

JUDGE HERB ROSS (Recalled)

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ALASKA  
605 West 4th Avenue, Room 138, Anchorage, AK 99501-2253 — (Website: www.akb.uscourts.gov)  
Clerk's Office: 907-271-2655 (1-800-859-8059 In-State) — Judge's Fax: 907-271-2692

In re

KAREN LOUISE VERNON and LONNIE  
GENE VERNON,

Debtor(s)

Case No. F12-00598-HAR  
In Chapter 7

**MEMORANDUM DETERMINING THAT  
THE VERNONS HAVE NOT COMPLIED  
WITH 11 USC § 109(h)(1) AND ARE NOT  
ENTITLED TO A WAIVER UNDER  
§ 109(h)(4), AND THAT THEIR CASE WILL  
BE DISMISSED**

1. **INTRODUCTION**- Both debtors were incarcerated in Alaskan jails when they filed chapter 7. They requested waivers of the requirement that they prove they received credit counseling before filing.<sup>1</sup> The court treated this as a request that they be permitted to file the certificates post-petition due to exigent circumstances.<sup>2</sup> They did not, however, meet the 45 day deadline to obtain the post-petition credit counseling.<sup>3</sup> Also, their incarceration does not warrant a permanent waiver of the requirement.<sup>4</sup> Therefore, this case must be dismissed.

2. **BACKGROUND**- The debtors were incarcerated before they filed this chapter 7 case on **October 5, 2012**. They recently received lengthy prison sentences. When they filed their

<sup>1</sup> 11 USC § 109(h)(1) and 11 USC § 111(a).

<sup>2</sup> 11 USC § 109(h)(3)(A).

<sup>3</sup> 11 USC § 109(h)(3)(B).

<sup>4</sup> 11 USC § 109(h)(4).

1 petition, the debtors did not file certificates that they had obtained pre-filing credit counseling.  
2 They did file a request that this requirement be waived due to their incarceration.<sup>5</sup>

3 Although the court was skeptical that they qualified for an extension of time to file the  
4 credit counseling certificate or a permanent waiver of the requirement altogether, it treated their  
5 incarceration as exigent circumstances for not having obtained counseling pre-petition and gave  
6 them until **November 19, 2012** to get their credit counseling, the maximum time allowed  
7 pursuant to 11 USC § 109(h)(3)(B).<sup>6</sup>

8 When the Vernons did not meet the November 19, 2012 deadline, the court entered an  
9 *Order to Show Cause Why Case Should Not Be Dismissed for Failure to Receive Credit*  
10 *Counseling.*<sup>7</sup> The purpose for this order was to allow the debtors until **December 31, 2012** to  
11 produce evidence why their incarceration prevented them from obtaining counseling, and if they  
12 did produce evidence, to finally determine if the bankruptcy law considered this a sufficient  
13 “disability” to qualify for a waiver of the requirement altogether under 11 USC § 109(h)(4).

14 A response was filed on January 4, 2013 by Karen Vernon outlining the difficulties she had  
15 experienced in getting counseling due to the restrictions imposed on her by being in jail.<sup>8</sup> One  
16 was also filed on January 6, 2013 by Lonnie Vernon which was a harangue against the credit  
17 counseling company he sought to deal with and against the government in general.<sup>9</sup>

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21 <sup>5</sup> ECF No. 2.

22 <sup>6</sup> ECF No. 20.

23 <sup>7</sup> ECF No. 31.

24 <sup>8</sup> ECF No. 34.

25 <sup>9</sup> ECF No. 35.

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1 And, lo and behold, Karen Vernon did obtain credit counseling on **January 9, 2013**.  
2 Unfortunately, this is beyond 45 days from the petition date, or November 19, 2012, the  
3 maximum time allowed for her to comply.

4 **3. ANALYSIS**

5 **3.1. Extension of Time Due to Exigent Circumstances to Obtain Credit Counseling**- The  
6 *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* (BAPCPA) added a  
7 requirement that individual debtors receive credit counseling within the 180 days before filing  
8 bankruptcy, from an approved credit counseling agency, as a condition to receiving the benefits of  
9 bankruptcy.<sup>10</sup>

10 Sometimes, a bankruptcy has to be filed precipitously, not leaving enough time to plan for  
11 or obtain pre-filing credit counseling. In that case, if a debtor can show “exigent circumstances,”  
12 he or she can get additional time post-petition to get credit counseling. The statutory  
13 requirements to get the additional time are that the debtor submit a certificate that:

14 (i) describes exigent circumstances that merit a waiver of the requirements  
15 of paragraph (1);

16 (ii) states that the debtor requested credit counseling services from an  
17 approved nonprofit budget and credit counseling agency, but was unable to  
18 obtain the services referred to in paragraph (1) during the 7-day period  
19 beginning on the date on which the debtor made that request; and

20 (iii) is satisfactory to the court.<sup>11</sup>

21 If the debtor is granted an extension of time to get credit counseling post-petition, that  
22 time is limited to a maximum of 45-days from the petition date.

