

James William Hubel
Mt. McGregor Correctional Facility
1000 Mt. McGregor Road - Box 2071
Wilton, New York 12831

Pro Se

Gregory G. Harris, Esq.
Harris, Balzer & Conway, PLLC
The Patroon Building
5 Clinton Square
Albany, New York 12207

Chapter 7 Trustee

Kim F. Lefebvre, Esq.
United States Trustee
74 Chapel Street
Suite 200
Albany, New York 12207

Re: JAMES WILLIAM HUBEL

CASE NO. 05-20260

LETTER DECISION AND ORDER

Before the court is the motion of the United States Trustee (“UST”) to dismiss the above-referenced Chapter 7 Case of James William Hubel (the “Debtor”) for cause pursuant to 11 U.S.C. §§ 109(h)(1), 521(a) and (b), 707(a), and 727(a)(8). This is a case of first impression for the court because it involves questions of law arising under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “Act”), and, for reasons discussed *infra*, the parties dispute whether pre-Act Title 11 or the Act controls.

The court has jurisdiction over the parties and subject matter of this core proceeding pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(A), and 1334. The following decision constitutes the court’s findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

The Debtor is a prisoner under the jurisdiction of the New York State Department of

Correctional Services, and he resides at Mt. McGregor Correctional Facility (“Mt. McGregor”). On October 11, 2005, the Debtor signed and delivered his completed, voluntary Chapter 7 petition to a corrections officer in the law library of Mt. McGregor, and he requested that the same be mailed to this court for filing. The first page of the Debtor’s petition included a notation under the “Filing Fee” section that read, “See attached letter [and] P.P. Ap.,” the latter reference was to an outdated and inadequate in forma pauperis application used in criminal actions. On October 17, 2005, the U.S. Bankruptcy Court Clerk received and returned the Debtor’s papers for failure to include the statutory filing fee, *see* 28 U.S.C. § 1930(a)(1)(A) (1999), or, alternatively, either an installment fee application or an in forma pauperis application, *see* 28 U.S.C. § 1930(f) (2005). The Clerk’s letter included the following note: “Your pleadings are being returned and will not be filed.” In addition, since the Act’s provisions became effective on October 17, 2005, the Clerk mailed the Debtor a correct in forma pauperis application and related documentation to assist the Debtor with filing his petition in accordance with the Act’s provisions.

On October 24, 2005, the Clerk received and filed the Debtor’s petition and application to proceed in forma pauperis. (No. 1.) On October 27, 2005, the court issued an Order granting the Debtor’s application for waiver of the Chapter 7 filing fee. (No. 4.) Upon the commencement of the Debtor’s case, the Clerk directed the Debtor to file all required documents, including a credit counseling certificate, a statement of monthly net income, etc., *see* 11 U.S.C. § 521 (2005), on or before November 4, 2005. The Debtor did not comply with this request. On December 9, 2005, the Deputy Clerk issued a Statement confirming that the following documents were missing in the case: payment advices, *see* 11 U.S.C. § 521(a)(1)(B)(iv); a means test analysis; and a statement pursuant to 11 U.S.C. § 342 (2005). (No. 16.)

On November 8, 2005, the UST filed the instant motion to dismiss the Debtor’s case. (No.

8.) The Debtor filed written opposition to the UST's motion in the form of an Answering Affidavit and a letter submission on November 25, 2005 (No. 13) and November 30, 2005 (No. 14), respectively. The motion was initially scheduled to be heard on November 30, 2005 (No. 8), but, at the parties' request, it was adjourned to December 14, 2005. By Order dated December 9, 2005, however, the court advised the parties that it would not require appearances or oral argument on the UST's motion. Rather, the court considered the matter fully submitted as of December 9, 2005. Because of the Debtor's pro se status, however, the court also considers the Debtor's December 12, 2005 letter opposition to the UST's motion.

Before deciding the merits of the UST's motion, the court first addresses the Debtor's argument that the Act does not apply to him because the court must consider the date of commencement of his case as October 11, 2005, the date on which he first delivered his petition to prison officials, rather than October 24, 2005. The Debtor insists that this court must recognize—and that it is bound by—the prisoner's mailing rule established by the Supreme Court in *Houston v. Lack*, 487 U.S. 266, 276 (1988) (Under Federal Rule of Appellate Procedure 4(a)(1), pro se prisoners' notices of appeal are considered filed at the moment of delivery to prison authorities for forwarding to the court clerk.). Next, while the Debtor acknowledges that in forma pauperis standing is a provision of the Act which did not exist under pre-Act Title 11, *see* 28 U.S.C. § 1930(f), he contends that his petition was improperly returned to him on October 17, 2005, because the court violated his constitutional right to proceed as an indigent person. Finally, based on his belief that the correct filing date of his petition is October 11, 2005, the Debtor asserts that all grounds cited by the UST in support of its dismissal motion are without merit.

