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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?

Victoria L. VanZandt*

I. INTRODUCTION

The Bankruptcy Abuse Prevention and Consumer Protection Act of 20051 ("BAPCPA") substantially revised the bankruptcy laws in the United States. One change, the pre-petition credit counseling requirement in 11 U.S.C. § 109(h),2 has created an obstacle for unwitting individuals who attempt to file following the effective date of the amendments. Congress envisioned a pre-petition credit counseling requirement could heighten financial literacy among potential debtors and ultimately steer them away from bankruptcy, demonstrating alternatives to a bankruptcy filing.3 To complement the goal of financial literacy, Congress also mandated subsequent to filing, and as a requirement to obtain a discharge, debtors must complete a financial management course to educate them further and to assist them in managing their finances post-petition.4

Although laudatory goals, Congress recognized there should be exceptions from the pre-petition credit counseling requirement and, therefore, created three methods by which individuals could avoid the requirement. Two of the methods, enumerated in § 109(h)(2) and § 109(h)(4), provide a complete exemption to the requirement upon the fulfillment of the elements of the exceptions.5 However, the third method, found in § 109(h)(3), the "exigent circumstances" exception, provides only a "temporary deferral" of the requirement for individuals who are facing exigent circumstances and who are unable to obtain

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3. See infra Part III, outlining the legislative purpose of § 109(h).
4. See id. §§ 727(a)(11), 1328(g)(1).
5. See id. § 109(h)(2), (4).
the counseling prior to filing. The "temporary deferral" found in § 109(h)(3) appears to serve no purpose whatsoever, other than requiring certain debtors, who meet its requirements, to pay for a credit counseling course that provides "alternatives" to bankruptcy after filing. The reasoning is circular: how can credit counseling designed to provide alternatives to bankruptcy and to steer individuals away from bankruptcy be of any assistance once one has already filed for bankruptcy? Why provide a true exemption from the requirement for individuals meeting certain criteria and not others? If financial education is the goal, for the individual who does not receive the counseling pre-petition, why does the BAPCPA mandated post-petition financial management course not satisfy that requirement? These questions and others are posited by the "temporary deferral" provided for in § 109(h)(3)(B).

This Article first outlines the pre-petition credit counseling requirement found in § 109(h) and the three exceptions to the requirement with particular emphasis on § 109(h)(3). A review of the legislative history of § 109(h)(3) and criticism of § 109(h)(3) follows. Then, the Article reviews the case law addressing this section since its enactment. The Article concludes that due to the confusion over its application and its inability to meet the blurred goals of Congress, the enactment of additional guidelines are needed to provide substance to the language of § 109(h)(3) and guidance to the courts interpreting the section, in an overall objective for consistency. With a strict framework in place, the section should then become, like its counterparts in § 109(h)(2) and § 109(h)(4), a true exemption and not a "temporary deferral."

II. THE LANGUAGE OF § 109(H): NOT A MODEL OF CONCISE LEGISLATIVE DRAFTING

Entitled "Who may be a debtor," § 109 of the Bankruptcy Code ("Code") sets forth who may be a debtor under the Code. This eligibility section has been an initial hurdle for any debtor under the Code since its original enactment. Prior to BAPCPA and subsequent to its

6. § 109(h)(3). See infra note 17 for the full text of § 109(h)(3).
8. See infra Part II.
9. See infra Part III.
10. See infra Part IV.
11. See infra Part V.
12. See infra Part V.
passage, § 109 establishes residency and domicile requirements, requirement to be a debtor under particular chapters, and eligibility to file after a dismissal of a previously filed case. BAPCPA added a new eligibility requirement, § 109(h), under which an individual must receive credit counseling prior to filing a petition under any chapter.

14. § 109(a).
15. § 109(b) (delineating requirements to be a debtor under Chapter 7); § 109(c) (delineating requirements to be a debtor under Chapter 9); § 109(d) (delineating requirements to be a debtor under Chapter 11); § 109(e) (delineating requirements to be a debtor under Chapter 13); § 109(f) (delineating requirements to be a debtor under Chapter 12).
16. § 109(g).
17. Section 109(h) provides:

(h)(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).

(B) The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in subparagraph (A) shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter. Notwithstanding the preceding sentence, a nonprofit budget and credit counseling agency may be disapproved by the United States trustee (or the bankruptcy administrator, if any) at any time.

(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,
chapter of the Code. Effective for all bankruptcy cases filed after October 17, 2005, § 109(h) provides that to be a debtor, an individual must obtain a "briefing" from an approved nonprofit budget and credit counseling agency during the 180-day period before filing bankruptcy.\footnote{18} Further, § 109 sets out which agencies are eligible and what, in general terms, the briefing should entail.\footnote{19} A debtor has a duty to file "a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under § 109(h) describing the services provided to the debtor," as well as any resultant debt repayment plan.\footnote{20} To be excused from this filing requirement, a debtor must demonstrate that he or she meets one of the three previously discussed exceptions to the rule: § 109(h)(2), 109(h)(3), or 109(h)(4).\footnote{21} Section 109(h)(3) requires a debtor to file a certification demonstrating he or she is entitled to the exception.\footnote{22} Pursuant to Interim Federal Rule of Bankruptcy Procedure 1007(c), this certification should be filed with the petition.\footnote{23} There is some disagreement as to whether the timing of the filing of the certificate of credit counseling\footnote{24} or the certification seeking an exception from the same should be strictly construed based upon the requirements of Interim Federal Rule of Bankruptcy Procedure 1007(c).\footnote{25} However,

\footnote{18} § 109(h)(1).
\footnote{19} Id.
\footnote{20} Id. § 521(b). Section 521(b) is a new subsection under the BAPCPA amendments, which provides in pertinent part:

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

\footnote{21} Id. § 109(h)(1).
\footnote{22} § 109(h)(3).
\footnote{23} INTERIM FED. R. BANKR. P. 1007(c), in ADVISORY COMM. ON BANKR. RULES, 109TH CONG., REPORT ON BANKR. RULES 3 (2006).
\footnote{24} In re Warren, 339 B.R. 475, 479 (Bankr. E.D. Ark. 2006) (holding that absence of credit counseling certificate at the time of filing is a matter of "form not substance," citing Federal Rule of Bankruptcy Procedure 5005, which prohibits a clerk from refusing to accept for filing documents that are not presented in the proper form).
\footnote{25} In re Bass, No. 06-21011-L, 2006 WL 1593978, at * 3 (Bankr. W.D. Tenn. June 9, 2006) (indicating that although Interim Bankruptcy Rule 1007(c) provides for the filing of the certification with the petition, there is nothing in the Bankruptcy Code that sets a deadline for such filing and that Interim Rule 1007(a)(5) provides the court with the power to extend such filing dead-
these issues will be resolved with the adoption of the proposed amendment to Federal Rule of Bankruptcy Procedure 1007.26 The proposed rule provides both documents should be filed with the petition.27 Issues also exist as to the timing of the receipt of the counseling itself. For example, an individual's case can be dismissed if the individual obtained the credit counseling outside of the 180-day window or received the credit counseling on the same date that the petition was filed.28


27. Id. (further providing that if a debtor files a statement that he or she has received the counseling but does not have the certificate, the certificate can be filed within fifteen days after the order for relief).

28. In re Moon, No. 06-40607, 2007 WL 1087452 (Bankr. D. Idaho Apr. 5, 2007) (dismissing case when credit counseling received 271 days before the petition date); In re Ruckdaschel, 364 B.R. 724 (Bankr. D. Idaho 2007) (dismissing case when credit counseling received 187 days before the petition date); In re Gaikoski, No. 07-60444, 2007 WL 845876 (Bankr. N.D. Ohio Mar. 16, 2007) (dismissing case when credit counseling received more than 180 days before the petition date); In re Giles, 361 B.R. 212 (Bankr. D. Utah 2007) (dismissing case when credit counseling received 182 days before the petition date); In re Jones, 352 B.R. 813 (Bankr. S.D. Tex. 2006) (dismissing case when credit counseling received more than 180 days before the petition date); In re King, No. 06-41046, 2006 WL 1994679, at *3 n.1 (Bankr. N.D. Ind. June 21, 2006) (noting case could be dismissed when debtors obtained pre-petition counseling 181 days before the petition date). But see In re Bricksin, 346 B.R. 497 (Bankr. N.D. Cal. 2006). The Bricksin court held dismissal was inappropriate even though debtors obtained the credit counseling outside of the 180-day window because the debtors' "completion of credit counseling, and then ongoing performance under the debt repayment plan within the 180-day period prior to filing, fulfill[ed] the spirit of the statutory requirement." Id. at 502.

29. In re Cole, 347 B.R. 70 (Bankr. E.D. Tenn. 2006). The court noted the requirement that counseling be obtained at least one day prior to the filing date comported with the congressional purpose of allowing individuals to be educated about bankruptcy in advance of filing, stating "[t]his purpose would be thwarted by allowing a debtor to obtain a pre-petition counseling briefing on the same day that a bankruptcy petition is filed." Id. at 77. This statement becks the question of how congressional purpose is furthered by allowing for the "temporary exemption" in 11 U.S.C. § 109(h)(3)(B). See also In re Mills, 341 B.R. 106, 109 (Bankr. D. D.C. 2006); In re Murphy, 342 B.R. 671, 673 (Bankr. D. D.C. 2006) (noting debtor "inadvertently" complied with § 109(h) because she received credit counseling one day before petition date, noting that "when a statute requires an act to be done within a specified number of days prior to a fixed date, the last day, namely, the fixed date, is to be excluded . . . in making the calculation" (citations omitted)). But see In re Swanson, No. 06-00968-TLM, 2006 WL 3782906 (Bankr. D. Idaho Dec. 21, 2006); In re Moore, 359 B.R. 665 (Bankr. E.D. Tenn. 2006) (noting the interpretation not requiring a one-day waiting period is practical in light of the electronic age of the Internet and
As stated previously, an individual can avoid the pre-petition credit counseling requirement under one of three specific exceptions found in § 109(h)(2), (3), and (4). First, under § 109(h)(2), the pre-petition credit counseling requirement does not apply to those individuals who reside in a district where the United States trustee has determined 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" as imposed by § 109(h)(1). Second, § 109(h)(3)(A) provides the pre-petition credit counseling requirement "shall not apply" to a debtor who submits a certification, which: (1) describes exigent circumstances that merit a waiver; (2) states that the debtor requested such services from an approved agency, but was unable to obtain such services during the five day period beginning on the date that the debtor made the request; and (3) is satisfactory to the court. This Subsection has a further qualification, which states that the "exemption" provided for in § 109(h)(3)(A) "shall cease to apply" thirty days after filing or an additional fifteen days for cause shown. Third, § 109(h)(4) provides that the pre-petition credit counseling requirement "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."

Although § 109(h)(1) uses the same prefacing language of "shall not apply," each of the three subsections, § 109(h)(2), (3), and (4), provide for different levels of "exemption." Whether the three exceptions are waivers, exemptions, or deferrals is unclear because Con-
gress mislabeled the carve-outs or failed to label them at all; none of the foregoing terms are defined by the Code.\textsuperscript{34} Black’s Law Dictionary defines “defer” as “[t]o postpone; to delay.”\textsuperscript{35} “Waiver” is defined as “[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage.”\textsuperscript{36} “Exemption” is defined as “[f]reedom from a duty, liability, or other requirement; an exception.”\textsuperscript{37} Common usage incorrectly equates waiver with relinquishment of a right or an obligation. The distinction is that waiver is a relinquishment of a right or entitlement, whereas an exemption is the release from an obligation. The terms “waiver” and “exemption” in proper usage should refer to the object. If the object is a known right, then the appropriate word is “waive.” For example, the client waived his right to counsel. However, if the object is an obligation, the appropriate word is “exempt.” For example, the debtor was exempt (or excused) from paying the filing fees. Therefore, with regards to § 109(h), courts “waive” the right to require the counseling, thereby conferring an exemption. Importantly, the wording is not merely a distinction without a difference but holds varying results whichever is implied.

Neither § 109(h)(2) nor § 109(h)(4) use any label for the carve-out. However, using the analysis above, § 109(h)(2) provides for an exemption because in districts where the United States trustee has determined that agencies are not available, an individual is automatically excluded/exempted from the pre-petition credit counseling requirement.\textsuperscript{38} However, because the United States Trustee Program has set

\textsuperscript{34} See generally id. § 101.

\textsuperscript{35} Black’s Law Dictionary 454 (8th ed. 2004). See In re Cleaver, 333 B.R. 430, 434 n.5 (Bankr. S.D. Ohio 2005) (noting the United States Supreme Court’s use of dictionaries to determine the common meaning of words that are not defined in the Code) (citations omitted).

\textsuperscript{36} Black’s Law Dictionary 1611 (8th ed. 2004).

\textsuperscript{37} Black’s Law Dictionary 612 (8th ed. 2004).

\textsuperscript{38} This exemption is further limited in § 109(h)(2)(B), which requires a review of a determination made under Subsection 109(h)(2)(A) within one year. This provision seems to eradicate the exemption, if one ever existed. However, on September 21, 2006, the United States Trustee Program conferred an exemption from the credit counseling requirement and the debtor education requirement to individuals in areas affected by Hurricane Katrina, specifically the Eastern, Middle, and Western Districts of Louisiana and the Southern District of Mississippi. See Press Release, U.S. Tr. Program/Dep’t of Justice, U.S. Trustee Program Extends Waiver of Credit Counseling and Debtor Education Requirements in Areas Affected by Hurricane Katrina (Sept. 21, 2006), available at http://www.usdoj.gov/ust/ eo/public_affairs/press/docs/pr20060921.htm. The United States Trustee Program withdrew this exemption for the Middle and Western District of Louisiana and the Southern District of Mississippi effective March 10, 2008. U.S. Tr. Program/Dep’t of Justice, Credit Counseling & Debtor Education Information, http://www.usdoj.gov/ust/ eo/bapcpa/ccde/index.htm (last visited Mar. 30, 2008).
forth an approved list for every district in the United States, it is unlikely that this Section will allow many, if any, individuals to escape the pre-petition credit counseling requirement.

Arguably, § 109(h)(4) provides for an exemption as well, even though an individual’s entitlement to an exemption is not automatic. An exemption is based upon a specific showing following notice and a hearing on the issue. Although this Section specifically states the credit counseling requirement does not apply to those individuals who fall under the definitions of § 109(h)(4), there is a quagmire inherent in the language of this Section because § 109(h)(1) specifically provides a carve-out for those individuals who meet the definitions of § 109(h)(2) and (3), but not § 109(h)(4). The exclusion of § 109(h)(4) appears to be a legislative oversight because there would be no logical reason to exclude it, and this language provides yet another example of poor legislative drafting.

