

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
515 RUSK AVENUE, STE 4636
HOUSTON, TEXAS 77002

December 14, 2007



CHAMBERS OF
MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D C. 20544

Dear Mr. McCabe and Members of the Committee.

Thank you for soliciting comments on proposed changes to the Federal Rules of Bankruptcy Procedure. The Committee's hard work is much appreciated.

With one exception, I support the adoption of the proposed rules without change. I am concerned about proposed Bankruptcy Rule 1017.1. Although I fully support the adoption of rules that make § 109(h) more workable, I am concerned that the proposed rule may not be the appropriate solution. In some ways, the proposed rule may add to the problem.

Before I make my detailed comment, please allow me to relate some anecdotal observations about my own recent experience. Shortly after the effective date of § 109(h), there was substantial confusion about the requirement for pre-petition credit counseling. Many petitions and cases were dismissed when debtors failed to obtain credit counseling. Some were dismissed after the filing of a certification under § 109(h)(3)(A), but not many. However, I cannot recall a single petition or case that was dismissed because of a failed certification under § 109(h)(3)(A) in the past year. I make these observations because of a concern that the injection of a new rule may create confusion in a situation that now appears well under control.

Although I cannot tell if my experience is typical, the experience is based on a relatively large number of cases. Since October 17, 2005, there have been 4,167 new chapter 7 and 13 cases filed in my court. 2,087 of those cases have been filed in the past year

There are still petitions and cases that are dismissed under § 109(h)(1). However, my experience has been that the vast majority of these are situations in which *pro se* debtors did not receive pre-petition credit counseling and did not file any § 109(h)(3)(A) certification.

With respect to the substance of the proposed rule, I support the adoption of a time limit for the filing of the certification. I suggest that 7 days is more appropriate than 14 days. If a debtor files a certification on the 14th day, and an objection is filed on the 21st day, there will be only a small amount of time for notice of a hearing and actual court consideration. I suggest that longer period of time be given for court consideration. That can be accomplished only with a very short initial deadline.

My concern about confusion in the proposed rule arises from the rule's use of the term "shall be deemed satisfactory to the court." Section 109(h)(3)(A) contains three requirements, each of which must be satisfied in order for a debtor to obtain a waiver. Pursuant to § 109(h)(3)(A), the certification must (i) describe exigent circumstances that merit a waiver of the requirement of credit counseling; (ii) state that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services during the five-day period on the date on which the debtor made the request; and (iii) be "satisfactory to the court." The proposed rule appears to deal only with the third requirement.

The proposed rule does not address whether a certification deemed satisfactory under BLR 1017.1 satisfies only § 109(h)(3)(A)(iii) or (i) and (ii) as well. I am concerned that the rule will promote confusion over what it means to have a certification satisfactory to the Court. Surely, meeting the one statutory requirement cannot mean that the other two are also met. Although a few reported cases have considered what a certification must include to be "satisfactory to the court" pursuant to (h)(3)(A)(iii) (e.g., must it be a sworn statement?), most of the case law has dealt with whether the first two requirements ((h)(3)(A)(i) and (ii)) were met.

Litigation may ensue as to the effect of the rule. Let me suggest the following hypothetical

On January 1, 2009, Debtor files a chapter 7 petition. On January 14, 2009, Debtor submits a certification that does not allege that debtor attempted to obtain pre-petition credit counseling. The certification does allege exigent circumstances. No objection is filed and the Court takes no *sua sponte* action. Debtor obtains credit counseling on January 30, 2009. Debtor's mortgage company then seeks dismissal based on ineligibility. The motion alleges that the debtor's certification did not satisfy § 109(h)(3)(A)(ii) and that BLR 1017.1 only deems that § 109(h)(3)(A)(iii) has been satisfied.

I am not certain of the correct answer to the above-presented hypothetical. However, it appears that there would be fertile arguments for both debtor and mortgage company. Debtor will argue that the deemed satisfactory language of the rule is meaningless unless it encompasses all of the requirements of § 109(h)(3)(A). Mortgage company will argue that the rule was only intended to encompass § 109(h)(3)(A)(iii) and that the objective test set forth in § 109(h)(3)(A)(ii) has not been satisfied.

Given the paucity of recent disputes in this area, I recommend that the proposed rule be clarified lest it promote—rather than resolve—disputes under the statute.

If the purpose of the rule is to require any objection to the certification to be filed, then I urge the selection of words that do not mirror only a portion of the statute. The test should not be whether the certification is "satisfactory to the court," but whether the certification meets the requirements of § 109(h)(3)(A). An alternative rule could be as follows:

Bankruptcy Rule 1017.1

- 1 *An individual debtor complies with § 109(h)(1) by*
 - A. *Completing the briefing required by § 109(h)(1) prior to the filing of the debtor's petition, or*
 - B. *If the debtor has filed a certificate that complies with § 109(h)(3)(A), completing the briefing required by § 109(h)(1) on or before the later of*
 - (i) *30 days after the filing of the debtor's petition, or*
 - (ii) *The date ordered by the Court, not to exceed 45 days from the date of the filing of the debtor's petition.*
- 2 *A certification filed by an individual debtor pursuant to § 109(h)(3)(A) complies with the requirements of that section unless*
 - A. *The debtor fails to file the certification within 7 days after the petition date, or*
 - B. *A party in interest objects to a timely filed certification and the objection to the certification is sustained not later than the 30th day after the petition date; or*
 - C. *The court, after hearing on notice to the debtor and the United States trustee, disapproves of a timely filed certification not later than the 30th day after the petition date.*

Thank you for your consideration.

Sincerely,


Marvin Isgur