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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 DISMISSED¹**

1. **INTRODUCTION**- Both debtors were incarcerated in Alaskan jails when they filed chapter 7. They requested waivers from the requirement that they prove that they received credit counseling before filing.² The court treated this as a request that they be permitted to file the certificates post-petition due to exigent circumstances.³ They did not, however, meet the 45 day deadline to obtain the post-petition credit counseling.⁴ And, their incarceration does not warrant a permanent waiver of the requirement.⁵ Therefore, this case must be dismissed.

¹ This paper corrects some typos appearing in ECF No. 41, filed on January 30, 2013.

² 11 USC § 109(h)(1) and 11 USC § 111(a).

³ 11 USC § 109(h)(3)(A).

⁴ 11 USC § 109(h)(3)(B).

⁵ 11 USC § 109(h)(4).

1 **2. BACKGROUND-** The debtors were incarcerated before they filed this chapter 7 case
2 on **October 5, 2012**. They recently received lengthy prison sentences. When they filed their
3 petition, the debtors did not file certificates that they had obtained pre-filing credit counseling.
4 They did file a request that this requirement be waived due to their incarceration.⁶

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

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

16 A response was filed on January 4, 2013 by Karen Vernon outlining the difficulties she had
17 experienced in getting counseling due to the restrictions imposed on her by being in jail.⁹ One
18 was also filed on January 6, 2013 by Lonnie Vernon which was a harangue against the credit
19 counseling company he sought to deal with and against the government in general.¹⁰

21 ⁶ ECF No. 2.

22 ⁷ ECF No. 20.

23 ⁸ ECF No. 31.

24 ⁹ ECF No. 34.

25 ¹⁰ ECF No. 35.

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

1 And, lo and behold, Karen Vernon did obtain credit counseling on **January 9, 2013**.¹¹
2 Unfortunately, this was 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 a United States Trustee approved credit counseling agency, as a condition to
9 receiving the benefits of bankruptcy.¹²

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.¹³

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 ¹¹ ECF No. 39

26 ¹² 11 USC § 109(h)(1) and 11 USC § 111(a); 2 *Collier on Bankruptcy*, ¶ 109.9[1].

27 ¹³ 11 USC § 109(h)(3)(A); 2 *Collier on Bankruptcy*, ¶ 109.9[3].

28 MEMORANDUM DETERMINING THAT THE VERNONS
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1 30 days after the petition, unless the court, for cause, allows the debtor an
2 additional 15 days. Such cause might include, for example, a temporary
illness or disability.¹⁴

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 97,745.¹⁵

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

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

25 ¹⁴ 2 *Collier on Bankruptcy*, ¶ 109.9[3]; 11 USC § 109(h)(3)(B).

26 ¹⁵ 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 ¹⁶ In re Phipps, In re Ace, and In re Ridder, 8 Alaska Bankr. Rep. 173 (Bankr. D. AK. 2005).

¹⁷ Id., at 179-180.

MEMORANDUM DETERMINING THAT THE VERNONS
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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 specifically 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 that it does not:

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.¹⁸

24 Judge MacDonald made his ruling just after BAPCPA became effective, when there was
25 little or no case law about whether § 109(h)(4) applied to incarceration. Most courts have since,
26 however, agreed with his conclusion. There are no circuit cases. The cases in agreement with
27 Judge MacDonald are at the district court, BAP and bankruptcy court levels.¹⁹ However, a few

28 ¹⁸ Id., at 180.

¹⁹ Disallowing a permanent exemption under 11 USC § 109(h)(4) for incarceration: In re Hubel, 395
B.R. 823 (N.D.N.Y. 2008); In re Anderson, 397 B.R. 363 (6th Cir. BAP 2008); In re Bristol, 2009 WL 238002
(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.
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 bankruptcy court cases have allowed an exemption.²⁰ Simply put, the majority gives the term
2 “disability” its natural reading, concluding that the explanatory language in § 109(h)(4)
3 restrictively defining “disability” cannot reasonably be expanded to include 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 concluded that where Congress clearly sets a policy it is not for the bankruptcy court to disregard
8 it.²¹

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

12 Of course, if they do, their right to the automatic stay under 11 USC § 362(a) may be
13 restricted, in that they may have to proactively apply to keep the stay in effect.²²

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17 ¹⁹ (...continued)

18 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.
19 Fla. 2010); In re Solomon, 436 B.R. d451 (Bankr. W.D. Mich. 2010); plus, many unreported decisions found in
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 ²⁰ Allowing a permanent exemption under 11 USC § 109(h)(4) for incarceration: In re Vollmer, 361
21 B.R. 811 (Bankr. E.D. Va. 2007) [incorrectly stating that In re Star, 341 B.R. 830 (Bankr. E.D. Va. 2006)
22 supported a permanent waiver of credit counseling]; In re Gates, 2007 WL 4365474 (Bankr. E.D. Cal. 2007)
[giving an expansive definition of “disability,” saying incarceration sufficed]; In re Lee, 2008 WL 696591 (Bankr.
W.D. Tex. 2008).

23 ²¹ In re Phipps, In re Ace, and In re Ridder, 8 Alaska Bankr. Rep., at 181.

24 ²² 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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