

# JOURNAL

AMERICAN BANKRUPTCY INSTITUTE

Issues and Information for Today's Busy Insolvency Professional

## The Lost Day?: Exigent Circumstances and the Timing of Credit Counseling

### Contributing Editor:

Leslie E. Linfield  
Institute for Financial Literacy  
Portland, Maine  
llinfield@financiallit.org

Attend any bankruptcy-related legal conference, CLE or bar meeting (sometimes even happy hour at the local pub after a heavy day of §341 hearings) and the topic of the new mandatory credit counseling requirement isn't too far from someone's lips. Most of those conversations revolve around precisely when a debtor needs to obtain their counseling and whether exigent circumstances for a waiver truly exist. Even now a new question is emerging: whether counseling received the day of the filing of a petition creates eligibility issues.

### How Exigent Is Exigent?



Leslie E. Linfield

Around the country, multiple bankruptcy courts have ruled on the requirements of 11 U.S.C. §109(h). We have even seen the first appellate decision addressing the issue. The Eighth Circuit Bankruptcy Appellate Panel (BAP) affirmed the bankruptcy court's determination that the debtor was not eligible to be a debtor in a bankruptcy case and that Chief Judge **Barry S. Schermer** (E.D. Mo.) had applied the statute correctly. The facts of *In re Dixon*<sup>1</sup> address the debtor's failure to establish exigent circumstances meriting a waiver of the pre-petition credit counseling as required under §109(h).

The debtor alleged that the fact that his home was scheduled for a foreclosure sale the same day he filed his bankruptcy

### About the Authors

Leslie Linfield is the executive director of the Institute for Financial Literacy (IFL), an approved credit counseling provider with the USTP and Bankruptcy Administrators.

case constituted an exigent circumstance under §109(h). The debtor had sought out credit counseling after contacting an attorney the previous day. He stated in his "Certification Requesting Waiver of the Debt Counseling by Individual Debtor" that "I called [the USTP-approved credit-counseling agency] and was advised that it would be two weeks before they could provide me with debt counseling on 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 five-day period beginning on the date on which the debtor made that request; and (iii) is satisfactory to the court.<sup>3</sup>

With regard to the second requirement, the BAP found that the debtor was unable to obtain the required credit counseling within the five days of his requests, as is required by 109(h)(1).

With regard to the statutory requirement that the certification be "satisfactory to the court," the BAP notes that "it is

## Feature

phone and that it would be 24 hours before they could provide me with the counseling by Internet" and that "I have no computer and had no access to the Internet." He goes on to state, "it was impossible for me to complete credit counseling prior to the time set for foreclosure on my home."<sup>2</sup>

The BAP's analysis looked at the requirements to establish a waiver under §109(h)(3). This section, which provides that the counseling requirement does not apply with respect to a debtor who submits to the court a "certification," consists of three statutory requirements:

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

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 subdivision (i) and (ii) are met, but still not satisfactory to the court."<sup>4</sup>

Finally, the BAP looked at what it called "the most problematic of the requirements,"<sup>5</sup> the actual description of the exigent circumstances that would lay the foundation for the waiver of the credit-counseling requirement. The opinion noted that there must be both an actual exigent circumstance and circumstances that would merit waiving the requirements.<sup>6</sup>

The BAP's analysis included a discussion of "exigent," stating that it "indicates that the debtor finds himself in a

<sup>1</sup> *Dixon v. LaBarge* (*In re Dixon*), #05-6059EM, 2006 WL 355332 (8th Cir. BAP (E.D. Mo.) 1/31/06).

<sup>2</sup> *Id.* at 3.

<sup>3</sup> 11 U.S.C. §109(h)(3)(A).

<sup>4</sup> See *supra* note 1 p. 7.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> It is worth noting that in a footnote of this opinion the court recognizes that this request for a waiver is an actual misnomer. Debtors are in fact requesting a 30-day deferral of the credit counseling requirement.

situation in which adverse events are imminent and will occur before the debtor is able to avail himself of the statutory briefing.<sup>7</sup> The opinion goes on to note that “virtually all of the cases in which the exigent circumstances certificate is filed will, in fact, involve exigent circumstances.”<sup>8</sup>

However, when the BAP looked at the merits of waiving the requirements, it found a problem. The BAP noted that the bankruptcy court had found that a Missouri law<sup>9</sup> requires a 20-day notice of a foreclosure sale:

In the face of that much notice of the impending foreclosure sale, the bankruptcy court determined that his exigent circumstances did not merit the waiver of the prebankruptcy briefing requirement. We cannot say that the bankruptcy court abused its discretion in making that determination. A review of the reported decisions on facts similar to these, discloses that most courts have come to the same conclusion.<sup>10</sup>

This fact was the fatal blow to the debtor’s request. The BAP affirmed the bankruptcy court’s finding that the debtor was not eligible to be a debtor in bankruptcy.

