of the United States Courts establish procedures for safeguarding the confidentiality of tax information required to be provided under 11 U.S.C. § 521. The term “tax information” includes tax returns, transcripts of returns, amendments to returns and any other document containing tax information provided by the debtor under 11 U.S.C. § 521. See also F.R.B.P. 4002(b)(5).

- **Financial account numbers.** Only the last four digits of financial account numbers should be given.

To gain access to a debtor's tax information under § 521(f), the U.S. Trustee, trustee or other party in interest (including a creditor) must comply with procedures designed to protect the debtor's privacy and prevent identity theft. A written request that the debtor file tax returns with the court pursuant to Bankruptcy Code § 521(f) must be filed with the court and served on the debtor and debtor's attorney, if any. In order to gain access to the debtor's tax information which is filed with the bankruptcy court, the party in interest must file a motion with the court which should include:

- a description of the party's status in the case, to allow the court to ascertain whether the party may properly be given access to the requested tax information;
- a description of the specific tax information sought;
- a statement indicating that the information cannot be obtained by the party from any other sources; and
- a statement showing a demonstrated need for the tax information.

The court will then issue an order, as appropriate, authorizing transmission of the tax information to the moving party. If granted, the order should include language advising the party that the tax information obtained is confidential and should condition dissemination of the tax information as appropriate under the circumstances. The order may state that sanctions may be imposed for improper use, disclosure, or dissemination of tax information.

Under §521(j), if the debtor fails to file (with the taxing authority) a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date, the taxing authority may request the conversion or dismissal of the debtor's case. If the debtor does not file the required return or obtain the extension within 90 days after the taxing authority's request for conversion or dismissal, the court is required to convert or dismiss the case, whichever is in the best interest of the creditors.

In Chapter 13 cases, if requested, the debtor must provide, under penalty of perjury, annual statements of the debtor's income and expenses during the most recent tax year, and of the monthly income of the debtor. This statement must disclose the amount and sources of the debtor's income, the identity of any person responsible for the debtor's dependents' support, and the identity of any person who contributed, and the amount contributed, to the household of the debtor.³¹ All of these items shall be available to parties in interest in the case for inspection and copying subject to the privacy protections of the 2005 Act.

Post-Petition Personal Financial Management Course

A discharge is not granted to a debtor who failed to complete an instructional course concerning personal financial management. This post-petition "debtor education course" is different than and in addition to the credit counseling or "briefing" the debtor was

³¹ 11 U.S.C. §521(f)(4) and (g).

required to receive prior to filing the petition.³² Denial of discharge for this reason does not apply to debtors unable to complete the course because of incapacity, disability, or active military duty in a combat zone.³³ Whether the debtor's incarceration is a disability or otherwise qualifies the debtor for a waiver of the credit counseling requirements is subject to disagreement among the courts.³⁴ Bankruptcy Rule 1007(c) requires debtors to file a certificate verifying their completion of the course within 45 days after the first date set for the meeting of creditors.³⁵ Rather than a denial of the discharge, the procedure under § 727(a)(11) is for the court to close the case without granting a discharge. Most, but not all, courts will allow the debtor to reopen the case, file the certificate, and receive a discharge.³⁶ However, the debtor may be required to pay a reopening fee (generally around the same amount as the original filing fee), so this procedure is to be avoided, if possible, by filing the certificate from the credit counseling agency as soon as possible.

³² See 11 U.S.C. §109(h).

³³ 11 U.S.C. §727(a)(11). See *In re Ferrell*, 391 B.R. 292 (Bankr. D.S.C. 2008) (debtors' medical conditions did not qualify them for exemption); *In re Robles*, 2007 Bankr. LEXIS 4239 (Bankr. W.D. Tex. Dec. 13, 2007) (deceased debtor was excused from filing certificate).

³⁴ Compare *In re Gates*, 2007 Bankr. LEXIS 4211 (Bankr. E.D. Cal. Dec. 11, 2007) (incarcerated debtor was deemed disabled and excused); *In re Vollmer*, 361 B.R. 811 (Bankr. E.D. Va. 2007) (incarcerated debtor was entitled to permanent waiver); with *In re Cox*, 2007 Bankr. LEXIS 4162 (Bankr. M.D. Ga. Nov. 29, 2007) (incarcerated debtor not excused); *In re Rendler*, 368 B.R. 1 (Bankr. D. Minn. 2007) (incarcerated debtor not excused).

³⁵ See *Lauro v. Shearer (In re Lauro)*, 2007 U.S. Dist. LEXIS 85637 (W.D. Pa. Nov. 20, 2007) (applying excusable neglect factors and reversing bankruptcy court's denial of discharge for failure to timely file the certificate). Under a proposed amendment, the 45-day time period will change to 60 days, and a new Rule 5009(b) will require the clerk to notify debtors who have not filed certificates within 45 days after the § 341 meeting, that their cases will be closed without a discharge unless the certificate is filed.

³⁶ See *Croak v. Turner (In re Turner)*, 2008 U.S. Dist. LEXIS 76259 (N.D.N.Y. Sept. 15, 2008) (court required debtor's attorney to reimburse debtor for reopening fee); but see *In re Sama Kim Taing*, 2008 Bankr. LEXIS 1528 (Bankr. E.D. Va. May 14, 2008) (court denied motion to reopen and file certificate).