23 Section 109(h)(3)(B) provides that the exemption for such a debtor expires  
24 when the debtor obtains a postpetition briefing, but in no event later than  
25 30 days after the petition, unless the court, for cause, allows the debtor an

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26 <sup>10</sup> 11 USC § 109(h)(1) and 11 USC § 111(a); 2 *Collier on Bankruptcy*, ¶ 109.9[1].

27 <sup>11</sup> 11 USC § 109(h)(3)(A); 2 *Collier on Bankruptcy*, ¶ 109.9[3].

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1 additional 15 days. Such cause might include, for example, a temporary  
2 illness or disability.<sup>12</sup>

3 Unfortunately, the debtors have not met the time limits given to them to obtain credit  
4 counseling. These time limits are construed strictly:

5 The vast majority of courts have construed the time requirements for credit  
6 counseling under § 109(h) strictly. These decisions, including, where  
7 helpful, their reasoning or comments included: Hedquist v. Fokkena (In re  
8 Hedquist), 342 B.R. 295, 301 (8th Cir. BAP 2006) (“the new requirements in  
9 section 109(h) can, in some circumstances, create harsh results. But because  
10 those requirements are mandatory, bankruptcy courts have no discretion  
11 but to dismiss the case when the debtor fails to file a certification in  
12 compliance with its provisions”); In re Carey, 341 B.R. 798, 803  
13 (Bankr.M.D.Fla.2006) (“the requirements of § 109(h) are explicit and leave  
14 no room for a court to exercise discretion”); In re Davenport, 335 B.R. 218,  
15 221 (Bankr.M.D.Fla.2005) Bankr. L. Rep. P 97,745.<sup>13</sup>

16 Alaska has adopted this reasoning. In an opinion, In re Phipps, In re Ace, and In re  
17 Ridder,<sup>14</sup> involving three cases (one of which involved an incarcerated debtor), shortly after the  
18 effective dated of BAPCPA, Judge MacDonald came to the same conclusion. Section 109(h)(1)  
19 required strict compliance. And, § 109(h)(3) offers only a window of opportunity to comply with  
20 § 109(h)(1) when a debtor has established exigent circumstances, and not an exemption from  
21 compliance.<sup>15</sup> While Karen Vernon was ultimately able to obtain credit counseling, the court has  
22 no authority to bend the time limits set by Congress.

23 Unless they were entitled to a permanent exemption from the counseling requirement  
24 pursuant to 11 USC § 109(h)(4), their case must be dismissed.

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25 <sup>12</sup> 2 *Collier on Bankruptcy*, ¶ 109.9[3]; 11 USC § 109(h)(3)(B).

26 <sup>13</sup> In re Ruckdaschel, 364 B.R. 724, 729-32 (Bankr. Ct. Ida. 2007); In re Mitrano, 409 B.R. 812, 818-19  
27 E.D. Va. 2009).

28 <sup>14</sup> In re Phipps, In re Ace, and In re Ridder, 8 Alaska Bankr. Rep. 173 (Bankr. D. AK. 2005).

<sup>15</sup> Id., at 179-180.

1 **3.2. The Vernons Do Not Qualify for an Exemption from the Counseling Requirement**

2 **Under 11 USC § 109(h)(4)**- In circumstances where a debtor cannot obtain counseling due to  
3 “incapacity, disability or active military duty in a combat zone,” the requirement can be  
4 permanently waived. The statute defines the term “disability”:

5 For the purposes of this paragraph, . . . “disability” means that the debtor is  
6 so physically impaired as to be unable, after reasonable effort, to participate  
7 in an in person, telephone, or Internet briefing required under paragraph  
8 (1).

9 The question becomes, does incarceration qualify for the “disability” exception. Shortly  
10 after BAPCPA came into effect, Judge MacDonald held:

11 Similarly, the Ridder case must be dismissed because the debtor has  
12 not established that he is disabled within the meaning of § 109(h)(4). The  
13 conditions of the debtor’s incarceration may be physically confining, but do  
14 not make him “physically impaired,” as that condition is defined within §  
15 109(h)(4). Moreover, the debtor testified that he could get permission to use  
16 the telephone for special purposes, such as court hearings, and that he had  
17 not approached his probation officer about the possibility of getting phone  
18 privileges for credit counseling. Accordingly, even if this court were to  
19 equate the debtor’s incarceration with a “disability,” the debtor has failed to  
20 show that he is so impaired that he cannot participate in any form of credit  
21 counseling. The debtor’s motion for relief from the requirements of  
22 § 109(h)(1) and 11 U.S.C. § 727(a)(11) will be denied and his case will be  
23 dismissed.<sup>16</sup>

24 Judge MacDonald made his ruling shortly after BAPCPA was implemented, when there  
25 was little or no case law on the issue. Most courts have since agreed with his decision (there are  
26 no circuit cases; the cases in agreement are at the district court, BAP and bankruptcy court  
27 levels;<sup>17</sup> however, a few bankruptcy court cases have allowed an exemption).<sup>18</sup> Simply put, the

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21 <sup>16</sup> Id., at 180.

