

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

-----X **Before Judge J. Feller**

IN RE:

NAVEED ASAD

Case: 08-43796-JF

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MEMORANDUM IN SUPPORT OF SETTING ASIDE THE ORDER OF DISMISSAL.

KARAMVIR DAHIYA of Dahiya & Associates PC respectfully submit the following memo of law in support of request to reconsider the order of dismissal of this case.

1. The issue is if the credit counseling done on the date of the petition is statutorily infructuous and renders the debtor ineligible pursuant to 109(h).

2. The core concept of credit counseling is that the debtor makes an informed decision to file bankruptcy petition. It was basically tailored to show people that they might just be better without filing bankruptcy and live on a suggested budget and or adumbrating the consequences of such filing i.e. impact on credit history etc. (as suggested by some rulings).
 - a. Hon.ble Judge Carla E. Craig in the case of **In re Ginsberg** “The purpose of the credit counseling requirement is “to give consumers in financial distress an opportunity to learn about the consequences of bankruptcy- such as the potentially devastating effect it can have on their credit rating- before they decide to file for bankruptcy relief.” [In re Henderson, 339 B.R. 34, 36-37](#) (citing H.R.Rep. No. 109-31, pt.1, at 18 (2005), U.S.Code Cong. & Admin. News 2005, pp. 88, 104.)” See 354 BR 644 Bkrtcy. E.D.N.Y. 2006

(With due respect, I must state that I have heard numerous credit counseling, none of them has ever opined, discussed, suggested anything about the consequences of filing bankruptcies. To suggest that the credit counseling is to apprise a prospective debtor about the consequences of filing bankruptcy is misleading and if it is so then most of the credit counselors are failing in their obligations. We must rule out at least one proposition that the credit counselor are to familiarize the prospective debtor about the consequences of filing bankruptcies. The plain language of section 109 (h)(1) do not suggest anything on that level)

3. It applies to all individual debtors.
4. Courts are split about the timing, some holding that it be done at least a day before the date of filing (*In re Cole*, 347 B.R. 70 (Bankr. E.D. Tenn. 2006)) where as others hold that it is all right to have it same date as long as it is done before the filing ([First Shore Fed. Sav. & Loan Ass'n v. Hudson \(*In re Hudson*\), 352 B.R. 391 \(Bankr. D. Md. 2006\)](#) ; [*In re Warren*, 339 B.R. 475 \(Bankr. E.D. Ark. 2006\)](#))).
5. Statutory obligation here, is substantive one i.e. credit counseling prior to filing.
6. Every statute must be conclusively presumed to be a purposive act. Here the purpose is the credit counseling and not the gap of one day for the credit counseling to be efficacious. Any judicial opinion which looks at the plain meaning in a statute without consideration of its purpose, self defeats. If we force a gap of a day after credit counseling before creating eligibility to file bankruptcy, it creates an irrational pattern of application for the reasons as mentioned below.

7. This court is requested to look at the vigor of different reasoning applied by the courts to effectuate the goal of a statute. For example in the case of *Associates Commercial Corp. v. Rash* the court cited, relied on and closely followed the solicitor general analysis of how to value property retained by a debtor in bankruptcy and not turned over to secured creditors. The court rejected not only the valuation approach of the lower court under review, but a compromise approach followed by the respected Second and Seventh Circuit. The words of the statute ultimately answered the interpretive issues-but only after they were understood in the context of bankruptcy policy. See *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997)
 - a. The words “preceding the date of filing of the petition” must be understood in the context of the bankruptcy policy. See §109 (h)(1).
 - b. Bankruptcy policy is an informed debtor.

8. This court inclination to follow the Plain Meaning Rule would definitely drag the debtors to rough water and contort the significance of credit counseling besides thwart access to court.
 - a. Plain meaning Rule, as suggested by this court, that date of filing means the date and not the moment could be taken as is without resorting to further analysis if however it does not create ambivalent situation. It is clear that in the bankruptcy code, nowhere do we have the intention of the congress as to why there should be a gap of one day before one is eligible to file for bankruptcy. There are several provisions of law wherein the statute and congress is clear about the enactment of timings and necessity of providing time period in consumer cases. Equity financing of residential houses is a clear example of statutory timings. In the Truth in Lending Act cases (15 USC 1601), we have a provision that the debtors will have three days time (72 hours) before the obligation

becomes final. Within the bracket of 72 hours, the borrowers could easily cancel the loan or their obligations. Congress felt it necessary to provide the borrower with a cooling time and time to think. However we do not discover such mandate in terms of section 109 (h).

i. If section 109 (h) establishes a cooling period of one day for the debtor to think that it could be easily defeated. For instance, the debtor could just finish credit counseling at 11:59 PM and file bankruptcy after one minute. This would fulfill the requirement on a prima facie level. Cooling period was not the intention of the congress. The only rationale of this requirement is that we have an informed debtor and this does not derive any efficacy from the 'gap period.'

b. The plain meaning would make sense here only if the congress wanted us to believe that it wanted a debtor to think for a day before filing bankruptcy. No where do we come across any suggestion of this kind. Credit counseling, ultimately was designed to give the debtor a informed choice, so that we have an informed debtor in the bankruptcy process.