Unlike § 109(h)(2) and (4), § 109(h)(3) uses the terms “waiver” and “exemption” interchangeably, when neither term is appropriate. First, in § 109(h)(3)(A)(i), the language requires a showing that the exigent circumstances “merit a waiver.” Then, twice in § 109(h)(3)(B) it states that there is “an exemption” under subparagraph (A). Arguably, the reference to “waiver” in § 109(h)(3)(A)(i) can be equated to the court’s “waiver” of its known legal right to require the pre-petition credit counseling. The more problematic language is the reference to an “exemption” in § 109(h)(3)(B) because the individual who meets the three-part test under § 109(h)(3)(A) is not entitled to an exemption in the true sense of the word but is still required to obtain the briefing post-petition. Therefore, there is not a waiver by the court or an exemption to the individual, but in reality, there is a deferral or a temporary exemption made upon the individual’s satisfactory showing under § 109(h)(3)(A). One court has even questioned whether the

41. § 109(h)(1) ("Subject to paragraphs (2) and (3) . . .."). See Dixon v. LaBarge (In re Dixon), 338 B.R. 383, 386 (B.A.P. 8th Cir. 2006) (noting the "Gordian Knot" this situation presents in that "the language of § 109(h)(1) and (4) seem to preempt each other’s applicability").
42. § 109(h)(3)(A)(i).
43. § 109(h)(3)(B).
counseling is required at all, noting that the “shall not apply” language in § 109(h)(3)(A) “appears to indicate that if the three part test found in that section is met, the debtor need not seek credit counseling at all.”

Having determined that both § 109(h)(2) and § 109(h)(4) provide for complete exemptions from the pre-petition credit counseling requirement and § 109(h)(3) provides merely for a temporary exemption, deferral, or an extension, one questions why Congress chose to provide the exemption to one subset of debtors and not another. Additionally, it is unclear whether this temporary deferral for only one subset of debtors furthers Congress’s goal of pre-petition education and financial literacy.

III. DOES § 109(h)(3) FURTHER A DEFINED LEGISLATIVE PURPOSE?

Rooted in the 1997 Recommendations from the National Bankruptcy Review Commission and echoed in the Congressional debates over BAPCPA, Congress’s goal was clear: heighten financial literacy in order to reduce bankruptcy filings. However, that goal is not being met by the pre-petition credit counseling requirement that Congress enacted. First, the “temporal deferral” of the pre-petition credit counseling requirement found in § 109(h)(3)(B), allowing for the counseling to be held post-petition, does not aid in steering individuals away from bankruptcy. Second, what limited data does exist suggests that individuals obtaining the counseling pre-petition are still turning to bankruptcy as their only recourse.

The goal of financial literacy has a long history of unrealized potential. Notably, in 1997, the National Bankruptcy Review Commission (“Commission”), which laid the groundwork for many of the BAPCPA Amendments, recommended “[a]ll debtors in both Chapter 7 and in Chapter 13 should have the opportunity to participate in a
financial education program."\textsuperscript{47} However, this Recommendation focused more on post-petition counseling, albeit recognizing the "emerging consensus for the need" for pre-petition counseling.\textsuperscript{48} The Commission noted there should be support for "financial education programs that might avert financial crises in the first place. . . . Improving individuals' knowledge of financial matters and money management can and should be encouraged on several fronts."\textsuperscript{49} Specifically addressing the post-petition education programs, the Recommendation did not focus on mandatory programs, but on "voluntary" programs, stating that "[m]andatory programs may be unduly coercive and difficult to administer. Mandatory education might also impose a hardship on a debtor whose job interferes with the class schedule, or who lives in a rural area."\textsuperscript{50}

In addition to the recommendations in 1997, the legislative history on the pre-petition credit counseling requirement of BAPCPA provides insight into the overarching purpose and goals intended by the requirement; however, it provides little insight into the specific language adopted by Congress. The main goals, echoed through many of the legislators’ comments, were financial literacy and exploration of alternatives to bankruptcy in order to avoid having bankruptcy as one’s only answer. Succinctly stated and repeated by courts addressing the issue, “[BAPCPA] requires debtors to receive credit counseling before they can be eligible for bankruptcy relief so that they will make an informed choice about bankruptcy, its alternatives, and consequences.”\textsuperscript{51} Congress has indicated financial education is a fundamental goal, expressing the “Sense of the Congress’ that personal finance

\textsuperscript{47} National Bankruptcy Review Commission, Report of the National Bankruptcy Review Commission, Recommendation 1.1.5, Financial Education, at 114 (1997) [hereinafter Commission Report]. Notably, individuals filing Chapter 11 were excluded from the Recommendation. However, under § 109(h)(1), this oversight was remedied by requiring each “individual” to receive the pre-petition credit counseling. § 109(h)(1). The constitutionality of requiring individuals filing Chapter 11 to obtain pre-petition credit counseling has been upheld. Hedquist v. Fokkena (In re Hedquist), 342 B.R. 295, 298 (B.A.P. 8th Cir. 2006); In re Watson, 332 B.R. 740, 747 (Bankr. E.D. Va. 2005); In re Tomco, 339 B.R. 145, 157 (Bankr. W.D. Pa. 2006).

\textsuperscript{48} Commission Report, supra note 47, at 114.

\textsuperscript{49} Id. at 116.

\textsuperscript{50} Id. The Commission also noted “[v]oluntary programs are the preferable course of action until various types of postbankruptcy education programs can be evaluated.” Id. This comment foreshadows some of the very problems associated with the § 109(h)(1) requirements, problems of implementing a new mandatory program without its prior testing in a pilot program.

curricula be developed for elementary and secondary education programs. If we teach our children, early-on, how to manage money, credit, and debt, they can become responsible workers, and heads of households and keep their parents out of bankruptcy court.\textsuperscript{52}

As noted previously, the laudatory goal of financial literacy is not at issue, but the means of implementing it is. If one is not open to an idea, the effort required to reach that individual is extraordinary, if not insurmountable. Attempting to teach a person about finances and creating a budget when the individual is facing imminent creditor collection activity is futile. However, the period post-petition or "pre-discharge" is a teachable moment when an individual can learn from his or her past mistakes, so as not to repeat them in the future. Although the pre-petition credit counseling provisions were meant to "help people avoid the cycle of indebtedness,"\textsuperscript{53} this purpose could be fulfilled by a post-petition financial management course, and would not be of service to an individual five days before an imminent creditor collection activity; nor would the purpose be fulfilled within the thirty to forty-five days post-petition should an individual obtain the "temporary exemption" or "deferral" in § 109(h)(3)(B). Therefore, the primary goal of educating individuals about the alternatives to bankruptcy and ways to avoid having bankruptcy as one's only option, is not being met by the "temporary deferral" of such counseling.

Furthermore, statistics indicate that even for those individuals who do receive the counseling pre-petition, this counseling is seen merely as a hurdle to the filing of the petition and not as an educational tool. In realistic estimation, it was envisioned the pre-petition credit counseling requirement might avert only a mere five to ten percent of bankruptcy filings.\textsuperscript{54} Actual data gathered subsequent to the enactment of BAPCPA indicated the percentages were closer to two to three percent.\textsuperscript{55} Therefore, the second goal of educating individuals pre-petition in order to reduce the numbers of bankruptcy filings has not been met.

\textsuperscript{52} 151 CONG. REC. H2063-01, 2070 (2005).
\textsuperscript{53} 151 CONG. REC. S1726-01, 1786 (2005).
\textsuperscript{54} 151 CONG. REC. S2053-08, 2054 (2005).
\textsuperscript{55} Out of 66,335 consumers surveyed by the National Association of Consumer Bankruptcy Attorneys, a “paltry” 3.3 percent of individuals who received the credit counseling qualified for alternative, non-bankruptcy, debt management treatment. In re Elmendorf, 345 B.R. 486, 490 (Bankr. S.D.N.Y. 2006). See also U.S. GOV'T ACCOUNTABILITY OFFICE, BANKRUPTCY REFORM: VALUE OF CREDIT COUNSELING REQUIREMENT IS NOT CLEAR 22 (2007) (noting averages vary between two to three percent of individuals who enter debt management plans following a credit counseling session).
Because it was a new provision, the credit counseling requirement was sure to encounter unforeseen problems; however, Congress did not impose a monitoring obligation upon the United States Trustee Program like it did for the pilot financial management course.\textsuperscript{56} The United States Government Accountability Office issued a report in April of 2007 recommending the United States Trustee Program, although not statutorily required to do so, track and monitor the results of the pre-petition counseling sessions because "such data would be useful in determining whether the counseling requirement is meeting its intended goal."\textsuperscript{57} Congress has an obligation to assess certain provisions and their effectiveness and to revise them upon consideration. Congress should do that very thing: review the nascent history of § 109 and its tortured path through the court system and revise the provisions by providing "honest but unfortunate debtors" with a fresh start.

IV. CRITICISM BY THE COURTS AND COMMENTATORS

Faced with the new amendments, courts and commentators have been less than supportive of the pre-petition credit counseling requirement and, in many instances, highly critical of the new requirement. Issues, such as purpose, utility, costs, and ethics, arise. With regard to the overall purpose, one court has opined "[i]t was apparently an agenda to make more money off the backs of the consumers in this country. . . . [T]o call the Act[ ] a 'consumer protection' Act is the grossest of misnomers."\textsuperscript{58} Another court has stated:

This facially well-intentioned section of the BAPCPA has evolved into an expensive, draconian gate-keeping requirement that has prevented many deserving individuals from qualifying for bankruptcy relief. The credit counseling requirement has not proven to be of assistance to debtors in seeking relief outside of the bankruptcy context . . . .\textsuperscript{59}

Issues as to the utility of the requirement also arise.\textsuperscript{60} One court has described the pre-petition credit counseling requirement as "the most outrageous fleecing of consumer debtors in this Court’s memory—a
perfunctory exercise with little or no substance which leaves a putative debtor $50-$100 the poorer.”61 In its 2007 Report, the United States Government Accountability Office specifically focused on the value of the pre-petition credit counseling requirement, finding in its research that “it is unclear whether the credit counseling requirement is achieving its intended purpose.”62 Its research indicated “the timing of the counseling conducted to fulfill the requirement of the Bankruptcy Act could mitigate its value” and the requirement was seen as “an administrative obstacle rather than a useful exercise.”63 A specific issue of utility is what is actually involved or to be accomplished in the “briefing.” For example, it has been posited that debtors could be “misled about their opportunities for relief under the Code” because the related budget analysis performed during the credit counseling could use different criteria than those criteria used under a means test analysis.64

Furthermore, cost issues arise. The Code provides “if a fee is charged for counseling services, [nonprofit budget and credit counseling agencies shall] charge a reasonable fee, and provide services without regard to ability to pay the fee.”65 However, what is defined as a “reasonable fee,” and does this provide a requirement for the credit counseling agency to provide services without payment?66 In its Re-

not had success with credit counselors in the past and because her case was too complicated did not excuse her from the pre-petition credit counseling requirement).


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. In both cases, it is generally too late for either type of counseling to produce a beneficial result.

Id.


63. Id. at 23-24.

64. Leslie E. Linfield, Strange Bedfellows: Bankruptcy Reform and Mandatory Credit Counseling, 24 AM. BANKR. INST. J. 12, 12 (2005) (citing Gordon Bermant & Ed Flynn, Planning for Change: Credit Counseling at the Threshold of Bankruptcy, 20 AM. BANKR. INST. J. 1 (2001)). This confusion is because credit counseling agencies may not be using the IRS expense guidelines, which are used in a means test analysis. Id. The majority of debtors fair better under Chapter 13 plans than under debt management plans; therefore, a debtor’s better choice is still bankruptcy. Id.


66. See Linfield, supra note 64 (“Some NFCC member agencies charge or request a contribution for counseling (the average amount is $15).” (quoting statement from Susan Keating, President and CEO of the National Foundation for Credit Counseling (NFCC))). But see In re
port, the United States Government Accountability Office concluded that while the fees charged by credit counseling agencies were generally considered reasonable, averaging fifty dollars per session, the fee waiver policies of the agencies varied greatly. Due to the lack of clear guidelines from the United States Trustee Program and the evidence of varying practices of credit counseling agencies with regard to fee waivers, the Report included a specific recommendation that the United States Trustee Program issue "formal guidance on what constitutes 'ability to pay.'" To date, no guidelines have been promulgated.

Additionally, ethical concerns focus on both debtors' counsel and the credit counseling agencies themselves. First, there is the potential issue of competition between credit counseling agencies and debtors' counsel, where both seek to provide services to the same client. Second, the issue of referral fees to attorneys raises ethical issues like practicing with non-lawyers, fee sharing, and attorney-run credit counseling agencies. Third, the creditability of the credit counseling agencies also arises. The Chair of the Senate Permanent Subcommittee on Investigations, Norm Coleman, stated:

Over the past several years, the credit counseling industry has seen the emergence of new and aggressive credit counseling agencies. The practices of these new agencies resulted in consumer complaints of excessive fees, pressure tactics, nonexistent counseling and education, promised results that never came about, ruined credit ratings, poor service and in many cases being left in worse debt than before they initiated their debt-management plan.

Regardless of the negative public opinion of the pre-petition credit counseling requirement, some believe the "briefing" mandated by § 109(h) may be beneficial in the form of: (1) a non-bankruptcy debt

Westenberger, No. 0610477-BKC-RBR, 2006 WL 1105008 (Bankr. S.D. Fla. Apr. 25, 2006) (credit counseling agency was not willing to provide counseling until debtor's out of town check cleared its bank account); see also infra note 155 and accompanying text, discussing cases where credit counseling agencies refused to waive fees.


68. Id. at 41.

69. Linfield, supra note 64 (noting that the credit counseling agency and the consumer bankruptcy attorney offer different alternatives to the same potential client, either a debt repayment plan or a bankruptcy case respectively).

70. Id.

71. Legislative Highlight, Senate Committee Urges More Cleanup of Credit Counseling, 24 Am. Bankr. Inst. J. 3 (2005). See also In re Elmendorf, 345 B.R. 486, 490 n.3 (Bankr. S.D.N.Y. 2006) (noting concern over actions of credit counseling agencies, stating: "Perhaps Congress should have taken a closer look at this industry before placing it between a debtor and the succor of the federal bankruptcy court.") (emphasis in the original).
management plan [DMP] based upon the means test showing a mandatory Chapter 13 filing, which will keep individuals out of bankruptcy; (2) a deterrent to unsecured creditors to force bankruptcy and an incentive to unsecured creditors to comply with a DMP under 11 U.S.C. § 502(k)(1); (3) coordinated efforts by credit counseling agencies through HUD-approved housing counseling agencies and lender loss mitigation departments in cases involving foreclosures; and (4) an escape from economic costs of filing fees, etc. associated with BAPCPA. However, a more in-depth analysis of some of these alleged benefits demonstrates that they represent a simplified view of the process.