22 <sup>17</sup> Disallowing a permanent exemption under 11 USC § 109(h)(4) for incarceration: In re Hubel, 395  
23 B.R. 823 (N.D.N.Y. 2008); In re Anderson, 397 B.R. 363 (6<sup>th</sup> Cir. BAP 2008); In re Bristol, 2009 WL 238002  
24 (E.D.N.Y. 2009); In re Alexander, 432 B.R. 41 (Bankr. N.D.N.Y 2010); In re Larsen, 399 B.R. 634, 638 (Bankr. D.  
25 Wisc. 2009); In re Rendler, 368 B.R. 1 (Bankr. D. Minn. 2007); In re Denger, 417 B.R. 485 (Bankr. N.D. Ohio  
2009); In re Gordon, 467 B.R. 639 (Bankr. W.D. Ky. 2009); In re Latovljecic, 342 B.R. 817, 820-22 (Bankr.

(continued...)

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1 majority gives the term “disability” and the explanatory language in § 109(h)(4) restrictively  
2 defining “disability,” its plain meaning, which cannot reasonably be expanded to include  
3 incarceration.

4 The few cases that go the other way, chafe against the harsh result that a strict  
5 interpretation sometimes engenders.

6 Judge MacDonald recognized that harsh and seemingly unjust results are troubling, but  
7 where Congress clearly sets a policy, it is not for the bankruptcy court to disregard it.<sup>19</sup>

8 **3.3. Nothing Prevents the Debtors from Refiling**- The court’s ruling does not permanently  
9 debar the debtors from obtaining relief under chapter 7. They can refile, if they comply with 11  
10 USC § 109(h)(1), which Karen Vernon already has.

11 Of course, if they do, their right to the automatic stay under 11 USC § 362(a) may be  
12 restricted, in that they may have to proactively apply to keep the stay in effect.<sup>20</sup>

13 **4. CONCLUSION**- A separate order dismissing this case because of debtors’ ineligibility to  
14 be chapter 7 debtors, due to their failure to comply with 11 USC § 109(h)(1) and qualify for a  
15 permanent waiver under 11 USC § 109(h)(4).

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16 <sup>17</sup> (...continued)  
17 N.D.W.Va. 2006); In re McBride, 354 B.R. 95 (Bankr. D. S.C. 2006); In re Patasnik, 425 B.R. 916 (Bankr. S.D.  
18 Fla. 2010); In re Solomon, 436 B.R. d451 (Bankr. W.D. Mich. 2010); plus, many unreported decisions found in  
19 West Law, and, of course, Judge MacDonald’s ruling in In re Phipps, In re Ace, and In re Ridder, 8 Alaska  
Bankr. Rep. 173, 180 (Bankr. D. AK. 2005).

20 <sup>18</sup> Allowing a permanent exemption under 11 USC § 109(h)(4) for incarceration: In re Vollmer, 361  
B.R. 811 (Bankr. E.D. Va. 2007) [incorrectly stating that In re Star, 341 B.R. 830 (Bankr. E.D. Va. 2006)  
21 supported a permanent waiver of credit counseling]; In re Gates, 2007 WL 4365474 (Bankr. E.D. Cal. 2007)  
22 [giving an expansive definition of “disability,” saying incarceration sufficed]; In re Lee, 2008 WL 696591 (Bankr.  
W.D. Tex. 2008).

23 <sup>19</sup> In re Phipps, In re Ace, and In re Ridder, 8 Alaska Bankr. Rep., at 181.

24 <sup>20</sup> 11 USC § 362(c)(3) requires an individual debtor whose prior chapter 7 case was dismissed within  
25 the previous year to move to extend the automatic stay beyond the first 30 days from filing the second case.  
That is, the automatic stay expires after 30 days in the second case, unless the debtor timely moves to extend it.

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DATED: January 30, 2013

/s/ Herb Ross  
HERB ROSS  
U.S. Bankruptcy Judge

Serve :  
Karen Vernon, debtor  
Lonnie Vernon, debtor  
Larry Compton, trustee  
U.S. Trustee  
Case Manager

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