

11 U.S.C. § 109(h)  
Credit Counseling Requirement

David and Lynn Bartlett, Case No. 07-63647-fra13

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Unpublished

Debtors received the credit counseling services required by § 109(h) 185 days prior to their bankruptcy petition date. After the petition date, Debtors completed a second credit counseling session. They thereafter filed a motion seeking an extension of the time to file a certificate of credit counseling. They did not state that they were unable to obtain counseling services within five days of requesting them (as required by § 109(h)(3)), but argued that dismissal of the case would prejudice creditors and result in the unnecessary administrative costs of filing a new case. They said their failure to file the case within 180 days of their first credit counseling session was due to their car being repossessed, which caused a one-month delay in filing the bankruptcy petition.

The Court opined that the Debtors' failure to obtain credit counseling within 180 days before the bankruptcy petition date rendered them ineligible for bankruptcy relief under § 109(h)(1) and that they failed to qualify for a post-petition extension of time for the second counseling session under § 109(h)(3). Notwithstanding this, the court characterized the Debtors' motion as seeking an equitable exception to strict compliance with the terms of § 109(h).

The court noted that the "vast majority" of cases have strictly construed the time requirements of § 109(h). However, the Court held that the Bankruptcy Appellate Panel's decision in In re Luna, 122 B.R. 575 (9th Cir. BAP 1991), interpreting § 109(g), is applicable to § 109(h). The BAP held that the statute in question is not jurisdictional in nature, and that mechanical application of the section to dismiss a case is inappropriate where doing so would produce an illogical, unjust, or capricious result. The Bankruptcy Court held, however, that strict compliance with the terms of § 109(h) would not produce an illogical, unjust, or capricious result in this instance, especially given the Code has provisions relating to the waiver of the filing fee and extension of the automatic stay in a second case. An order was entered dismissing the case.

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8 UNITED STATES BANKRUPTCY COURT  
9 FOR THE DISTRICT OF OREGON

10 In Re: ) Bankruptcy Case  
11 DAVID RAE BARTLETT and ) No. 07-63647-fra13  
12 LYNN MARIE BARTLETT, )  
13 \_\_\_\_\_ ) MEMORANDUM OPINION  
Debtors. )

14 Debtors have failed to strictly comply with the pre-petition  
15 counseling requirements imposed by 11 U.S.C. § 109(h). They seek an  
16 order waiving the requirement on the grounds that they have moved  
17 promptly to remedy the defect, and that dismissing the case would  
18 prejudice creditors and result in unnecessary administrative costs. The  
19 Court finds that the Debtors have not established grounds for relief from  
20 the provisions of § 109(h), and that the case should be dismissed.

21 I. FACTS

22 Debtors filed their petition for relief under Chapter 13 of the  
23 Bankruptcy Code on December 29, 2007. Accompanying their petition were  
24 Certificates of Credit Counseling Briefing attesting that each received  
25 the briefing required by Code § 109(h) on June 27, 2007 - 185 days prior  
26 to the date the petition was filed.

1           On January 2, 2008, the Court issued an order and notice  
2 directing the Debtors to file either an amended certificate reflecting  
3 receipt of a briefing within 180 days prior to the filing date, a motion  
4 for an extension of time to file, or an exemption from the briefing  
5 requirement altogether. On January 3, the Debtors filed their motion to  
6 extend the time to file a certificate, using the Court's standard Form  
7 100.3. The motion states in part that:

8           We completed the required credit counseling briefing  
9 on June 27, 2007, and originally planned to sign and  
10 file our bankruptcy case on November 28, 2007.  
11 However, our vehicle was repossessed the night before  
12 our scheduled appointment to sign and file the  
13 bankruptcy case. This delayed our filing for one  
14 month. We signed the bankruptcy petition on December  
15 28, 2007 - within 184 days of completing the briefing  
16 - and the case was filed on the 185th day after  
17 completing the briefing. We completed a second  
18 counseling session on January 2, 2008, which would  
19 allow us to immediately file a new case if this case  
20 is dismissed. Dismissing this case will only  
21 prejudice creditors and result in the unnecessary  
22 administrative costs of filing a new case.

## 23                           II. STATUTORY REQUIREMENTS

24           Code § 109(h) (1) provides that:

25           Subject to paragraphs 2 and 3, and notwithstanding any  
26 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 § 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. [Emphasis added.]

          A debtor may commence a case under the Code notwithstanding  
this requirement by submitting a certification which describes exigent

1 circumstances that merit a waiver of the requirements described above,  
2 and which states that the debtor requested services from an approved  
3 counseling agency but was unable to obtain the services during the five  
4 day period beginning on the date on which the debtor made the request. If  
5 the certification is satisfactory to the court, it may, for up to 30  
6 days, waive the filing requirement. Code § 109(h) (3) (A).