First, as stated previously, credit counseling agencies may not use the same IRS guidelines as used in a means test analysis. Second, regardless of an individual’s ability to avoid any stigma attached to a bankruptcy filing, many seek bankruptcy relief for the protection of the automatic stay, which would not be realized outside of the bankruptcy arena. Last, there continues to be economic costs associated with non-bankruptcy alternatives, including the counseling fee, monitoring fee, and other costs, such as if the DMP fails and the debtor must file bankruptcy.

Regardless of the position taken, the courts are faced with implementing this new Code provision. If the courts are to give any substance to the language of the provision, there needs to be a consensus on the meaning of the terms. By giving substance to the language and concrete guidelines for individuals prepared to file, a real standard can be set. A concrete standard, like those provisions of § 109(h)(2) and (4), should result in a true exemption instead of a temporary exemption or deferral.

V. INCONSISTENT APPLICATION BY THE COURTS

Since its effective date, BAPCPA has presented the courts with many issues of first impression, including the exception to the prepetition credit counseling requirement in § 109(h)(3). Courts have employed several different interpretations as to the form of the certification under § 109(h)(3)(A), the definition of “exigent circumstances,” the requirements of § 109(h)(3)(A)(ii), and the definition of “satisfactory to the court.” These conflicting interpretations demon-

73. These issues are the main focus of differing interpretations addressed in this Article but by no means demonstrate an exhaustive list. Although outside the scope of this Article, a major source of debate centers around the ultimate effect of an individual’s failure to comply with the
strate a need to revise this confusing section. Once the ambiguities are addressed and guidelines set forth, the meeting of the statutory elements of § 109(h)(3)(A) should result in a complete exemption, similar to its counterpart in § 109(h)(4), wherein additional guidelines exist in the Section itself to provide guidance to courts interpreting the words of § 109(h)(4). This next Section attempts to propose an outline of what should suffice under § 109(h)(3)(A) to obtain the exemption.

**A. Debate over the Form of Certification Under § 109(h)(3)(A)**

One of the initial hurdles under the pre-petition credit counseling requirement is the mere formatting of the certification requesting an exception under § 109(h)(3)(A). Several courts have adopted the standard enunciated in *In re Hubbard* in determining what is to be included in a certification under § 109(h)(3)(A); it requires a showing of "the facts underlying any alleged exigent circumstances, the date(s) on which the debtor requested credit counseling, which agencies were contacted to render the services, why the debtor believes that the services could not be obtained before the filing, and when the services were rendered." Notably, the statute is silent as to the effect of a filing of a petition by an individual who is ineligible under § 109(h), thereby leaving that decision to the courts, a "Hobson's choice," at best, between dismissal of the case or striking the petition. *Elmendorf*, 345 B.R. at 501 n.21. For a thorough analysis of this issue, see Joseph Satorius, *Strike or Dismiss: Interpretation of the BAPCPA 109(h) Credit Counseling Requirement*, 75 Fordham L. Rev. 2231 (2007). An additional twist to this controversy results in debtors seeking to use their failure to comply with the mandatory pre-petition credit counseling requirement as a method by which to dismiss their own cases. See Mendez v. Salven (*In re Mendez*), 367 B.R. 109 (B.A.P. 9th Cir. 2007); *In re Parker*, 351 B.R. 790 (Bankr. N.D. Ga. 2006). In order to circumvent the situation where a debtor could utilize the Bankruptcy Code for improper purposes, these courts have held the debtors waived strict compliance with the pre-petition credit counseling requirement. *Mendez*, 367 B.R. at 118; *Parker*, 351 B.R. at 799.

74. See infra notes 105-13 and accompanying text.

75. In addition to the diverging views on the form of the certification, courts have also addressed the appropriate nomenclature of the document itself. In *In re Wallert*, the court found the debtor's attorney incorrectly entitled the document submitted under § 109(h)(3)(A) a certificate. 332 B.R. 884, 887 n.3 (Bankr. D. Minn. 2005). The court held this label was incorrect because § 109(h)(3)(A) specifically states a debtor's request for an exemption was to be made by "certification." *Id.* (emphasis in original). The court found the statement from a credit counseling agency, demonstrating the completion of such briefing, was a certificate. *Id.* The court noted "[t]here was no apparent basis for the distinction in nomenclature on the fact of the Act. Nonetheless, if anything was to be gleaned from the facial complexity of so many of the Act's provisions, it is that the very devil is in the details." *Id.* See also *In re Rodriguez*, 336 B.R. 462, 470 n.18 (Bankr. D. Idaho 2005). The *Rodriguez* court found the title of the document, a "Request for Waiver of Timely Filing of Title 11 U.S.C. § 109(h) Credit Certificate," was of "limited significance" if the document followed the certification requirements of 28 U.S.C. § 1746. *Id.* at 464, 470 n.18. The court also noted Congress used titles such as certification, declaration, and affidavit interchangeably, advising against "exalt[ing] form over substance." *Id.* at 470 n.18 (citations omitted).
are reasonably likely to be obtained."

Although courts have been generally able to agree on this standard, there are divergent views on the format of the certification. Some courts have required that the certification under § 109(h)(3)(A) be made under penalty of perjury, whereas others impose less exacting requirements. Unfortunately, the differing interpretations will only be multiplied by the amended Official Voluntary Petition Form, adopted in October of 2006.

The courts requiring the certification be made under penalty of perjury base their conclusion on the requirements of 28 U.S.C. § 1746.80

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76. In re Hubbard, 332 B.R. 285, 289 (Bankr. S.D. Tex. 2005). As to the form of the certification, the court found an unverified motion did not suffice and, without a proper certification, the motion was "fatally defective." Id. For cases citing the Hubbard standard, see, e.g., In re Mingueta, 338 B.R. 833, 838 n.9 (Bankr. C.D. Cal. 2006); In re Rodriguez, 336 B.R. at 472 n.22; In re Cleaver, 333 B.R. 430, 434-35 (Bankr. S.D. Ohio 2005); In re Talib, 335 B.R. 417, 421 (Bankr. D. Mo. 2005). Additional standards provide that in a certification, a debtor should:

[F]orthrightly address the extent of his or her knowledge of the credit counseling requirement; the contacts if any with lawyers, petition preparers or other providing advice, and whether such advice included information regarding the credit counseling requirement; and the nature and timing of the event(s) that create the exigency for filing.

Rodriguez, 336 B.R. at 475.

77. However, it is clear Official Bankruptcy Form 23, 11 U.S.C. (Oct. 2006), entitled "Debtor's Certification of Completion of Instructional Course Concerning Personal Financial Management," which is the form used to request an exemption from the personal financial management course, cannot be deemed a request or "certification" under § 109(h)(3)(A). See In re Swiatkowski, 356 B.R. 581, 584 (Bankr. E.D.N.Y. 2006).


79. See, e.g., In re Graham, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005). The court noted:

The failure of Congress to require expressly that a debtor adhere to 28 U.S.C. § 1746 when filing his or her motion under § 109(h)(3)(A) prevents this Court from imposing such stringent requirements upon a debtor. Instead, this Court finds that "certification" simply means that a debtor must sign his or her motion requesting such an extension.

Id.; Cleaver, 333 B.R. at 434.

80. 28 U.S.C. § 1746 (2006). Section 1746 provides in pertinent part:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

Id.
Courts requiring strict compliance with that Section argue that by the choice of the terminology “certification” in § 109(h)(3)(A), Congress obviously envisioned more than a mere “garden-variety” motion signed by the debtor’s attorney to suffice. 81 Although these courts require strict compliance with § 1746, other courts do not always require form over substance.

Various rationales exist for not imposing the exacting requirements of § 1746 in a certification. First, § 109(h)(3)(A)’s requirement of a “certification” is not the exact language used in 28 U.S.C. § 1746. 82 Second, the requirement that documents to be signed under penalty of perjury, found in Federal Rule of Bankruptcy Procedure 1008, does not specifically include such certifications. 83 Third, a synthesis of the dictionary definitions of “certification,” “certify,” and “attest” 84 pro-

81. Rodriguez, 336 B.R. at 469. Although the court acknowledged that by signing a motion, either a debtor or his attorney were “certifying” that the allegations had evidentiary and factual support under Federal Rule of Bankruptcy Procedure 9011, the court found “§ 109(h)(3)(A) requires more than the implicit certifying effect of Rule 9011.” Id. However, the court allowed the debtors, after a hearing on their attorney’s “request” under § 109(h)(3)(A), to remedy the inadequate submissions due to the matter being one of first impression, noting such leniency would not be provided in future cases. Id. at 474 n.30. For other cases requiring a certification to meet the standards of § 1746, see Hubbard, 333 B.R. at 376 (declining “to read the word ‘certification’ to mean merely that a motion is filed that makes certain allegations. Congress obviously had a meaning that extended beyond the mere filing of a motion. The fact that some of the motions say that they are certifications does not make them so.”). See also Dansby, 340 B.R. at 567. The court focused the bar’s attention on the court’s suggested forms for certification under § 109(h), which contain the oath as set forth in 28 U.S.C. § 1746. Id. The court found that because the certification was an “important document,” it needed to include the normal certification language “required by debtors in other initial filings.” Id. However, the court ultimately did not impose these requirements on those debtors. Id. See also In re Afolabi, 343 B.R. 195, 198 n.2 (Bankr. S.D. Ind. 2006) (noting that the certification form for § 109(h)(3)(A) on the court’s website contained the oath).


83. Id. Federal Rule of Bankruptcy Procedure 1008 provides “[a]ll petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.” FED. R. BANKR. P. 1008. The Talib court found additional support for this position in the proposed Official Bankruptcy Form 23 styled Debtor’s Certification of Completion of Instructional Course Concerning Personal Financial Management, which was also captioned a “certification,” and which was not set up to be signed under penalty of perjury. Talib, 335 B.R. at 420 n.3. The court noted the Interim Federal Rule of Bankruptcy Procedure 1007(b)(7) required the filing of this “statement,” with regards to the pre-discharge counseling required under 11 U.S.C. § 727(a)(11). Id. However, even though such a “statement” should have been sworn to as required by Rule 1008, the Proposed Official Form 23 did not so require. Id.

84. See In re Cleaver, 333 B.R. 430, 434 (Bankr. S.D. Ohio 2005). The Cleaver court utilized the following definitions: “[1]n Black’s Law Dictionary, a certification is ‘1. The act of attesting. 2. The state of having been attested. 3. An attested statement.’” Id. at 433 (citing BLACK’S LAW DICTIONARY 220 (7th ed. 1999)). The court found that “attest” was defined as “[1] To bear witness; testify < attest to the defendant’s innocence>. 2. To affirm to be true or genuine; to authenticate by signing as a witness < attest the will>.” Id. at 434 (citing BLACK’S LAW DICTIONARY 124 (7th ed. 1999)). The court further found Webster’s Third New International Dictionary
vides a certification is to be "at a minimum, a written statement that the signer affirms or attests to be true." Yet another reason for divergence from the strict requirements of § 1746 is, like any other filing in a bankruptcy case, the certification has to comply with the requirements of Federal Rule of Bankruptcy Procedure 9011 and would be presumed by a court to be "truthful, accurate, and made in good faith."

Although the Official Voluntary Petition Form, adopted subsequent to the enactment of BAPCPA, could have addressed and clarified some of the ambiguities with the formatting of the certification, the revised Voluntary Petition Form only appears to complicate the issue. Prior to its amendment in October of 2006, the Official Form required a debtor to choose between two options: a completion of a credit counseling course or a waiver based upon exigent circumstances, with an attached certification explaining. Again, misleading nomenclature came into play. Although most attorneys who had been practicing under BAPCPA realized the requirements to be entitled to an exception, pro se debtors were the most in danger of misconstruing this simplified form. As they likely understood it, if they had not received the credit counseling prior to filing, then they were in need of a waiver. By merely checking the box for waiver, they had not fulfilled the requirements of § 109(h)(2), (h)(3), or (h)(4). Although the instructions sheet for the Voluntary Petition provided a summary of the exceptions to the pre-petition credit counseling requirement, typical pro se debt-

"define[d] 'certify' as 'to attest esp. authoritatively or formally.'" Id. (citing WEBSTER's THIRD NEW INT'L DICTIONARY 362 (2002)). See also In re Fields, 337 B.R. 173, 179 n.6 (Bankr. E.D. Tenn. 2005) (using dictionary definitions to divine the meaning of certification).

85. Cleaver, 333 B.R. at 434. The court found the debtor's motion, intended as such a certification under § 109(h)(1), "marginally [came] within this minimum definition," although it was neither an affidavit, nor a declaration under oath, and did not contain the typical certification language. Id. However, the court found it to be sufficient because it stated "some facts" and was signed by the debtor and his attorney. Id. The court found the motion signed by both the debtor and his attorney indicated that the pleading was so signed by the debtor to verify the truth of its contents, as was the local custom in the jurisdiction. Id.

86. In re Henderson, 339 B.R. 34, 38 (Bankr. E.D.N.Y. 2006). Federal Rule of Bankruptcy Procedure 9011 requires that any filing by an attorney or unrepresented parties not be presented for any improper purpose and that it must have evidentiary support. FED R. BANKR. P. 9011.

87. Official Bankruptcy Form 1, 11 U.S.C. (Oct. 2005). Specifically, the form provided:

Certification Concerning Debt Counseling by Individual/Joint Debtor(s)

[ ] I/we have received approved budget and credit counseling during the 180-day period preceding the filing of this petition.

[ ] I/we request a waiver of the requirement to obtain budget and credit counseling prior to filing based upon exigent circumstances. (Must attach certification describing.).

Id.

88. The Instructions for Completing Official Form 1, Voluntary Petition, in the section titled Certification Concerning Debt Counseling by Individual/Joint Debtors, states as follows:
ors would never knew that, in order to be entitled to such waiver, they were required to meet the all of statutory elements of the exceptions, specifically, the three elements required under § 109(h)(3)(A).