9. So the plain meaning of the statutory text would be followed¹ (when the statute is unambiguous)² except when textual plain meaning requires an absurd result or suggest a scrivener error. However when the underlying policy reason is impacted adversely, the textual meaning has to be revised to facilitate congressional intent.

¹ **Massachusetts v. E.P.A.** 127 S.Ct. 1438 U.S.,2007. in [West Virginia University Hospitals, Inc. v. Casey](#) 499 U.S. 83, 111 S.Ct. 1138 U.S.Pa.,1991.

2. When text and its consequences does not militate against the underlying policy, the statute could have an unscathed passage in legal interpretation.

“When the statutory “language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to its terms.” **Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.**, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989), in turn quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917); internal quotation marks omitted).” As quoted in **Arlington Cent. School Dist. Bd. of Educ. v. Murphy** 548 U.S. 291, 126 S.Ct. 2455 U.S.,2006.

10. Did the word ‘date’ undergo any changes or did the congress revise the meaning of the word date, then it would have definitely done so in reference to as it is used in section 547(b)(4)(A), 549 (a)(1) and 348 (f)(1)(A). Does the amendment mandate a distinctive meaning of “date”? It is doubtful the congress wanted a restrictive or wider reading of this word date as it has been previously used.

“Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. See 2 J. Sutherland, *Statutory Construction* § 5201 (3d F. Horack ed.1943). We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact? , but because it is our role to make sense rather than nonsense out of the *corpus juris*” as quoted in **West Virginia University Hospitals, Inc. v. Casey** 499 U.S. 83, 111 S.Ct. 1138 U.S.Pa.,1991.

11. It is clear that this impugned section dealing with the timing of credit counseling cannot be given a plain meaning for:
- a. There is an arguable ambiguity;
 - b. The apparent plain meaning produces unreasonable consequences, and or

- c. The apparent plain meaning is contrary to probable legislative intent or purpose.

12. This court was not right in dismissing the case of the debtor as this court interpreted it in such a fashion which militates against its legislative context, the aim of the statute and overall purpose of the bankruptcy code.

- a. Plain meaning reading of “date” here produces absurd results:
- b. Since it produces absurd results, basic purpose of the statute must be gauged.

- i. “Instead, because of the technical nature of the language in question, we shall first examine the provision's background and basic purposes.” **Zuni Public Schools Dist. No. 89 v. Department of Educ.** 127 S.Ct. 1534 U.S.,2007.

- ii. We also find support for our view of the language in the more general circumstance that statutory “[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.” [Brown v. Gardner, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 \(1994\)](#). See also [FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-133, 120 S.Ct. 1291, 146 L.Ed.2d 121 \(2000\)](#) (“[m]eaning- or ambiguity-of certain words or phrases may only become evident when placed in context” (emphasis added)). That may be so even if statutory language is highly technical. **Id.**

- iii. It is the duty of this court to avoid absurd result, i.e. it must not read the date as a date but must read it as ‘moment.’ See [United States v. Turkette, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d](#)

[246 \(1981\)](#) (absurd results are to be avoided). **U.S. v. Wilson** 503 U.S. 329, 112 S.Ct. 1351 U.S.Tenn.,1992.

13. In this case at the bar, if the debtor had taken credit counseling at 11:59 PM, he should be able to file bankruptcy after one minute. Statutorily that would be next day! Whereas if one takes credit counseling in the morning and files bankruptcy same day but after 10 hours, that would not be considered a proper conformation with the statutory demand?? This literal reading produces an absurd result. The purpose of the credit counseling is clear is not to give a cooling period to think but just to have an informed debtor with choices to enter into the bankruptcy field. Court must interpret the credit counseling as proper as long as it is done prior to filing and this reading would help court to interpret this ambiguous statute as to best to carry out their statutory purpose. See *Reves v. Earnest & Young* 494 US 56, 60-61 (1990)

- i. "The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest." **Green v. Bock Laundry Mach. Co.** 490 U.S. 504, 109 S.Ct. 1981 U.S.,1989.

