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## CONSUMER BANKRUPTCY

### The New Credit Counseling Requirement:

### How to Deal with It, Cases Interpreting It, News About It, and Practical Tips

by Craig D. Robins, Esq.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), which went into effect on October 17, 2005, imposes a strict duty on debtors to obtain credit counseling as a mandatory prerequisite to being eligible to file for any kind of bankruptcy relief. Courts here and around the country have already begun dismissing cases left and right because debtors have not strictly adhered to this requirement. In our own jurisdiction, local counsel has been sanctioned for not ensuring that clients have followed through with their credit counseling obligations. The credit counseling requirement has been very controversial as most

people believe that it is merely a device to delay and to drive up the costs of bankruptcy protection for the very poorest people who can barely afford it. Here, in a nutshell, are some of the most important aspects of the credit counseling requirement.

**The Credit Counseling Requirement.** Put very simply, a debtor must obtain credit counseling from a credit counseling agency that is approved by the United States Trustee for this jurisdiction. The debtor must get this counseling before the petition is filed.



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**The Statutes.** The requirement for pre-petition credit counseling is set forth in Bankruptcy Code section 109(h), which states that a debtor's eligibility to file for Chapter 7 relief is predicated on receiving credit counseling from an "approved non-profit budget and credit counseling agency" within 180 days preceding the date of filing.

Bankruptcy Code section 111(a) states that the court clerk is responsible for maintaining a list of approved agencies. The United States Trustee is entity that investigates and qualifies the agencies. Code section 521(b)(1) states that the debtor shall file with the Court a certificate from the credit

counseling agency describing the credit counseling services.

**What is Credit Counseling?** The general idea is that a credit counselor performs a budget analysis to determine if the debtor can pay his debts through a non-bankruptcy plan, and if so, the counselor will prepare a plan. Counseling sessions can be in person, over the phone, or by computer. There are no agencies in this area so almost all sessions are conducted by phone. A typical session lasts about 30 to 45 minutes.

Most agencies charge \$50 for the session which is usually paid by the debtor who authorizes an automatic debit from a bank account. Some agencies will waive the fee for pro-bono debtors. Attorneys can set up an account with a particular agency that will then periodically bill the attorney, who collects the fee from the client. At the conclusion of the session, the agency will prepare a Credit Counseling Certificate attesting to the completion of the requirement and they will mail it to the debtor. The agency will also immediately fax you a copy if requested.

**Texas Judge Blasts Credit Counseling Requirement.** In my column last month, I noted that Texas Bankruptcy Judge Frank Monroe called the BAPCPA credit counseling provisions "inane," "absurd," and incomprehensible to "any rational human being" in a December, 2005 decision. In that case, the debtors sought Chapter 13 relief to stop a foreclosure sale. They were unaware of the new BAPCPA requirement to complete credit counseling prior to filing. Judge Monroe found that the new laws required that he dismiss the case, even though the debtors had obtained the credit counseling just a few days after filing. The judge apparently disliked both the law and the result, but felt compelled to apply it.

Judge Monroe noted in his

decision that Congress refused to listen to many judges, professors, and bankruptcy attorneys who spoke out against the Act. He stated: "This is because the parties pushing the passage of the Act had their own agenda. It was apparently an agenda to make more money off the backs of the consumers in this country." The judge held that "simply stated, if a debtor does not request the required credit counseling services . . . that person is ineligible to be a debtor no matter how dire the circumstances . . ." Judge Monroe's opinion on this requirement is clear: "This Court views this requirement as inane."

**Credit Counseling Not Working.** Last month I highlighted an investigative *Washington Post* article that concluded that the credit counseling requirement is not steering debtors away from bankruptcy and into payment plans, as envisioned by the Act's supporters. Credit counselors who were interviewed for that article reported that most debtors were in such deep financial trouble that they could not qualify for any kind of non-bankruptcy debt-management plan.

**My Own Opinion.** Like many commentators, I believe that this requirement is a silly, stupid, waste of time that does not help debtors at all and instead makes it more difficult for consumers to obtain bankruptcy relief. There is no doubt that the vast majority of people declaring bankruptcy do so because of divorce, loss of employment, or medical debt. Credit counseling cannot help such people. Anyone who voted for this bill in congress deserves our everlasting scorn for clearly choosing the wants (not needs) of industry over the needs (not wants) of working class Americans who fall farther and farther behind every year. I also find it very troubling that many of these credit counseling agencies are funded in

part by credit card companies and therefore cannot possibly be unbiased.