Therefore, apparently to alleviate some of this confusion, a revised Official Voluntary Petition Form was adopted, replacing the former two boxes on the prior form.89 Labeled “Exhibit D,” this portion of the Voluntary Petition now requires every individual debtor to check a box, indicating he or she, or, if the case is joint, each debtor, has completed and signed an Exhibit D that is attached and made a part of the petition.90 Exhibit D, adopted in October of 2006, entitled “Ex-

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Before an individual or joint debtor can file a bankruptcy case, section 109(h) of the Bankruptcy Code requires the debtor to receive a briefing from an approved nonprofit budget and credit counseling agency. The briefing may be an individual or group briefing and may be conducted in person, by telephone, or over the Internet. The briefing must outline the opportunities for available credit counseling and must assist the debtor in performing a related budget analysis. The clerk of the bankruptcy court maintains a list of approved of credit counselors in the district that is available to the public at the office of the clerk and on the court’s website. 11 U.S.C. § 111(a)(1). Interim Bankruptcy Rule 1007(c) requires the debtor to file with the petition a certificate from the credit counseling service describing the services provided and a copy of a debt repayment plan developed through the credit counseling service. Exceptions to this requirement are limited to those provided in 11 U.S.C. §§ 109(h)(2) and (h)(4). If a debtor requests credit counseling and is unable to obtain the services required by the Code within five days of requesting them, § 109(h)(3) provides a limited waiver of the credit counseling requirement. The debtor must attach to the petition a certification of “exigent circumstances,” and obtain the credit counseling within 30 days after filing the petition. The debtor should check the appropriate box, based on whether the debtor has obtained the required counseling or not, and attach the required documents.


89. The 2006 Committee Notes regarding the Voluntary Petition, Form 1, provides in part: Exhibit D replaces the section formerly labeled “Certification Concerning Debt Counseling by Individual/Joint Debtor(s).” Early cases decided under the 2005 amendments to the Bankruptcy Code indicate that individual debtors may not be aware of the requirement to obtain pre-[petition credit counseling, the few and very narrow exceptions to that requirement, or the potentially dire consequences to their efforts to obtain bankruptcy relief if they fail to complete the requirement. Accordingly, page 2 of the petition instructs individual debtors to attach a completed Exhibit D and makes it clear that each spouse in a joint case must complete and attach a separate Exhibit D. Exhibit D itself includes a warning about the requirement to obtain counseling and the consequences of failing to fulfill this requirement. It further provides checkboxes and instructions concerning the additional documents that are required in particular circumstances, in order to minimize the number of cases which the court must dismiss for ineligibility.


Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)
hhibit D-Individual Debtor’s Statement of Compliance with Credit Counseling Requirement,” requires a debtor to choose one of five boxes. The five boxes are: (1) a statement that credit counseling was

[ ] Exhibit D completed and signed by the debtor is attached and made a part of this petition.
[ ] If this is a joint petition:
[ ] Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Id.

91. The form reads as follows:

**Official Form 1, Exhibit D (10/06)**

**UNITED STATES BANKRUPTCY COURT**

**District of**

**In re** Case No. (if known)

**EXHIBIT D - INDIVIDUAL DEBTOR’S STATEMENT OF COMPLIANCE WITH CREDIT COUNSELING REQUIREMENT**

Warning: 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. If your case is dismissed and you file another bankruptcy case later, you may be required to pay a second filing fee and you may have to take extra steps to stop creditors’ collection activities.

*Every individual debtor must file this Exhibit D. If a joint petition is filed, each spouse must complete and file a separate Exhibit D. Check one of the five statements below and attach any documents as directed.*

[ ] 1. Within the 180 days before the filing of my bankruptcy case, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, and I have a certificate from the agency describing the services provided to me. Attach a copy of the certificate and a copy of any debt repayment plan developed through the agency.

[ ] 2. Within the 180 days before the filing of my bankruptcy case, I received a briefing from a credit counseling agency approved by the United States trustee or bankruptcy administrator that outlined the opportunities for available credit counseling and assisted me in performing a related budget analysis, but I do not have a certificate from the agency describing the services provided to me. You must file a copy of a certificate from the agency describing the services provided to you and a copy of any debt repayment plan developed through the agency no later than 15 days after your bankruptcy case is filed.

[ ] 3. I certify that I requested credit counseling services from an approved agency but was unable to obtain the services during the five days from the time I made my request, and the following exigent circumstances merit a temporary waiver of the credit counseling requirement so I can file my bankruptcy case now. [Must be accompanied by a motion for determination by the court.][Summarize exigent circumstances here.]

If the court is satisfied with the reasons stated in your motion, it will send you an order approving your request. You must still obtain the credit counseling briefing within the first 30 days after you file your bankruptcy case and promptly file a certifi-
obtained within the 180 days pre-petition and that a certificate from an approved credit counseling agency is attached; (2) a statement that credit counseling was obtained within the 180 days pre-petition and that a certificate from an approved credit counseling agency is not attached (therefore, further requiring a debtor to obtain the certificate and file the same with the court within fifteen days); (3) a statement seeking a temporary waiver under § 109(h)(3) (therefore, requiring the debtor to attach a motion for determination by the court); (4) a statement demonstrating that the debtor is not required to complete the counseling because he or she meets the statutory requirement of § 109(h)(4); or (5) a statement demonstrating the debtor is not required to complete the counseling because he or she meets the statutory requirements of § 109(h)(2). The end of Exhibit D includes certification language, similar to that found in § 1746 and requires the debtor's signature.

Exhibit D, adopted in October of 2006, addressed many of the previously voiced concerns as to the formatting of the certification. It included the "penalty of perjury" language of § 1746 and had to be
signed by the debtor, thereby eradicating the controversy over formatting described previously. However, the requirement of a separately filed motion was a new addition to the form. This requirement was not part of the statute itself. Although a motion is also required under the § 109(h)(4) box, the procedure that a court decides this issue after notice and hearing is built into the language of § 109(h)(4) explicitly.94 A motion for a § 109(h)(3) request served a record-keeping purpose, allowing a court to enter an order upon a properly filed motion, thereby alleviating some confusion on dockets and clerks’ offices nationwide. But, the motion created more confusion over procedural and substantive requirements for a request under § 109(h)(3). As to the procedural requirements, the motion could have imposed an additional burden on already confused debtors. First, pro se debtors could have been confused as to the formatting and drafting of motions. Also, service of the motion could have resulted in yet another hurdle for a pro se debtor. Second, if represented, was the motion to be signed by the attorney or the debtor or both?

The substantive requirements for the request were still quite vague. The preliminary issue of the title of the document seeking an exemption under § 109(h)(3)(A) was still unknown. Exhibit D was labeled a “statement.”95 Then, Exhibit D required a “motion.”96 Neither document carried the title of “certification” as required by § 109(h)(3)(A). A core issue was whether this motion was the “certification” required by § 109(h)(3)(A) or whether Exhibit D was the “certification”? Or, were both considered in tandem to be the certification? If so, did both need to comply with the requirements of § 109(h)(3)(A) or only the motion? If only the motion, did the motion need to be signed by the debtor under penalty of perjury?

In response to these various concerns, a proposed new Federal Rule of Bankruptcy Procedure and an Exhibit D were created. The revised Exhibit D is essentially the same form; however, it deletes any reference to a “motion” to be filed by the debtor. This newly revised Exhibit D may be adopted for use in December of 2009. The proposed new Federal Rule of Bankruptcy Procedure 1017.1 addresses some

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96. Id.
   Rule 1017.1. Exemption from Pre-petition Credit Counseling Requirement

A certification filed by an individual debtor under § 109(h)(3) of the Code shall be deemed satisfactory to the court unless the court, on its own motion or on motion of a
of the record-keeping concerns that were previously addressed with the motion required under the former Exhibit D. Proposed Rule 1017.1 provides that a debtor's certification under § 109(h)(3) will be deemed satisfactory unless a motion is filed by the court or a party in interest within fourteen days after the debtor files the certification and the court enters an order that the certification is not satisfactory. The court is required to enter such an order within twenty-one days after the certification is filed. This proposed rule appears to address the record-keeping concerns and provides a presumption of validity of a certification. However, this rule with its presumption of validity may go too far. It overrides the statutory duty of the court under § 109(h)(3)(A)(iii) to make an affirmative determination of whether the certification is satisfactory. Furthermore, whether it will succeed in eliminating or reducing the challenges to the certifications or streamline the process for the courts is yet to be seen.

Regardless of the impact of the new proposed rule, the details in the certification to satisfy the elements of § 109(h)(3)(A) are still vague and will be difficult for debtors, particularly those acting pro se, to comprehend. For example, the concept of exigent circumstances is still not defined. The simple task of requiring debtors to list the names of the agencies contacted and the dates of such contacts is not included. Notably, for debtors seeking an exemption under § 109(h)(4), Exhibit D explicitly sets forth definitions from § 109(h)(4) of the terms of incapacity and disability.

The amended Voluntary Petition did little to resolve the issues surrounding the “certification” required under § 109(h)(3)(A). Inclusion of Exhibit D was an appropriate method by which to highlight the requirements for debtors on the Voluntary Petition and should remain intact. However, the attached Exhibit D should be modified with regard to the requirements of § 109(h)(3)(A). First, as proposed, it should delete any reference to a motion and use the appropriate term “certification” instead. Although there is efficacy in requiring a motion for record keeping purposes, such purposes are overridden by the desire for uniformity and clarity for debtors and are taken care of by

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party in interest filed no later than 14 days after the filing of the certification and served on the debtor and the United States trustee, enters an order finding the certification is not satisfactory. The order shall be entered no later than 21 days after the filing of the certification and shall specify why the certification is not satisfactory.

Id.

98. Id.
99. Id.
100. Id.
new proposed Federal Rule of Bankruptcy Procedure 1017.1.\textsuperscript{101} Second, Exhibit D should maintain the format for signing under penalty of perjury used in 28 U.S.C. § 1746\textsuperscript{102} and, for individuals seeking an exception under § 109(h)(3), should include a format similar to the Hubbard standard.\textsuperscript{103} The creation of a simple official certification form would alleviate many of these issues and provide clear guidance to bankruptcy practitioners, and debtors, especially pro se debtors, who are encountering this issue for the first time.\textsuperscript{104}

B. A Call to Clarify the Statutory Elements in § 109(h)(3)(A)

In addition to the Judicial Conference revising Exhibit D, Congress should establish clear definitions for the terms and phrases found within § 109(h)(3)(A), similar to the ones set forth in § 109(h)(4). Although courts are still required to engage in some interpretation in § 109(h)(4) cases, there is somewhat less confusion and ambiguity as to the meaning of the terms therein. Based upon the opinions addressing § 109(h)(3) so far, there needs to be guidelines set for the elements of § 109(h)(3)(A), including the definition of exigent circumstances, the requirements found in § 109(h)(3)(A)(ii), and the definition of “satisfactory to the court.” With these guidelines in place, consistency should emerge in opinions.

Included within § 109(h)(4) are statutory definitions for the terms required to meet the exception.\textsuperscript{105} Specifically, § 109(h)(4) defines “incapacity” to mean “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.”\textsuperscript{106} The section further defines “disability” to mean “the debtor is so physically impaired as to be unable, after reasonable effort, to partici-

\textsuperscript{101} See supra note 97.
\textsuperscript{102} See Dixon v. LaBarge (In re Dixon), 338 B.R. 383, 387 (B.A.P. 8th Cir. 2006) (finding that because the debtor’s certificate was sworn to, it was “sufficient under both lines of cases”).
\textsuperscript{103} See supra notes 75-76 and accompanying text (discussing the Hubbard standard).
\textsuperscript{106} Id.
pate in an in person, telephone, or Internet briefing as required under paragraph (1)."

Several cases have addressed the permanent exemption provided for in § 109(h)(4). In one such case, In re Tulper, the United States Bankruptcy Court for the District of Colorado found that both debtor spouses were "disabled" within the meaning of § 109(h)(4). The court found the permanent exemption is "only available in very limited circumstances," based upon the specific statutory definitions of "incapacity" and "disability," noting the statute set "the bar for the granting of the exemption very high." The court found a determination under § 109(h)(4) had to be on a case-by-case basis; however, the court set forth a standard by which to review such claims for exemption based upon disability, requiring a showing that "(1) the debtor is severely physically impaired; (2) the debtor has made a reasonable effort, despite the impairment, to participate in the pre[-]petition credit counseling; and (3) the debtor is unable, because of the impairment, to participate meaningfully in an in person, telephone, or Internet briefing pre[-]petition." This standard closely tracks the language of the statute and inserts the qualifiers "severely" and "meaningfully." The court found inserting the qualifier "meaningfully" aligned with the congressional goal of having a debtor understand the consequences of bankruptcy and the alternatives; furthermore, the court found mere participation, without the ability to understand what is being conveyed or the ability to learn the consequences of bankruptcy, would be "meaningless . . . without purpose and utility." The same can be said for the participation by a debtor

107. Id.


109. Tulper, 345 B.R. 322. Both debtors had significant health problems. ld. Specifically, the debtor-wife suffered from "heart problems, extensive tremors, severe asthma, a bad lung, arthritis, a disintegrated spine . . . , and a plate in her right ankle." ld. at 324. The debtor-husband was ninety-seven percent deaf and had problems with his hands and feet. ld. at 325.

110. ld. at 326 (emphasis in original). The court additionally noted that a congressional goal in enacting § 109(h) was to have fewer individuals filing bankruptcy at all and, at a minimum, Chapter 7 liquidations. ld. at 328. Because the debtors filed Chapter 13, the court found that Congress’s goal was realized, even without the pre-petition credit counseling. ld.

111. Id. at 326 (emphasis in original).

112. ld. at 327-28. Additionally, the court noted § 109(h) "avoids the absurd situation in which a debtor would be required to obtain a briefing even if suffering from Alzheimer’s disease or some other disability that would make the briefing meaningless or even impossible." ld. at 326 (citing 2 COLLIER ON BANKRUPTCY ¶ 109.09[4], 109-60 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2005)).
in a credit counseling session held after the filing of the petition, as provided for in § 109(h)(3)(B). How can such participation be “meaningful,” when, although the debtor may have the ability to understand what is being conveyed, as well as learn the consequences of bankruptcy, he has already eliminated the choice of alternatives thereto by having filed a petition? Although a debtor could just dismiss the case if he learned about the choices available to him outside of bankruptcy, this scenario is unlikely, as statistics show the majority of individuals who obtain the credit counseling still chose to file for bankruptcy.

Based on the statutory definitions set out in § 109(h)(4) and the clarification established by the courts, a standard has been set for a request under § 109(h)(4), which allows the exception to be met by those qualified. The definitions found in § 109(h)(4) provide some guidance to courts interpreting the same, and, as shown below, there is a need for similar guidance in the interpretation of § 109(h)(3)(A).