14. It is important for court to maintain the textual integrity of this proviso. Further it must not be read in exclusion, as each statutory provision should be read by reference to the whole act. See *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 523 (1993). No doubt statutory interpretation is a “holistic” endeavor. See *Smith v. United State* 113 S.Ct. 2050, 2057 (1993).

- a. We have provisions in the bankruptcy code that allows a debtor to resort to emergency filing, now if we construe the provision of mandatory credit counseling to have a cooling time of one day or just wait, it would be rendering that facility of emergency filing futile. Interpreting a provision in a way that would render other provisions of the Act superfluous or unnecessary. See *Ratzlaf v. United States* 114 St. 655, 659 (1994); *Kungys v. United States* 485 US 759 778; *South Carolina v. Catawba Indian Tribe, In.* 476 US 498 (1986).

15. The policy behind the credit counseling is that we have an informed debtor and that the debtor has explored other means to salvaging his dire situation. Further, it is to make available other options to the would be debtor. However, to force this credit counseling to be done a day before the filing is to give a very narrow interpretation to the value of credit counseling. Further it must be observed that should we give such literal meanings to the words of the statute then the provision related with the preferential transfer, section 547 would render transfer done on the date of the filing not preferential. Such cannot be policy of the congress. We must avoid interpreting this credit counseling provision in a way that would be inconsistent with the policy of another provision. See *United Saving Association v. Timbers of Inwood Forest Assocs*, 484 US 365, 371 (1988).

16. This court must avoid interpreting this provision in a way that is inconsistent with a necessary assumption of another provision. See *Gade v. National Solid Wastes Management Assn't* 112 S. Ct. 2374 2384 (1992)
17. It is not out of place to suggest that this court must give the same reading to this credit counseling statute as it has given to section 547 of the Code. **Court must interpret the same or similar terms in a statute the same way.** See *Sullivan v. Stroop*, 496 US 478; *United Saving Association v. timbers of Inwood Forest Association* 484 US 365.
18. Not only is the court to interpret in foregoing fashion, there is a presumption that congress uses same term consistently in different statute. See *Hawaiian Airlines, Inc. v. Norris* 114 S. Ct. 2239, 2244-45 (1994); *Smith v. United States* 113 S. Ct. 2050 (1993). Further there is Super-strong presumption of correctness for statutory precedents. See *California v. FERC* 495 US 490.
19. The credit counseling statute does not find much discussion by the congress in regards to the timing of the credit counseling and thus when compared with the reading of section 547 of the code we can safely resort to the “dog didn’t bark” cannon which creates a presumption that prior legal rule should be retained if no one in the legislative deliberation even mentioned the rule or discussed any changes in the rule. See *Chimson v. ropemer* 501 US 380
20. In an interesting case of a priest being brought from England to serve in New York city, the government prosecuted the church for paying this priest and holding them liable under a 1885 statute which made a crime for anyone in this country to assist or encourage the importation or migration of any aline or aliens, any foreigners into the United States under contract or agreement . . . to perform labor or service of any kind in the Untied States. A unanimous Supreme Court

ruled that the minister might fall within the plain meaning of the statute, but not its “spirit” or intent, however looking at the title, deliberation of the legislature, the statutory purpose and over all religious values of the country, the Court held that the law did not make it a crime for a church to import a man of the cloth see Holy Trinity Church v. United States, 143 US 457 (1892)

21. This court is requested to follow what Mr. Justice Reed opined in United States v. American Trucking Ass’n, 310 US 534 (1940)—“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”

22. This court is requested to treat the “date” as a moment of filing rather than giving a calendar meaning. See *In re In re Francisco* 390 B.R. 700 10th Cir.BAP (N.M.),2008.

23. 2005 Amendment of the Code was not a high calibered draftsmanship. “While the statute in question exhibits the same mediocre draftsmanship as the bulk of the BAPCPA of 2005 . . . “ See *In re Pope* 351 B.R. 14 Bkrcty.D.R.I.,2006.

- a. Court will be on a dangerous course if a plain meaning is adopted here, especially looking at the background of this amendment.

- b. It is no truism to suggest that courts can intimately be involved in the policy making and lawmaking processes by virtue of their statutory interpretation opinions.
- c. Not only this chance to rule on an ambiguous term lead to a revision of a poorly drafted law, it leads to a legal certainty and policy consensus. See Federalist Papers No. 10 and No. 51, 1788).
- d. Courts in all hierarchy are not only to enforce the law, but they are to act as a check mate to other branches.

Wherefore, it is prayed that the debtor's case be reinstated for the purposes of adjudication.

Dated: New York New York
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s/Karamvir dahiya

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