The BAP decision clearly indicates that exigent circumstances do exist, but that it is extremely difficult to rise to the level of meriting the waiver. Falling back on the maxim “ignorance of the law is no excuse,” courts will hold a client responsible for dallying after receiving statutory notice of a pending action such as a foreclosure.

So how will the debtors’ bar deal with cases like this? One attorney who was not surprised by the court’s finding has a policy of not taking emergency cases. **O. Max Gardner III** of North Carolina says, “we don’t file emergency cases. There is insufficient time to do a reasonable investigation and to prepare the case. It may even be malpractice.”

However, there are attorneys who feel that you take the debtors as you find them. “You have an ethical obligation to represent your clients,” says Marc Stern of Seattle. “The fact you don’t have a lot of time because the client walks in the day before the foreclosure is a factor in what goes into a reasonable inquiry.” Stern, who recently contributed to an ABA report entitled *Attorney Liability*

*under §707(b)(4) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, also believes that “reasonable inquiry relates to chapter 7 cases. If you’re doing a ‘house-saver,’ you’re filing an emergency chapter 13.”

For those that disagree with the BAP’s holding, there may be a glimmer of hope. The bankruptcy court in *In re Carter*<sup>11</sup> held that out of the five debtors seeking a waiver in the case, the one debtor who had actually attempted to obtain counseling but was unable to had met their burden. If this decision or a similar one is affirmed by a BAP, practitioners may be able to shoehorn their clients into court. In the meantime, practitioners should proceed cautiously when pursuing an exigent-circumstance waiver.

### **The Lost Day**

When must a client complete the credit counseling in order to be eligible as a debtor under §109(h)? The BAP in *Dixon* also underlined the fact that the counseling must be obtained prior to the date of filing. A panel trustee in Arkansas, **Jo-Ann Goldman**, believes that not only does the credit counseling need to be completed prior to the filing of the petition, but that counseling completed on the day of the actual filing of a petition will disqualify a debtor from eligibility under §109.

Goldman’s argument lies in the actual language of §109(h)(1), which says that “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...a...briefing.”

“You have no idea what time [debtors] actually got their credit counseling,” Goldman says. “That’s why the word ‘day’ versus ‘date’ is important.” She goes on to state that as a panel trustee she has limited discretion around issues of eligibility. “I don’t have discretion of who may be a debtor under §109(e) and debt limitations, so therefore it stands to reason I do not have discretion around eligibility under §109(h).” She also says that “if Congress wanted trustees to have discretion they could have put this requirement in §1325, but they didn’t; they put in §109.”

So what raised this concern for Goldman? “I had a debtor who didn’t file

the credit counseling certificate with the petition as required under §521(b). When it was later filed, it showed that the counseling was completed the day the petition was filed. I called the agency and learned that the debtor had actually completed their counseling after the petition had been filed. The certificates do not show what time the debtor completed their actual counseling.”

So is this just a case of a tough trustee? Perhaps not. “Confirmation of a case does not bind a debtor. Judges don’t have jurisdiction if debtors were not eligible to begin with,” Goldman explains. “If we are jeopardizing a debtor’s ability to get a discharge, this has to be addressed. I’m really concerned for the chapter 7 debtors. What if their discharges aren’t valid? In a chapter 13 plan, we have three to five years to figure this out; not [so] with the chapter 7 cases. You’re talking about malpractice and the possibility of creditors attempting to collect years later. This could be a quagmire of litigation.”

Whether counseling may be completed on the day of filing will remain an open question until it reaches the appellate courts. In the meantime, practitioners may wish to stress to their clients the importance of obtaining credit counseling prior to the date of filing.

### **Additional Thoughts**

The developing case law regarding exigent-circumstance waivers is clearly demonstrating an almost insurmountable barrier for debtors to climb. It is distressing that the underlying facts in these cases involve debtors who are facing an impending mortgage foreclosure.

Does Congress need to consider passing stronger consumer-protection provisions for those at risk of mortgage foreclosures? One possible provision could require mortgage lenders to provide notice of the credit-counseling requirement of §109(h) and a list of all approved nonprofit budget and credit-counseling providers in their district. This may reduce the need for debtors to file exigent-circumstance waivers by better informing them of the need for counseling. ■

*Reprinted with permission from the ABI Journal, Vol. XXV, No. 3, April 2006.*

*The American Bankruptcy Institute is a multi-disciplinary, nonpartisan organization devoted to bankruptcy issues. ABI has more than 11,500 members, representing all facets of the insolvency field. For more information, visit ABI World at [www.abiworld.org](http://www.abiworld.org).*

<sup>7</sup> See *supra* note 1 p. 9.

<sup>8</sup> *Id.*

<sup>9</sup> Mo. Rev. Stat. §443.310.

<sup>10</sup> See *supra* note 1 p. 9.

<sup>11</sup> *In re Carter*, (#05-90089DK, 2005 WL 3529729 (D. Md.)12/16/05).