An individual can evade, at least temporarily, the pre-petition credit counseling requirement if he or she can show “exigent circumstances that merit a waiver.” The elusiveness of the statutory language is apparent. What constitutes exigent circumstances? Or as set forth in the statutory language, what constitutes exigent circumstances that merit a waiver? Most courts agree that the language sets forth a two part test: first, a showing of exigent circumstances is required, and, second, a showing that the exigent circumstances merit a waiver is also required. However, the agreement ends there. One line of cases sets a minimal standard, which is met merely by a showing of imminent credit collection activity, and seemingly overlooks the second part of the analysis, which requires the exigent circumstances to merit

113. See, e.g., Vollmer, 361 B.R. at 811 (holding an incarceration was not within the congressionally-defined meaning of “disability,” but finding courts had the ability to permanently waive the requirement when there was no possibility for the debtor to obtain the counseling); McBride, 354 B.R. at 98 (holding that a debtor’s incarceration had “no bearing on the exigency of his need to file” and he did not qualify for an exemption under § 109(h)(4)); Tulper, 345 B.R. 322; Latovilevic, 343 B.R. at 822 (holding the debtor, who was incarcerated, did not present any evidence to support exemption under § 109(h)(4) and he made an insufficient showing to support an extension under § 109(h)(3)); Stockwell, 2006 WL 1149182, at *2 (finding a medical report submitted by the debtor did not support a finding of incapacity or disability for the purposes of § 109(h)(4), as required to escape the personal financial management course required by 11 U.S.C. § 727(a)(11)); Star, 341 B.R. at 831-32 (holding incarceration of the debtor did not support a finding of disability for the purposes of § 109(h)(4), but allowing the debtor to defer the pre-petition counseling requirement under § 109(h)(3)).


115. See, e.g., Dixon v. LaBarge, (In re Dixon), 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006).
a waiver. Another line of cases sets a higher standard, which is rarely met and seemingly vitiates the exception altogether. A balance needs to be struck between these two extremes.\textsuperscript{116}

The more lenient approach finds mere imminent creditor collection activity is sufficient, thereby effectively ignoring the requirement that the exigent circumstances must merit a waiver. For example, some courts have found an impending foreclosure of a debtor's homestead meets the definition of exigent circumstances.\textsuperscript{117} The United States Bankruptcy Court for the Southern District of Ohio stated:

\begin{quote}
[T]he 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. . . . [I]t 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.\textsuperscript{118}
\end{quote}

Additionally, the courts have found the freezing of a debtor's sole bank account containing her sole source of income,\textsuperscript{119} as well as the

\textsuperscript{116} For example, in the Federal Judicial Center's survey of bankruptcy judges regarding BAPCPA, thirty-five percent of the 157 judges responding answered:

[T]hey treated imminent foreclosure or eviction, by itself, as an exigent circumstance, while about 55 percent treated this as an exigent circumstance only if the debtors could satisfactorily explain why they had not yet received credit counseling. Another 10 percent said that imminent foreclosure or eviction was never an exigent circumstance.


\textsuperscript{118} Cleaver, 333 B.R. at 435. See also In re Graham, 336 B.R. 292, 297 (Bankr. W.D. Ky. 2005) (stating exigent circumstances would not be difficult to find "based on impending creditor action that will materially affect the debtor or dependants of the debtor").

repossession of a debtor’s car and a garnishment constituted exigent circumstances.

One court, which set a very minimal standard for the exigent circumstances determination, required “only that the debtor state the existence of some looming event that renders pre-petition credit counseling to be infeasible. The standard is not one of ‘excusable neglect’ that would require the Court to delve into the reasons why the exigent circumstances occurred.” Likewise, in In re Giambrone, the United States Bankruptcy Court for the Western District of New York held that even though debtors may have had ample notice of an impending foreclosure and could have secured the required pre-petition counseling in advance of the auction, “this fact speaks more to irrelevant attributions of fault than to the sufficiency of exigent circumstances.” The court found the test to require that “[i]f debtors reasonably attempt to obtain credit counseling during the interval between learning about this requirement and the occurrence of the exigent event, their exigent circumstances should merit a waiver.” The court found the pre-petition requirement did not require any absence of fault or culpability on the part of the debtors, and, therefore, the exigency of a debtor’s self-imposed situation would satisfy the first prong of § 109(h)(3)(A).

However, another line of cases requires a higher showing to meet the exigent circumstances requirement. Situations that have not been found to meet the definition of exigent circumstances include: a lack

120. Hubbard, 333 B.R. at 384 ("An individual facing the immediate and permanent loss of her sole means of transportation generally faces exigent circumstances that satisfy the requirements of § 109(h)(3)(A)(i)."). See also In re Davenport, 335 B.R. 218, 221 (Bankr. M.D. Fla. 2005).

121. In re Rodriguez, 336 B.R. 462, 476 (Bankr. D. Idaho 2005). Although the court found that a garnishment might constitute an exigent circumstance, it did not so find in the case at bar because the debtors had been through two previous garnishments. Id. The court also inferred from the facts that the debtors were the subject of a continuing garnishment, which lessened the “exigency” of their situation in the court’s opinion. Id.

122. In re Childs, 335 B.R. 623, 630 (Bankr. D. Md. 2005) (holding debtors showing of “the occurrence of a supervening event that precipitated the emergent need to file a bankruptcy petition” constituted exigent circumstances). See also Henderson, 339 B.R. at 39 (holding a debtor’s showing under § 109(h)(3)(A)(i) was not “an overwhelmingly high one,” and, “[a]t a minimum, ‘exigent circumstances’ should be particular to the putative debtor, and should support the conclusion that the putative debtor was confronted with an urgent situation that rendered him or her unable to comply with the budget and credit counseling requirement”).

123. 365 B.R. 386, 390 (Bankr. W.D.N.Y. 2007). The court held “[e]xigency relates solely to issues of immediacy, and not to any notions of causation, justification, or excusability. Even when circumstances are of a debtor’s own making, they will nonetheless become exigent as the moment when immediate action or aid is required.” Id. at 389.

124. Id. at 390.

125. Id.
of funds to pay the credit counseling agency for the pre-petition counseling;\textsuperscript{126} a need for advice as to legal rights;\textsuperscript{127} and a scheduled foreclosure sale.\textsuperscript{128} For example, the Bankruptcy Appellate Panel for the Eighth Circuit found although an impending foreclosure qualified as an exigent circumstance, it did not merit a waiver because the debtor had twenty days' notice of the sale.\textsuperscript{129} Additionally, one court has stated that a sheriff's sale:

[D]oes not in and of itself merit a deferral of the credit counseling requirement. . . . [T]he proper focus under § 109(h) is not on the circumstances that hastened or precipitated the bankruptcy filing but on whether those circumstance or any other pre\textsuperscript{v}ent\textsuperscript{ed} the debtor from being able to obtain credit counseling prior to filing for bankruptcy.\textsuperscript{130}

A debtor's presumed notice of the sale is one reason for finding a foreclosure not to be an exigent circumstance, making any claim of exigent circumstances based upon a pending foreclosure sale merely a debtor's "self-created emergency."\textsuperscript{131}

Therefore, to follow the reasoning of courts that require a higher showing, exigent circumstances would have to be an emergency that is not due to imminent credit collection activity (in order to differentiate


\textsuperscript{127} In re Henderson, 339 B.R. 34, 40 (Bankr. E.D.N.Y. 2006) (noting that allegation did not, "standing alone, distinguish [the debtor's] circumstances from the circumstances of thousands of debtors who, . . . are required to pursue bankruptcy relief without the benefit of legal advice").


\textsuperscript{129} Dixon v. LaBarge, \textit{(In re Dixon)}, 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006).

\textsuperscript{130} Afolabi, 343 B.R. at 198.

\textsuperscript{131} Id. The court also placed little credence in the debtor's claim that the reason for waiting until the eve of foreclosure was due, in part, to last minute negotiations with the mortgage company. \textit{Id.} The court questioned whether a mortgage company would even engage in serious negotiations that late in the process and opined the "'negotiations' may have been nothing more than [the debtor's] one-sided attempt to stop the inevitable." \textit{Id.} Last, the court stated it could not "conclude that such negotiations prevented him from obtaining credit counseling. Instead, [the debtor] made an unfortunate choice to place all of his eggs in one basket and to avail himself of bankruptcy protection only after it became clear that he could not prevent the sheriff's sale. . . ." \textit{Id.} \textit{See also Hedquist}, 342 B.R. at 298 (stating "a bankruptcy court does not abuse its discretion in finding that a debtor's waiting to file a bankruptcy petition until the eve of a foreclosure, when the debtor has had ample notice of the foreclosure, does not constitute exigent circumstances meriting a waiver of the prebankruptcy briefing requirement."); \textit{DiPinto}, 336 B.R. at 697 (noting debtor's claim that he had found a last minute buyer for his property, which was the subject of a foreclosure, did not suffice to demonstrate why he had not been diligent). \textit{But see In re Toccaline}, No. 06-20218, 2006 WL 2081517, at *2 (Bankr. D. Conn. July 17, 2006) (holding "the sudden collapse of the petitioners' mortgage negotiations on the eve of the scheduled foreclosure sale constitutes circumstances sufficiently exigent to satisfy the requirements of the first requirement of the three-part test").
among debtors) and that is not an emergency involving the debtor's personal health or well-being (because such an emergency would likely be covered by § 109(h)(4)). However, such instances, although exigent, would probably not require an immediate filing; the debtor could just wait to file until the emergency was over. Therefore, the question becomes what action against the debtor's property, outside of imminent creditor collection, would suffice for these courts?¹³²

Of the cases reported, it appears few seem to answer that question. In In re Hess, a debtor's case was filed without a certificate from a credit counseling agency and without a certification alleging exigent circumstances.¹³³ However, the court found the debtor satisfied § 109(h)(3)(A)(i) because her failure to comply with § 109(h)(3)(A) was a result of "acts and circumstances of others that were both beyond her control and extraordinary."¹³⁴ Specifically, the debtor had filled out her paperwork at her attorney's office, signed the petition, and left the documents at the attorney's office until she completed the credit counseling briefing and could supply the certificate.¹³⁵ However, during the attorney's absence from the office due to a medical emergency involving the attorney, an employee in the attorney's office, assuming the documents to be complete, filed the debtor's petition and supporting documents.¹³⁶

Are these extreme scenarios the types of situations envisioned by Congress to constitute exigent circumstances? Obviously they will suffice; however, it is unlikely that Congress created an exception to § 109(h) to capture these extreme and rare occurrences. Again, Congress labeled the exception "exigent circumstances," not "extreme circumstances," and a definition requiring such extremes could be rarely used and would not fulfill the purpose of helping the "honest, but unfortunate debtor."

Because most debtors file bankruptcy due to financial difficulties, that is, they are unable to meet their obligations and have creditor collection activity, it is likely Congress knew all debtors believed themselves to have "exigent circumstances" at the time of filing a bankruptcy petition. Therefore, it appears that a minimal standard is insufficient, specifically a standard ignoring the second prong of the analysis, which requires a showing that the exigent circumstances

¹³⁴. Id. at 499.
¹³⁵. Id. at 493.
¹³⁶. Id. The court found that the facts before it fell "well within the narrow exception carved out for catastrophic, extraordinary circumstances." Id. at 500.
merit a waiver. If exigent circumstances were merely defined to include financial difficulties, such as a typical foreclosure, the exception found in § 109(h)(3) would swallow the rule, allowing each and every debtor to claim an exception to the pre-petition credit counseling requirement. On the other hand, to define it narrowly as something specific to an individual debtor would make it akin to § 109(h)(4), which already provides an exemption for a debtor who is suffering from an incapacity or disability. Based upon the statutory language, Congress evidently required a lesser showing in § 109(h)(3) because the exemption is only temporary.

However, merely stating § 109(h)(3)(A)(i) requires a two-prong analysis, a showing of (1) exigent circumstances (2) that merit a waiver, still beckons the question of what are exigent circumstances and what type of exigent circumstances merit a waiver? The term “exigent circumstances” is not defined in BAPCPA. Depending on the jurisdiction in which a debtor files bankruptcy, the definition varies. According to Black’s Law Dictionary, “exigent” means “[r]equiring immediate action or aid; urgent.” Black’s defines “exigent circumstances” to be “[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures.” These dictionary definitions provide little guidance, other than to focus the courts’ attention on the uniqueness of a debtor’s claim. Additionally, how “exigent” can they be if one must wait five days before filing?

The second part of the analysis requires the court to assess whether the exigent circumstances merit a waiver. To provide any substance to

   It is hard to imagine an exigent circumstance sufficient to motivate an immediate bank-
   ruptcy filing that does not concern creditor collection activity of some sort. Still, virtually every bankruptcy has such factors looming in the background somewhere. Congress did not, in § 109(h), grant each and every debtor a pass on the counseling requirement due to an impending foreclosure, garnishment, trial, or other filing motiva-
   tor. It is clear enough that § 109(h)(3)(A) exemptions are intended to be the excep-
   tion, not the rule.

Id.

138. See supra notes 105-13 and accompanying text. One court has likened the definition of exigent circumstances to the situations exempting a debtor from the pre-petition credit counsel-
   ling requirement found in § 109(h)(4), noting that something more than “mere inconvenience to
   the debtor is required if the credit counseling briefing is to be waived, even temporarily.” In re

139. Id. at *4 (noting that exigent circumstances “cannot be uniformly defined”).

140. BLACK’S LAW DICTIONARY 260 (8th ed. 2004).

141. BLACK’S LAW DICTIONARY 614 (8th ed. 2004).

142. In re Walter, 332 B.R. 884, 889 n.4 (Bankr. D. Minn. 2005) (noting “the counter-intui-
   tiveness of § 109(h)(3)(A)”)


the statutory language of § 109(h)(3)(A)(i), it is imperative that courts give meaning, not just mere lip-service, to the requirement that the circumstances must "merit a waiver." But, what is involved in this analysis? It can be argued, like the lenient line of cases, the "merit a waiver" determination is superfluous because a court is already called upon to determine whether the certification is satisfactory under § 109(h)(3)(A)(iii). However, as written, the statutory language does require two independent findings: (1) that the exigent circumstances merit a waiver, and (2) that the certification is satisfactory.

The best approach is to look at each case individually and to determine whether the debtor faced exigent circumstances that differentiate him or her from a typical individual seeking bankruptcy relief.

143. As stated by the United States Bankruptcy Appellate Panel for the Eighth Circuit:

"[E]xigent" indicates that the debtor finds himself in a situation in which adverse events are imminent and will occur before the debtor is able to avail himself of the statutory briefing. Virtually, all of the cases in which the exigent circumstances certificate is filed will, in fact, involve exigent circumstances. After all, the reason that such debtors are filing bankruptcy quickly and before they receive the briefing is because they feel that they are unable to wait. The real question for the court in such certifications will usually be whether or not those exigent circumstances merit the statutory waiver.

Dixon v. LaBarge (In re Dixon), 338 B.R. 383, 388 (B.A.P. 8th Cir. 2006). The existence of "exigent circumstances" alone is insufficient because:

In the context of a bankruptcy filing without the requisite credit counseling, the circumstances presented obviously have to relate in some way to the urgency and need to file. And they must establish something sufficiently different from or more pressing than the usual or typical motivations to file bankruptcy so as to justify dispensing with the requirement of prefiling counseling. ... [T]he described and certified facts must show what makes this debtor different from all others who are expected to comply with §109(h)(1).