### 7 III. DISCUSSION

8 The Debtors' motion does not assert that they were unable to  
9 obtain counseling services within five days of their request for such  
10 service. More importantly, the motion does not, in the Court's opinion,  
11 describe "exigent circumstances" which justify commencement of the case  
12 after the counseling certificate had expired, and without first  
13 undertaking a new counseling session. It may be - as the sequence of  
14 events here certainly suggests - that the expiration of the original  
15 certificate was simply overlooked. Whatever the reason, the Debtors are  
16 ineligible under § 109(h) because they failed to obtain the counseling  
17 within the 180 days prior to their petition, and failed to qualify for a  
18 post-petition extension of time. That Debtors did in fact act to remedy  
19 the problem by obtaining counseling after receiving notice of the defect  
20 does not, by itself, satisfy the terms of § 109(h) (3).

21 The Debtors argue that, notwithstanding their lack of strict  
22 compliance, the case should not be dismissed in light of the potential  
23 for prejudice to creditors and the unnecessary administrative costs  
24 entailed in filing a new case. In effect, the Debtors seek an equitable  
25 exception to strict compliance with the terms of § 109(h).

26 Bankruptcy courts have been varied in their responses to this

1 issue. The "vast majority" of courts considering the issue have strictly  
2 construed the statute's time requirements. In re Ruckdaschel, 364 B.R.  
3 724, 729 (Bankr. D. Id. 2007). Courts adhering to this view have  
4 dismissed cases filed by debtors who are deemed ineligible under  
5 § 109(h). Other courts have held that the provisions of § 109(h) are not  
6 jurisdictional, and that dismissal is not mandated when debtors are  
7 ineligible. In re Manalad, 360 B.R. 288 (Bankr. C.D. Ca. 2007); In re  
8 Enloe, 373 B.R. 123 (Bankr. D. Co. 2007); In re Hess, 347 B.R. 489  
9 (Bankr. D. Vt. 2006).

10 Another eligibility requirement in the Code is to be found at  
11 § 109(g): this section provides that an individual "may not be a debtor  
12 under this title" if the individual has been the debtor in a case within  
13 the 180 days preceding the petition if the prior case was dismissed for  
14 failure to comply with a court order, or voluntarily after a motion for  
15 relief from the automatic stay had been filed. In In re Luna, 122 B.R.  
16 575 (9th Cir. BAP 1991), the Bankruptcy Appellate Panel for the Ninth  
17 Circuit held that § 109(g) was not jurisdictional in nature, and that  
18 mechanical application of this section was inappropriate where doing so  
19 would produce an illogical, unjust, or capricious result. Since  
20 §§ 109(g) and (h) are similar in language and intent, it stands to reason  
21 that the standard set out in Luna is applicable to § 109(h).

22 Dismissal in this case, while inconvenient and expensive, is  
23 neither illogical nor unjust. The statute imposes a clearly defined  
24 requirement: that debtors must undergo counseling prior, but not more  
25 than 180 days prior, to commencement of their bankruptcy cases. This is  
26 part of a consistent statutory scheme designed to encourage (if not

1 force) prospective debtors to explore alternatives before commencing a  
2 bankruptcy case. Debtors here failed to comply with that requirement and  
3 offer no substantial justification for that failure. The result is that  
4 they will have to file again: this may require payment of a new filing  
5 fee and, perhaps, the need to seek an extension of the automatic stay  
6 under Code § 362. Unlike § 109, relief from these provisions is provided  
7 for in the Code, and does not require a resort to equity. The filing fee  
8 may be waived if the Debtors qualify, Fed.R.Bankr.P. 1006(c), and the  
9 automatic stay may be extended, 11 U.S.C. §362(c)(3)(B). Neither the  
10 inconvenience nor the expense attendant to dismissal are insurmountable.  
11 The existence of these remedies in the statutory scheme precludes ready  
12 application of equitable remedies.

13 Debtors point out that neither the Trustee nor any other  
14 interested party has sought dismissal of the case. In some contexts this  
15 might mean that the case would be allowed to continue. See e.g. In re  
16 Duffus, 339 B.R. 746 (Bankr. D.Or. 2006). However, provisions such as  
17 the one at issue in Duffus merely set out a remedy -dismissal- which may  
18 or may not be sought in a given case. Under §109(h), a debtor who has  
19 not complied with the briefing requirement is not entitled to any relief  
20 under Title 11, including the benefit of the automatic stay or any  
21 discharge. Absent circumstances satisfying the Luna criteria, no further  
22 relief may be extended.

#### 23 IV. CONCLUSION

24 Code § 109(h) should be strictly applied according to its  
25 terms. Where debtors are found to be ineligible under this section the  
26 case should be dismissed, unless to do so would be illogical, unjust or

1 capricious under the circumstances. That is not the case here, and the  
2 case must be dismissed.

3           The Court recognizes that substantial inconvenience to the  
4 parties may result if particularly aggressive creditors move to seize  
5 assets between the time a case is dismissed and a new one is filed. In  
6 most instances such seizures would be subject to avoidance as  
7 preferences. In order to avoid that problem, the order dismissing the  
8 case will not take effect for 10 days.

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11                           FRANK R. ALLEY, III  
12                           Bankruptcy Judge  
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