**Approved Credit Counseling Agencies.** Shortly after BAPCPA went into effect, the United States Trustee for the Eastern District of New York approved four credit counseling agencies. Now there are twelve. The list of approved agencies is maintained on the court's official website,

**Credit Counseling and Emergency Filings.** How do you handle the credit counseling requirement if you must rush to file a petition to stop a foreclosure? A debtor can obtain a 30 day postponement of the credit counseling requirement under certain emergency circumstances by filing an application and proposed order. To obtain the additional time, the debtor must certify to the court's satisfaction that exigent circumstances prevented the debtor from seeking counseling prior to filing. In addition, the debtor must also state in his application that the debtor tried to obtain pre-petition counseling in the five days prior to making the request, but was unable to do so. Also note that even if the debtor obtains the credit counseling, but does so in an untimely manner, it will not have any mitigating effect, and the case will still be dismissed because the counseling was not obtained during the mandatory statutory period.

**Practice Caveat:** Take heed that an emergency, alone, is not enough to get the extension. The debtor must have tried, but been unable, to obtain the counseling. You must also bring an application at the time of filing. We have already seen some published decisions in which the court dismissed a case that the debtor filed under emergency circumstances but did not even try to obtain the counseling. I just filed an emergency Chapter 13 petition for a debtor who came to me the afternoon before a foreclosure sale. I had the

debtor take the counseling session by telephone from my conference room while I worked on his petition.

Another Practice Caveat: As I indicated last month, a local attorney was sanctioned because even though he successfully obtained 30 day extensions for some debtors, he neglected to take reasonable steps thereafter to ensure that the debtors fulfilled their obligation to obtain credit counseling within the 30 day extension period. So if you get an extension for your client, make sure you follow through.

**Penalties and Consequences for Non-compliance.** These can include having your case dismissed, being put on the defensive in a *sua sponte* hearing before the judge, suffering extreme embarrassment, being ordered to disgorge fees, encountering potential malpractice suits and grievance complaints, and being assessed sanctions and attorney's fees. You therefore do not want to get into trouble on this one.

**Filing Certificate by ECF.** You must file the Credit Counseling Certificate at the time that you file the petition. If you do not, the filing will be considered deficient. You must file the certificate as a separate docket event in ECF, using the event, "Certificate of Credit Counseling" located under the "Other" category. There is no official form for the Credit Counseling Certificate. Do not use Form 23 (Debtor's Certification of Completion of Personal Financial Management Course), which is included in most bankruptcy filing software programs, for the Credit Counseling Certificate. The debtor should have received a certificate from the approved credit counseling agency. You can also ask the agency to fax you a copy. You will need to scan this certificate with a scanner attached to your computer so that you can make a PDF copy. It is this PDF copy that you then upload through ECF. Yes, this means that you must have a computer scanner

now to practice bankruptcy.

**Credit Counseling Payment Plan.** If the credit counseling agency actually prepares a payment plan, Bankruptcy Code section 521(b)(2) requires you to file a copy of it when you file the Credit Counseling Certificate. This means that your PDF file for the Certificate should also include the plan.

**Practical Tips.** I urge you to do what I do. To make sure my clients complete the credit counseling requirement, I usually set up the telephone session for them while they are at my office and I have them do it in my conference room. I collect the counseling fee from them and have the agency invoice me for it. The agency also automatically faxes me a copy of the certificate within an hour or two of the session. Of course, this is all a pain in the neck and BAPCPA gives us no choice, but this approach appears to be the smoothest way to handle the requirement and ensure that it is complied with timely and properly.

**Do Not Confuse Credit Counseling with Budget Counseling.** BAPCPA also imposes an additional obligation on the debtor to obtain budget counseling as a condition to obtaining a discharge. Please note that credit counseling and budget counseling from a financial management course are two distinctly different requirements.

**Conclusion.** Although the credit counseling provision appears to be extremely unpopular, Judges are compelled to apply it strictly as it is written. Therefore, you need to be knowledgeable about this requirement in order to file any consumer bankruptcy case. Make sure you have the Credit Counseling Certificate in hand when you file the petition.

**Editor's Note** (revised 2008):  
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