144. Another definition is "subjective," defined as:

[Whether the debtor was actually precluded by his or her circumstances from obtaining the briefing. This is a fact specific inquiry into the good faith efforts of the debtor to comply with the credit counseling requirements of the Bankruptcy Code. The debtor's knowledge (or lack thereof) may be relevant here. This is not to say that debtor may simply stick his or her head into sand and do nothing. However, there is no bright line rule guiding a bankruptcy judge in this endeavor. How well educated are the debtors? What is their financial situation? Did the debtors have the ability to seek counsel at an earlier stage of the insolvency, but chose not to do so for reasons that are unacceptable to the court? Did any of these or other circumstances render the failure to obtain the pre-petition credit counseling beyond the reasonable control of the debtors?

In re Tomco, 339 B.R. 145, 155 (Bankr. W.D. Pa. 2006). One court has gone so far as to add that one is not entitled to an exemption if the filing, "without counseling, does not ameliorate or solve the exigent circumstances which [the debtor] offers as the basis for the exemption." In re Anderson, No. 06-00047S, 2006 WL 314539, at *2 (Bankr. N.D. Iowa Feb. 6, 2006). In that case, the debtor-wife filed a certification under §109(h)(3)(A), alleging exigent circumstances relating to the garnishment of her husband's wages and the loss of her job. Id. at *1. The court found that even if it provided an exemption to the wife, it was doubtful her bankruptcy would have pre-
Again, a failure to do so would possibly result in every debtor being able to claim the exemption. Albeit the most central issue in § 109(h)(3), courts must define exigent circumstances realistically, envisioning some creditor collection activity, but the more central focus should be on whether it merits a waiver, thereby not allowing the exemption to swallow the rule.

2. Parsing through the Requirements of § 109(h)(3)(A)(ii)

In addition to demonstrating exigent circumstances that merit a waiver, § 109(h)(3)(A)(ii) requires an allegation that "the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain services . . . during the 5-day period beginning on the date on which the debtor made that request." Regardless of whether courts struggle with the interpretation of exigent circumstances, this provision appears to make a clear cut decision as to whether an individual fulfills the requirements of § 109(h)(3)(A): one must contact an agency but be unable to obtain services within the five-day period from that request. Although seemingly a bright line rule, this Subsection is also subject to varying interpretations and is the Subsection upon which most requests for exemption under § 109(h)(3)(A) fail. Upon a cursory reading of this Subsection, it is evident that it is not the model of specificity or clarity. Many courts have struggled with the discrete sub-elements of § 109(h)(3)(A)(ii), including: the number of agencies to be contacted; the "unable to obtain" language; and the five day period.

146. See In re Talib, 335 B.R. 417, 422 (Bankr. W.D. Mo. 2005) (noting § 109(h)(3)(A)(ii) is an objective test, which "obviates the need for [a] court to . . . second guess . . . a debtor's procrastination").
147. See, e.g., In re Henderson, 364 B.R. 906, 915 n.14 (Bankr. N.D. Tex. 2007) (making an "unscientific guess" that ninety-nine percent of cases seeking a waiver under § 109(h)(3)(A) failed to allege a pre-petition attempt to request counseling).
148. Additionally, although not a perceived ambiguity from the language of the statute, one court has questioned whether a debtor is required to request such services or whether a debtor's counsel can request such services on behalf of the debtor in order to fulfill this obligation. In re Hubbard, 333 B.R. 377, 385 (Bankr. S.D. Tex. 2005) (noting debtors cannot rely on their attorneys' general determination, not specific to those debtors at issue, that services are not available).
a. "An Agency," or So It Says

The language in the statute is clear and unambiguous; a debtor is to request such services from "an approved nonprofit budget and credit counseling agency." Clearly, "an" is defined as one, a singular agency, and some courts have defined it as such. This language clearly opens a Pandora's box. First, a debtor could request services from one agency and upon learning that agency was unable to provide services, believe his or her obligation has been fulfilled. Second, a debtor's counsel, after describing the exception provision in § 109(h)(3)(A), might steer a debtor to an agency that the attorney knows "typically" cannot provide such services within five days due to a backlog or some other reason. Both situations would be permissible interpretations of an attempt to contact an agency under the Subsection.

Although the language provides that "an" agency be contacted, the better interpretation would impose upon debtors a good faith attempt at contacting an approved agency, which would likely entail attempting to contact multiple agencies. To support the interpretation that Congress did not intend that only one agency be contacted, 11 U.S.C. § 102(7) specifically states "the singular includes the plural." Therefore, debtors should be required to list in the certification, among other things, the number of agencies contacted and how those agencies were located.

b. "Unable to Obtain" Requirement May Be Unable To Be Met

In addition to divining the number of agencies to be contacted, one must also divine the meaning of the language "unable to obtain." One court has posited that "unable to obtain" should be "judged by what a debtor can reasonably accomplish in light or [sic] his or her particular, and likely exigent, circumstances," and should not be "determined simply by looking at what a credit counseling agency offers a

150. Dixon v. LaBarge (In re Dixon), 338 B.R. 383, 387 (B.A.P. 8th Cir. 2006); In re Graham, 336 B.R. 292, 297 (Bankr. W.D. Ky. 2005) (finding "no express requirement in § 109(h) that a debtor exhaust all credit counseling options or that a debtor absolutely accept any offer of counseling, not matter how inconvenient or onerous"); Hubbard, 333 B.R. at 387 (noting the burden is on the United States trustee to make the determination of available credit counseling agencies, and debtors are not required "to scour the field for other providers"). But see In re DiPinto, 336 B.R. 693, 699 (Bankr. E.D. Pa. 2006) (noting that granting a waiver under § 109(h) to a debtor who solely contacted one agency would "reward token effort"); In re Essien, 358 B.R. 286 (Bankr. S.D. Tex. 2006) (imposing sanctions on a debtor who provided a false affidavit and false testimony regarding his pre-petition contacts with credit counseling agency and his unsuccessful attempts to obtain the required pre-petition credit counseling).
First, the most obvious reason a debtor could claim he or she was “unable” to obtain such services is because of a lack of funds to pay a credit counseling agency. Notably, the pre-petition credit counseling requirement is an “unfunded mandate,” which leads one to conclude it is to be funded by already financially-strapped debtors. Courts are split as to the issue of whether an inability to pay the fee for the credit counseling satisfies the “unable to obtain” requirement in § 109(h)(3)(A)(ii). Some courts have found the inability to pay defense does not satisfy § 109(h)(3)(A)(ii).\textsuperscript{154} Whereas, other courts have found the inability to pay defense satisfies § 109(h)(3)(A)(ii).\textsuperscript{155}

152. 

153. 

154. \textit{In re} Dansby, 340 B.R. 564, 568 n.6 (Bankr. D.S.C. 2006) (noting, under “exceptional” circumstances, a debtor may be unable to obtain the credit counseling through no fault of the debtor or the credit counseling agency).

155. See, e.g., \textit{In re} Toccaline, No. 06-20218, 2006 WL 2081517, at *3 (Bankr. D. Conn. July 17, 2006). See also \textit{In re} Piontek, 346 B.R. 126, 130 (Bankr. W.D. Pa. 2006). The \textit{Piontek} court found as a “general proposition” that “a debtor who lacks sufficient resources to pay for credit counseling may, under the right circumstances, have a de facto ‘inability’ to obtain pre-bankruptcy credit counseling for the purposes of 11 U.S.C. § 109(h)(3)(A)(ii).” \textit{Id}. However, the court did not find a debtor-wife’s inability to pay defense in a joint case to be credible or persuasive. \textit{Id}. The court noted that the debtors had not requested the credit counseling agency provide services on a pro bono or reduced fee basis, and, without such a showing, upon a review of the debtors’ schedules, and upon the evidence that a monthly disposable income was available to pay a nominal credit counseling fee, the court could not find the debtor-wife’s inability to obtain the required pre-petition counseling was “due to circumstances beyond her reasonable control.” \textit{Id}. at 131. See also \textit{In re} Morales, No. 806-70854-478, 2006 WL 2050555 (Bankr. E.D.N.Y. May 24, 2006). The \textit{Morales} court found the debtor was unable to obtain the services because the debtor’s sole funds were frozen by a creditor pre-petition and because the debtor could not take off work the five days before filing. \textit{Id}. at *4. The court further found the inability to pay defense also qualified as an “exigent circumstance” under § 109(h)(3)(A)(i). \textit{Id}. at *3. See also \textit{In re} Westenberger, No. 0610477- BKC-RBR, 2006 WL 1105008 (Bankr. S.D. Fla. Apr. 25, 2006) (holding a debtor satisfied both the “exigent circumstance” requirement, as well as the “unable to obtain” requirement in § 109(h)(3)(A)(ii), when debtor’s sole bank account was frozen); \textit{In re} Allen, No. 05-15847-SSM, 2005 WL 4862559 (Bankr. E.D. Va. Nov. 1, 2005) (holding although an inability to pay for the counseling may have been a basis for a temporary deferral, debtor failed to allege that she requested the services but was refused due to her inability to pay). But see \textit{In re} Curington, No. 05-38188, 2005 WL 3752229, at *5 (Bankr. E.D. Tenn. Dec. 19, 2005). The \textit{Curington} court held the debtor’s lack of funds to pay the credit counseling agency did not constitute an exigent
The latter group of courts has noted the absurdity in the situation where a debtor could be exempt from the filing fee requirement but still be burdened with the costs associated with the credit counseling requirement. In addition to the filing fee and attorneys' fees, if so engaged, debtors are now required to pay a credit counseling agency, all before filing. With regard to the first two expenses, debtors can escape the payment. With respect to the attorneys' fee, debtors can act pro se. With respect to the filing fee, 28 U.S.C. § 1930(f) provides for a waiver of filing fees. However, there is no such waiver for the pre-petition credit counseling fee. In In re Raymond, the United States Bankruptcy Court for the District of New Hampshire noted several conceptual inconsistencies in cases where the filing fee has been waived. First, a credit counseling agency would be the only party paid if the filing fees were waived because both the court and the trustee would be denied fees for the administration and serving of the case. Second, the court questioned the utility of pre-petition credit counseling for a debtor who is so financially strapped that a waiver of filing fees was appropriate.

However, to possibly remedy this situation, 11 U.S.C. § 111(c)(2)(B) requires that "if a fee is charged for counseling services, [a credit counseling agency is to] charge a reasonable fee, and provide services without regard to ability to pay the fee." What constitutes a "reasonable fee" has yet to be determined. The United States Trustee Program has not set a dollar amount for what constitutes a reasonable fee. Additionally, the United States Trustee Pro-

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156. See, e.g., In re Petit-Louis, 338 B.R. 132, 134 (Bankr. S.D. Fla. 2006). The Petit-Louis court had previously waived the filing fee for the debtor and noted the absurdity in finding that the debtor was exempt from the filing fee requirement but might have been burdened with a cost associated with finding an interpreter to assist in the credit counseling. Id. Upon a motion for reconsideration filed by the United States Trustee, the court held the requirement was also waived under § 109(h)(2). In re Petit-Louis, 344 B.R. 696, 699 (Bankr. S.D. Fla. 2006). See also In re Raymond, No. 06-10275-JMD, 2006 WL 1047033, at *2 (Bankr. D.N.H. Apr. 12, 2006).


158. 2006 WL 1047033, at *2 (noting "anecdotal information indicates that . . . free credit counseling services are difficult and time consuming to obtain, if they are available at all").

159. Id.

160. Id.


162. Specifically, the website for the United States Trustee Program [USTP] provides:

Based on information provided by the industry, we believe this service generally will be available for a fee ranging from free to $50. There are, however, numerous variables
gram has not set guidelines regarding the waiver of fees, although the United States Government Accountability Office’s 2007 Report specifically recommended that the United States Trustee Program issue formal guidance on what constitutes an individual’s ability to pay.\textsuperscript{163} Even if certain agencies are providing the services without a charge, there exist further complications. To establish an inability to pay the fee and to get an agency to agree to waive the fee may take time; unfortunately, most individuals who are facing exigent circumstances do not have time.

A debtor could likewise claim he or she was unable to obtain such services because of lack of access to the agency. Although Congress attempted to circumvent such excuses by specifically providing that such services could be obtained via telephone or the Internet, and by including § 109(h)(2) to address the lack of agencies in a given district, it is possible such issues could still arise. For example, it is possible an individual contemplating bankruptcy could be in a position where his car has been repossessed; his cable, internet access, and telephone service has been disconnected; or he could be incarcerated.\textsuperscript{164} Again, this leads back to the exigent circumstances in which this debtor finds himself. Would that suffice for a court? Or, would such a circumstance rise to the level of a “disability,” thereby providing for a complete exemption under § 109(h)(4) without jumping through the hurdles imposed by § 109(h)(3)?\textsuperscript{165}

that may impact an agency’s fee structure, including geography, types of services, administrative costs, and alternate funding sources. The USTP will give due consideration to these factors and to the fees customarily charged in the industry for similar services in determining the reasonableness of a particular agency’s fees.


164. In re Vollmer, 361 B.R. 811 (Bankr. E.D. Va. 2007). In Vollmer, the debtor was incarcerated and, as a result, had no computer access and only could make collect telephone calls. \textit{Id.} at 813. The court granted the debtor a permanent waiver of the pre-petition credit counseling requirement, as well as the financial management course, because the debtor was “truly unable” to participate in either of the activities. \textit{Id.} at 814-15. See also \textit{In re Walton}, No. 07-41086-293, 2007 WL 980430 (Bankr. E.D. Mo. Mar. 5, 2007) (providing an incarcerated debtor with a temporary waiver after finding the debtor was unable to obtain the services because he had no internet access and had limited telephone access, hindering his ability to complete the counseling). \textit{See supra} footnotes 105-13 for cases discussing whether an individual could use the fact of his incarceration to meet the elements of §109(h)(4).

165. An enlargement of the definitions of § 109(h)(4) could encompass those individuals who are unable to satisfy the requirements of § 109(h)(3)(A)(ii), specifically, the request and timing issues. Therefore, this interpretation makes the exigent circumstances analysis similar to the disability or incapacity analysis in § 109(h)(4), as suggested by \textit{In re Curington}, No. 05-38188, 2005 WL 3752229, at *5 (Bankr. E.D. Tenn. Dec. 19, 2005).
An inability to obtain such services could also be posited on the credit counseling agency itself, which thus far has been the most often encountered problem. Does the credit counseling agency not answer the phone? Is the credit counseling agency backlogged?\textsuperscript{166} The standards for business practices indicate a credit counseling agency should offer services within two business days of being contacted.\textsuperscript{167} In \textit{In re Davey}, a debtor engaged in pre-petition counseling almost three months prior to filing her petition; however, the credit counseling agency refused to issue a certificate, arguing the counseling the debtor underwent was not "specifically designed" for § 109 purposes, in turn requiring the debtor to take a second course post-petition.\textsuperscript{168} The debtor alleged the two counseling sessions were, for all intents and purposes, identical, and the court found any defect under § 109 was a result of the credit counseling agency, not the debtor.\textsuperscript{169} Another court wrestled with this issue, finding a debtor was unable to obtain pre-petition credit counseling under § 109(h)(3) because of a credit counseling agency’s failure to provide counseling in Creole.\textsuperscript{170}

Therefore, to alleviate this possible problem, the “unable to obtain” language should be read in conjunction with and in light of the court’s finding of “exigent circumstances” meriting the waiver in the first place.\textsuperscript{171} This determination should be an objective determination, looking at a debtor’s situation, his “exigent circumstances,” and be judged against whether a reasonable person in the debtor’s situation

\textsuperscript{166.} See \textit{In re Anderson}, No. 06-00047S, 2006 WL 314539 (Bankr. N.D. Iowa Feb. 6, 2006). One of the co-debtors in her certification under § 109(h)(3)(A) alleged that although she contacted a credit counseling agency seven days prior to filing her bankruptcy petition, she was told by the agency that “due to its case load” it could not provide services for almost a month. \textit{Id.} at *1. However, the court dismissed the petition because the co-debtor’s certification failed to prove exigent circumstances. \textit{Id.} at *2.

\textsuperscript{167.} Linfield, \textit{supra} note 64 (stating the Best Practices Guidelines published by the Association of Independent Consumer Credit Counseling Agencies calls for credit counseling agencies to offer an appointment within two business days of a request).

\textsuperscript{168.} No. 06-10065, 2006 WL 898101, at *1 (Bankr. D. Vt. Apr. 4, 2006).

\textsuperscript{169.} \textit{Id.} at *1-2. See also \textit{In re Kernan}, 358 B.R. 537, 540 (Bankr. D. Conn. 2007) (asserting a debtor was an “innocent victim of miscommunication with an approved credit counseling agency” when the debtor sought the appropriate pre-petition counseling prior to the filing of her petition but was given the wrong services by the agency. The court was “troubled” by the fact that the agency had failed to clarify with the debtor the difference between the pre-petition credit counseling as required by the Code and its “credit counseling,”). \textit{But see In re Duplessis}, No. 06-14747 JNF, 2007 WL 118945 (Bankr. D. Mass. Jan. 11, 2007) (finding that although debtors attempted to shift the blame to the credit counseling agency for failing to issue the appropriate certificates, debtors failed to show that they had obtained the counseling pre-petition).

\textsuperscript{170.} In \textit{re Petit-Louis}, 338 B.R. 132 (Bankr. S.D. Fla. 2006). Upon a motion for reconsideration filed by the United States Trustee, the court held that the requirement was also waived under § 109(h)(2). \textit{In re Petit-Louis}, 344 B.R. 696 (Bankr. S.D. Fla. 2006).

\textsuperscript{171.} In \textit{re Talib}, 335 B.R. 417, 422 (Bankr. W.D. Mo. 2005) (calling for such an interpretation).
could have been unable to obtain the credit counseling. A major focus should be on whether the debtor was unable to obtain the services because of circumstances beyond his or her control. By requiring such a showing, debtors would not be awarded for token effort or false attempts to comply. For example, in In re Postlethwait, the United States Bankruptcy Court for the Western District of Pennsylvania found the debtor’s claim that she was unable to obtain the credit counseling prior to filing her petition was discredited because the debtor’s two unsuccessful attempts to obtain counseling were made in the span of fifteen minutes, merely one hour before the filing of the petition.\textsuperscript{172} The court based its ruling on the fact that the “exigent” event was not to occur for at least another five days.\textsuperscript{173} Therefore, a debtor should be required to use due diligence to obtain the briefing and must be required to show his or her efforts were otherwise thwarted because of circumstances beyond his or her control.


The next quandary involves the interpretation of “during the 5-day period beginning on the date on which the debtor made that request.”\textsuperscript{174} Section 109(h)(3)(A)(ii) is “awkwardly worded, making it unclear whether a debtor is required merely to request credit counseling prior to filing for bankruptcy relief or whether such request must be made at least five days prior to filing.”\textsuperscript{175} Interpreting the plain meaning of the statute, the five days should be counted beginning when the debtor made the request. Whether one is able to divine why Congress chose this language, it is clear that “Congress chose not to link the availability of credit counseling to the event which might require the Debtor to file, but rather to the date of the debtor’s request for credit counseling.”\textsuperscript{176}

\begin{itemize}
\item \textsuperscript{172} 353 B.R. 428 (Bankr. W.D. Pa. 2006).
\item \textsuperscript{173} Id. at 428-30.
\item \textsuperscript{175} In re Afolabi, 343 B.R. 195, 199 (Bankr. S.D. Ind. 2006). \textit{See also In re Henderson}, 364 B.R. 906, 912 (Bankr. N.D. Tex. 2007) (finding that there are two meanings to the term “during,” which provide alternate interpretations. One such meaning is “throughout the duration of”; and the other is “at a point during the course of or \textit{IN}.” The court found that using the second dictionary definition would not require a five day waiting period.) (emphasis in original).
\item \textsuperscript{176} In re Talib, 335 B.R. 424 (Bankr. W.D. Mo. 2005) (denying reconsideration of the earlier case decided just eleven days prior). In \textit{Talib}, the debtor claimed she was entitled to a waiver for exigent circumstances because, although she was able to get the counseling within a five day period from her request, the session would have been subsequent to the “exigent” event, an impending foreclosure sale, which created her need to file. \textit{Id.} The court held, looking at the requirements of the statute, her ability to obtain the counseling within the five-day period precluded her entitlement to a waiver under § 109(h)(3). \textit{Id.} at 428.
\end{itemize}
In an attempt to divine congressional purpose, one court opined:

The statute does nothing more than mandate debtors to recognize and start dealing with their straits of insolvency squarely, at least a week before they will bloom out to an actual, permanent economic loss. As Congress clearly contemplated, within that week one would either lay the eligibility issue to rest by snagging the counseling agency's certificate, or would qualify for the temporary exemption and, in tandem, lay the groundwork to get the briefing and counseling promptly after filing for bankruptcy.\textsuperscript{177}

Some courts have adopted this interpretation and require the debtor to have requested such credit counseling services at least five days prior to filing his or her petition.\textsuperscript{178}

However, some courts have found a debtor can file a petition as soon as the debtor learns from a credit counseling agency that the agency will not be able to provide the counseling within five days, thereby alleviating any waiting period.\textsuperscript{179} It is unclear why a debtor who learns he cannot receive counseling for at least ten days cannot file immediately, especially if there is imminent creditor action looming. The United States Bankruptcy Court for the Western District of New York in \textit{In re Giambrone} rejected a "five-day waiting period" for three reasons.\textsuperscript{180} First, if a debtor is excused under \textsection 109(h)(3)(A), he

\textsuperscript{177} \textit{In re Wallert}, 332 B.R. 884, 890 (Bankr. D. Minn. 2005) (questioning whether its holding left "debtor subject to the vagaries of local agencies' \textit{de facto} ability to promptly provide pre-petition briefing and counseling services.").


While it can be argued that Congress was not realistic in its assessment of the circumstances under which some debtors and their counsel may find themselves on the eve of a foreclosure sale, repossession, or garnishment, Congress'[s] goal appears to be to eliminate bankruptcy petitions filed by individuals who have not allowed themselves adequate time (at least five days) to consider a bankruptcy alternative before they file. \textit{Id.} See also \textit{In re Thomas}, No. 06-10242, 2006 Bankr. LEXIS 362, at *6 (Bankr. D. Kan. Mar. 14, 2006) ("[T]he request must be made at least 5 days prior to the bankruptcy filing in order to satisfy the requirement that pre[-]petition counseling could not be obtained within 5 days of the request."); \textit{Talib}, 335 B.R. at 424; \textit{In re Cleaver}, 333 B.R. 430, 435 (Bankr. S.D. Ohio 2006) (noting in dicta that \textsection 109(h)(3)(A)(ii) appears to require a five-day waiting period).

\textsuperscript{179} See \textit{In re Giambrone}, 365 B.R. 386, 391 (Bankr. W.D.N.Y. 2007) (stating the test is "not whether the agency can provide a counseling session within five days, but whether in the context of their circumstances, the debtors can complete within five days the counseling that must otherwise occur prior to that exigent moment when a bankruptcy filing is necessary"). See also \textit{In re DiPinto}, 336 B.R. 693, 700 (Bankr. E.D. Pa. 2006) ("[I]f a five pre[-]petition day requirement was what Congress intended, it simply did not put that requirement in the statute. . . . Thus, while the Court finds merit to the argument that the requirement probably should be five pre[-]petition days, the Court cannot conclude that the plain reading of the statute supports that result.")(emphasis added); \textit{In re Graham}, 336 B.R. 292, 298 n.6 (Bankr. W.D. Ky. 2005) (asserting that "if a debtor reasonably believes that he or she cannot reasonably complete the offered credit counseling within the five-day period, he or she need not wait until the end of the five-day period to file his or her bankruptcy petition").
is still required to obtain the counseling post-petition, which would not invoke the “temporal limitation of § 109(h)(3)(A)(ii).” Second, the imposition of a five-day waiting period would “unfairly impose different outcomes in situations of identical exigency.” Third, a waiting period would “contradict the statutory standard that allows bankruptcy relief in instances of exigency.” Under the Giambrone court’s holding, a debtor could request the services on the day before filing bankruptcy, find that the services are unavailable, and be able to meet the literal words of the exception. This outcome was not likely Congress’s intent. This interpretation of the statutory language makes the phrase “five days” superfluous. The question then becomes: why insert any time period at all?

Again, the same questions are revisited. What is the purpose of such counseling on the eve of bankruptcy and under exigent circumstances? Why the arbitrary five-days pre-petition? Was it to ensure that the individual received the counseling at least five days pre-petition, thereby allowing for almost a week of exploring non-bankruptcy alternatives? If so, the language does not say that. Even if it is interpreted to mean the individual requested the services six days pre-petition and luckily was able to obtain it on the day prior to the petition, any “period of reflection” is lost. These questions and others cannot be answered because Congress chose this language for an unknown reason. Regardless, courts should divine Congress’s intent based upon the purpose and the statutory scheme to require the request be made at least five days prior to the filing of the petition.

3. The Unsatisfactory Definition of “Satisfactory to the Court” in § 109(h)(3)(A)(iii)

Again, wrought with ambiguity, § 109(h)(3)(A)(iii) has been the subject of varying interpretations by the courts. What does “satisfactory to the court” mean? Some courts believe it merely speaks to the technical, procedural aspects of the certification itself. Others equate “satisfactory” to mean a satisfactory showing of the other elements of § 109(h)(3)(A). Still others believe it invokes the court’s discretion. There appears to be no consensus as to the definition; however, a combination of the varying definitions may provide more guidance.

181. Id.
182. Id.
183. Id. The court opined § 109(h)(3)(A) would be rendered “meaningless” if a court could not take into consideration the fact that an exigent circumstance arises within five days of the debtor’s request for counseling. Id.
184. See supra notes 179-83 and accompanying text.
First, a few courts merely look to the certification itself, as to whether it was sworn to and signed by the debtor.\textsuperscript{185} This interpretation goes back to the form of the certification and fails to add any substance to the inclusion of this Subsection by Congress, making the Subsection superfluous. Therefore, a more meaningful interpretation of the phrase "satisfactory to the court" is required.

Other courts tie the language "satisfactory to the court" to the debtor's satisfaction of the requirements of § 109(h)(3)(A)(i) and (ii); in other words, if a debtor fails to meet the requirements of either § 109(h)(3)(A)(i) or (ii), then the debtor accordingly fails § 109(h)(3)(A)(iii).\textsuperscript{186} This interpretation is faulty by failing to give independent significance to Subsection (iii). As set forth in the statutory language, there are three elements in § 109(h)(3)(A), represented by the three subsections: (i), (ii), and (iii).\textsuperscript{187} Courts appear to agree that because the elements are listed in the conjunctive, by the word "and," a debtor must satisfy each element in order to be entitled to an exception.\textsuperscript{188} However, courts interpreting § 109(h)(3)(A)(iii) to mean merely the first two elements are satisfied fail to require an independent showing under § 109(h)(3)(A)(iii).

Finally, some courts find this provision makes the courts "gatekeepers,"\textsuperscript{189} invoking the courts' discretion.\textsuperscript{190} Specifically, the Bankruptcy

\textsuperscript{185} See In re Morales, No. 806-70854-478, 2006 WL 2050555, at *4 (Bankr. E.D.N.Y. May 24, 2006) (finding the debtor's certifications were satisfactory because they followed the forms proposed by the court and contained the signatures of both the debtor and her attorney); In re Westenberger, No. 0610477-BKC-RBR, 2006 WL 1105008, at *2 (Bankr. S.D. Fla. Apr. 25, 2006) (asserting the initial certification must be "sworn to and signed by the Debtor before a notary public").

\textsuperscript{186} See In re Walton, No. 07-41086-293, 2007 WL 980430, at *1 (Bankr. E.D. Mo. Mar. 5, 2007) (holding § 109(h)(3)(A)(iii) "does not contain a substantive requirement, but merely directs the court to make an independent inquiry into whether the certification meets the first two elements"); In re Carey, 341 B.R. 798, 803 (Bankr. M.D. Fla. 2006) (finding the "Debtor's Request cannot be 'satisfactory to the court' since it does not meet the requirements of § 109(h)(3)(A)(ii)"); In re Wallert, 332 B.R. 884, 888 (Bankr. D. Minn. 2005) ("[B]ecause the Debtor's certification lacks proof of one of the statutory requirements for an exemption, it cannot be 'satisfactory to the court.'"); In re LaPorta, 332 B.R. 879, 882 (Bankr. D. Minn. 2005) (finding a debtor's statement is not satisfactory if the debtor fails to meet § 109(h)(3)(A)(i) and (ii)).


\textsuperscript{189} E.g., In re Tomco, 339 B.R. 145, 154 (Bankr. W.D. Pa. 2006) (noting the filing of a certification under § 109(h)(3)(A) is not a "mere formality," but can be reviewed by court for adequacy).

\textsuperscript{190} See In re Elmendorf, 345 B.R. 486, 496 n.15 (stating "the additional requirement that the certification seeking a waiver of the credit counseling requirement be 'satisfactory' is a broad grant of discretion to the bankruptcy court"); In re Rodriguez, 336 B.R. 462, 473, 473 n.29
Appellate Panel for the Eighth Circuit held, in order to give § 109(h)(3)(A)(iii) some independent meaning, courts are required to use their "discretion in making the determinations under subdivisions (i) and (ii)." Yet another definition is "[w]hether the individual debtor’s ‘certification’ is ‘satisfactory’ to the court is to be resolved on a case-by-case basis considering a totality of the particular facts and circumstances." However, "a boiler-plate allegation, merely reciting the statutory language, is inadequate" under Subsection (iii), "even if that allegation is certified."

In order to give independent significance to the language, courts cannot merely equate satisfactory with meeting the elements of § 109(h)(3)(A) (i) and (ii). Clearly, if either one of the first two subsections is not satisfied, then a court needs not reach the third determination; however, that does not mean a satisfactory showing under the first two subsections will guarantee that the third subsection is met. Furthermore, merely stating that § 109(h)(3)(A)(iii) is a procedural or technical determination is faulty. However, stating that § 109(h)(3)(A)(iii) requires the use of discretion seems to be closer to Congress's intent, as long as discretion involves looking at the certification as a whole, the form and content, to determine whether it meets the court’s satisfaction. Although still somewhat vague, it seems to meld the varying interpretations into a review of adequacy of the

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(191) Dixon v. LaBarge (In re Dixon), 338 B.R. 383, 387 (B.A.P. 8th Cir. 2006) ("It is unclear what substantive content this requirement has. It is difficult for us to posit a situation where a court would determine that the requirements of subsections (i) and (ii) are met, but, still, is not satisfactory to the court.").

192. In re Graham, 336 B.R. 292, 296 (Bankr. W.D. Ky. 2005). The Graham court found the debtor had the burden of "demonstrating or detailing the background facts that might be ‘satisfactory to the court.’" Id. Although stating this definition, the court ultimately held that because the certification was not signed by the debtor and because the debtor failed to state whether she even sought pre-petition counseling, her certification was "not satisfactory." Id. at 298. See also In re Postlethwait, 353 B.R. 428, 430 (Bankr. W.D. Pa. 2006) (holding debtor’s minimal attempts to obtain credit counseling on the day of filing, which was more than five days before the “exigent” event, was unsatisfactory under § 109(h)(3)(A)(iii), and meriting a waiver would “reward token and nominal effort”); In re Rodriguez, 336 B.R. 462, 473 (Bankr. D. Idaho 2005) ("Nothing, as yet, tells the bankruptcy courts what should guide their discretion or satisfy them. The key, almost certainly, will be the specific factual circumstances described in the certification. If not sufficiently exigent and compelling, the certification will not be satisfactory to the court . . . .").

193. Rodriguez, 336 B.R. at 474 (noting such boiler-plate allegations would also be inadequate for subsection (ii)).
certification under a totality of the circumstances: procedural, technical, and substantive.

VI. RECOMMENDATION

Following the tortuous path of interpretation by the courts, it is evident that guidance is clearly needed. Courts have two options when dealing with the pre-petition credit counseling requirement and the exception under § 109(h)(3): require strict compliance or allow for "substantial compliance." Several courts have allowed "substantial compliance" with the requirements of § 109(h)(3) to suffice. However, substantial compliance in the face of a clear mandate does not suffice. As one court stated:

194. See In re Brickson, 346 B.R. 497 (Bankr. N.D. Cal. 2006). In Brickson, the debtors obtained pre-petition credit counseling approximately thirteen months prior to filing bankruptcy. Id. at 499. As part of the pre-petition credit counseling, the debtors proceeded under a debt repayment plan, paying over eleven thousand dollars to their creditors over a period of nine months. Id. at 500. Upon determining that they were no longer able to maintain the payments under the debt repayment plan, they filed for Chapter 7 relief. Id. The Chapter 7 trustee filed a motion to dismiss for failure to comply with the requirements of § 109(h), asserting their credit counseling fell outside of the 180-day window. Id. at 498. Based upon the court's interpretation of congressional intent, the court found the debtors' continued participation in the debt repayment plan within the 180-day window pre-petition fulfilled the "spirit," if not the technical requirements, of § 109(h) and, on equitable grounds, refused to dismiss the case. Id. at 502. See also In re Henderson, 364 B.R. 906, 913 (Bankr. N.D. Tex. 2007) (holding that because § 109(h)(3) was not jurisdictional, it was a waivable eligibility requirement that a court could "overlook"); In re Nichols, 362 B.R. 88, 96 (Bankr. S.D.N.Y. 2007) (denying trustee's motion to dismiss because under the totality of the circumstances, a strict interpretation of § 109(h)(3) would result in manifest injustice to the debtors, whose failure to comply with the strict requirements was solely a result of attorney error); In re Bass, No. 06-21011-L, 2006 WL 1593978 (Bankr. W.D. Tenn. June 9, 2006). In Bass, the debtor obtained the credit counseling over forty-five days after filing her bankruptcy petition. Id. at *1. Finding § 109(h)(1) was an eligibility requirement, the court held, based upon a totality of the circumstances, the debtor had substantially complied with § 109(h)(1). Id. at *5. The court stated "[t]o hold otherwise would be to render an overly technical reading of the Bankruptcy Code at odds with its expressed purposes." Id. But see Clippard v. Bass, 365 B.R. 131, 137 (W.D. Tenn. 2007) (reversing the bankruptcy court's order and holding that because the requirements for a § 109(h)(3)(A) certification were so precise, bankruptcy courts have no discretion to allow substantial compliance by debtors); In re Parker, 351 B.R. 790 (Bankr. N.D. Ga. 2006). In Parker, the court denied a debtor's motion to dismiss his case based upon his failure to comply with the pre-petition credit counseling requirement. Id. at 799. The court found that to allow the debtor to do so "would make a mockery of the bankruptcy process." Id. The court held the debtor waived the requirements of § 109(h) and he was judicially estopped from arguing his ineligibility when faced with the sale of his pre-petition assets by the trustee. Id. See also Mendez v. Salven (In re Mendez), 367 B.R. 109, 118 (B.A.P. 9th Cir. 2007) (holding debtor intentionally waived strict compliance with the requirements of § 109(h) and affirming denial of debtor's motion to dismiss).

195. See Rodriguez, 336 B.R. at 477 ("The law is what it is. The Court is obligated to enforce it as written."). See also In re Ruckdaschel, 364 B.R. 724, 733 (Bankr. D. Idaho 2007) ("[T]he bankruptcy courts' equity powers do not license the Court to rewrite statutes in favor of parties based on extenuating circumstances."); In re Dillard, No. 06-30128-RFH, 2006 Bankr. LEXIS 3485, at *16 (Bankr. M.D. Ga. Dec. 11, 2006):
The utility of the counseling may be debatable in some cases, but the requirement that it be obtained is not. An overly liberal approach to granting exemptions under § 109(h)(3)(A) would vitiate the evident Congressional intent that almost all individuals must undergo the counseling before, and as a precondition to, filing bankruptcy. Based upon the plain meaning of the terms and evident congressional intent of pre-petition credit counseling, courts should judge a certification for an exception under § 109(h)(3)(A) as follows.

As a preliminary matter, the procedural requirements must comply with the revised Official Voluntary Petition Form and Exhibit D. Exhibit D, in tandem with the motion required under the October 2006 form, should be considered the “certification” required by § 109(h)(3)(A) and be relabeled as such. Exhibit D provides the certification language of 28 U.S.C. § 1746, signed under penalty of perjury. To alleviate any confusion, Exhibit D should include a reference to the requirements of § 109(h)(3)(A), further defining the terms in the statute as follows.

First, to meet the requirements of § 109(h)(3)(A)(i), a debtor must allege exigent circumstances meriting a waiver, which will likely include some type of imminent creditor collection activity but must be something outside of the normal prospective debtor's situation, as any other reading would vitiate the exception. However, the exigent circumstances requirement should not be read to require “extreme” circumstances. The second part of the analysis under § 109(h)(3)(A)(i), the “merits a waiver” analysis, will require a debtor to show how his or her exigent circumstances are different than the typical prospective debtor.

Second, to meet the requirements of § 109(h)(3)(A)(ii), a debtor must make several independent showings. First, a debtor must use reasonable efforts to contact several approved agencies in his or her district. One agency is insufficient and does not show diligence in attempting to meet the requirements. A debtor should list the names of the agencies contacted, when they were contacted, and how these agencies were located by the debtor. Also, a debtor should allege he or she was unable to obtain the credit counseling. This requirement

That [a debtor] was proceeding in good faith, was given bad advice by a disreputable business, was not informed of the requirement by the Clerk's Office, and was in a state of extreme distress due to the foreclosure of her home may make her extremely sympathetic, but they do not make her above the law. . . . [T]he judges' hands are tied, and they can do little more than complain as they terminate cases filed by honest but unfortunate debtors who failed to obtain pre[-]petition credit counseling.

Id. 196. Rodriguez, 336 B.R. at 477.
should focus on what the obstacle was that thwarted a debtor's effort to get the counseling, which in many cases may be the same reason asserted as an exigent circumstance. A debtor should specifically state the reasons why he or she was unable to obtain the counseling. Additionally, the debtor must allege that he or she attempted to contact the agencies at issue at least five days pre-petition and specifically provide the dates and times when the specific agencies were contacted.

Last, a court should judge whether the certification is satisfactory by considering a totality of the circumstances: procedural and substantive. Procedural considerations should include whether the certification is in the correct format, including whether it uses the penalty of perjury language of 28 U.S.C. § 1746. Substantive considerations should include whether the certification is factually sufficient to fulfill the exception, allowing for the courts to exercise a certain amount of discretion in cases involving exigencies.

Although these standards comport with the plain meaning and congressional purpose, the question is revisited: what is the congressional purpose for imposing the pre-petition credit counseling requirement? Can such counseling halt a foreclosure sale scheduled in the upcoming six days? The Congressional purpose was obtainment of pre-petition credit counseling within the six months preceding the bankruptcy. What does a counseling five days or even one day prior succeed in doing, other than providing yet another mandatory requirement to fulfill before a bankruptcy filing? Can that much information or debtor education be gained from a counseling session a few days before the filing, when a debtor is already facing recognized “exigent circumstances?” It appears to be a little too little too late.

Adding to this quandary, the temporary deferral provided for in § 109(h)(3)(B) flies in the face of congressional purpose. Is this post-petition credit counseling different than the financial management course taken post-petition, or is it merely the same as the pre-petition counseling aimed at steering a debtor away from bankruptcy? Whatever the answer, both options are questionable. First, if it is no different than the financial management course, what is the purpose of having a debtor engage in this course twice? It appears to be a sanction. However, if it is decidedly different, then the question becomes: what goal is accomplished by requiring the debtor to engage in pre-petition credit counseling post-petition?197 The reasoning found in

197. See In re Warden, No. 05-23750, 2005 WL 3207630 (Bankr. W.D. Mo. Nov. 22, 2005). The bankruptcy court refused to vacate an order dismissing a debtor’s case for failure to comply with pre-petition credit counseling requirement, noting the fact that the debtor received the counsel-
Tulper\textsuperscript{198} can and should be applied to the "exemption" found in § 109(h)(3) because how can "post-petition" pre-petition credit counseling ever be meaningful after the petition has been filed; it would be "without purpose or utility," especially one day before a foreclosure, when a debtor has no realistic chance of negotiating with a lender? Although debtors who had claimed exemptions under § 109(h)(3)(A) would be able to have a cognitive focus and participate in the counseling, the whole effort would be "meaningless" if they had already filed for relief. In this instance, the purpose of steering the debtor away from bankruptcy has already been thwarted. And, the draconian measure of dismissing the case, in the face of an exigent circumstance, is unfair to say the least.

This assertion is not to do away with the laudatory goals of pre-petition counseling six months prior to bankruptcy but to point out the absurdity of requiring such counseling post-petition when all it does is add yet another financial burden to an already financially strapped debtor. If the exception is to have any meaning, it should be seen as an exemption in the truest sense of the word: the debtor is exempted upon strict compliance with the statutory requirements. Furthermore, the educational goals of financial literacy are still imparted upon the debtor in the required post-petition financial management course.

To further the intent of Congress and to meet the laudatory goals of financial literacy, such counseling should be provided in other forums, not just as a bankruptcy requirement. As a society, we can state that we value financial literacy and make it part of our education process. As stated by the United States Bankruptcy Court for the Southern District of Florida in \textit{In re Petit-Louis}:

\begin{quote}
[The credit counseling] should be required for and provided to every high school senior as a prerequisite to graduation. So timed, the counseling would be of immense value to millions and would no doubt have a positive effect in reducing the number of bankruptcy
\end{quote}

\textsuperscript{*3} The court stated:

\begin{quote}
The apparent congressional hope in enacting the credit counseling requirement is that focusing on a budget analysis with the help of a credit counseling professional might obviate the need for seeking bankruptcy relief for some debtors. That objective is not achieved by obtaining credit counseling after the case has been filed.
\end{quote}

\textit{ld.} This statement overlooks that the very same statutory section, specifically § 109(h)(3)(B), does provide and infers the validity of such "post-petition" pre-petition credit counseling. See also \textit{In re Carey}, 341 B.R. 798, 803 (Bankr. M.D. Fla. 2006) ("Obtaining credit counseling post-petition does not achieve Congress' [s] purpose.").

filings of certain types of cases. Unfortunately, the requirement for creditor counseling immediately prior to and as a prerequisite to filing bankruptcy is similar to locking the barn after the horse is gone. The present statutory requirement is the equivalent of requiring a person who has suffered a heart attack to listen to a lecture on exercise, diet and the evils of cholesterol before allowing such person to undergo open heart surgery.\textsuperscript{199}

This education should start in high schools, when individuals first get credit cards, and in orientation programs at universities when discussing financial aid and student loans. Furthermore, there should be a requirement of credit card lenders and other lenders to educate borrowers on both the obligation of the debt and the consequences of default. Although these are discrete instances of learning, such instances can create an overall foundation for one’s future financial health.

VII. Conclusion

In BAPCPA, Congress set forth a bold new proposition with the pre-petition credit counseling requirement. Its purpose was clear: pre-petition financial education to steer prospective debtors away from bankruptcy. In an attempt to be realistic, it set forth exceptions to the requirement. However, an exception that is difficult or impossible to satisfy or that serves no purpose once satisfied belies reason. That is not to say an exception for exigent circumstances should not exist. It should, however, have clear elements that can be met by an eligible debtor. And, if met, a debtor should receive an absolute exemption from the pre-petition credit counseling requirement because any other result would not comport with the goal of pre-petition education.

\textsuperscript{199} In re Petit-Louis, 344 B.R. 696, 701 (Bankr. S.D. Fla. 2006).