The court need not decide whether the prisoners' mailing rule extends to bankruptcy filings, because the Debtor's application was incomplete when it was delivered to prison officials on

October 11, 2005. The court rejects the Debtor's argument that his constitutional rights were violated because the court refused to allow him to proceed under pre-Act Title 11 without first tendering payment of the mandatory filing fee, or, alternatively, moving to pay the fee in installments. In support of his position, the Debtor cites *In the Matter of Smith*, 323 F. Supp. 1082, 1089 (D. Colo. 1971) (holding that the bankruptcy filing fee violates equal protection). This holding was examined and adopted by the United States District Court for the Eastern District of New York, *see In re Kras*, 331 F. Supp. 1207 (E.D.N.Y. 1971), but it was ultimately rejected by the United States Supreme Court, *see In re Kras*, 409 U.S. 434 (1973). The United States Supreme Court held that "[t]here is no constitutional right to obtain a discharge in bankruptcy." *Id.* at 446. The United States Supreme Court explicitly acknowledged that the granting of in forma pauperis relief originates with Congress, not the courts. *Id.* at 450.

The Advisory Committee Notes to Federal Rule of Bankruptcy Procedure 1006 provide, "**Subdivision(a)** of this rule is amended to clarify that every petition must be accompanied by any fee prescribed under 28 U.S.C. § 1930(b) that is required to be paid when a petition is filed, as well as the filing fee prescribed by 28 U.S.C. § 1930(a)." FED. R. BANKR. P. 1006 advisory committee's notes to the 1996 Amendments (emphasis added).¹ Local Bankruptcy Rule 1006-2 informs the general public as follows:

Unless otherwise directed by the court, the clerk shall not be required to render any service for which a fee is prescribed, either by statute or by the Judicial Conference of the United States, including the acceptance of a document for filing, unless the fee for that service is paid in advance, or an order is granted pursuant to Fed. R. Bankr. P. 1006(b)(1) to pay the filing fee for a voluntary petition by an individual in installments.

¹ In the Debtor's case, the filing fee is \$200, and the miscellaneous administrative fee is \$30. *See* 28 U.S.C. § 1930(a)(1) and (b).

LBR 1006-2 (emphasis added). With the enactment of the Act and, specifically, amendment of 28 U.S.C. § 1930 to add subsections (f)(1) and (2),² Congress has heeded the words of the Supreme Court. Because in forma pauperis relief was not available to the Debtor on October 11, 2005, however, the Clerk acted properly when he rejected the Debtor’s petition on that date. For these reasons, the Debtor’s request for relief must be analyzed under the Act.

The UST has alleged three grounds for dismissal under the Act. First, the UST contends that the Debtor is not entitled to Chapter 7 relief because he was granted a discharge on December 2, 1999 in the joint Chapter 7 Case of James W. and Debra A. Hubel, Chapter 7 Case No. 99-14223. *See* 11 U.S.C. § 727(a)(8)(2005) (“The court shall grant the debtor a discharge unless the debtor has been granted a discharge under this section . . . in a case commenced within 8 years before the date of filing of the petition . . .”). Second, the UST asserts that the Debtor fails to meet the eligibility requirements for Chapter 7 relief because the Debtor has not complied with the credit counseling requirements. *See* 11 U.S.C. § 109(h)(1) (2005) (“[A]n individual may not be a debtor under this

² (f)(1) Under the procedures prescribed by the Judicial Conference of the United States, the district court or bankruptcy court may waive the filing fee in a case under chapter 7 of title 11 for an individual if the court determines that such individual has income less than 150 percent of the income official poverty line (as defined by the Office of Management and Budget, and revised annually in accordance with section 673(2) of the Omnibus Budget Reconciliation Act of 1981) applicable to a family of the size involved and is unable to pay that fee in installments. For purposes of this paragraph, the term “filing fee” means the filing fee required by subsection (a), or any other fee prescribed by the Judicial Conference under subsections (b) and (c) that is payable to the clerk upon the commencement of a case under chapter 7.

(2) The district court or the bankruptcy court may waive for such debtors other fees prescribed under subsections (b) and (c).

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 . . . an individual or group briefing . . . that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.”); *see also* 11 U.S.C. § 109(h)(3) (an individual’s participation in credit counseling is not required upon a showing of exigent circumstances or inability to obtain counseling). Third, the UST argues that the Debtor’s petition should be dismissed because the Debtor has failed to file schedules, statements, lists, and a creditor matrix as required by 11 U.S.C. § 521(a)(1) and Local Bankruptcy Rules.

The Act added 11 U.S.C. § 109(h) to the Bankruptcy Code and, like Judge Marvin Isgur, “the court sees no ambiguity in the statute.” *In re Hubbard*, 333 B.R. 377, 382 (Bankr. S.D. Tex. 2005). Unless prospective debtors meet certain criteria, i.e., they are suffering from incapacity, disability, or are on active military duty in a military combat zone, *see* 11 U.S.C. § 109(h)(4), they are required to receive credit counseling, subject only to the exceptions in subparagraphs (2) and (3).

In this case, the Debtor admittedly did not comply with those subsections because he believed his petition would be filed prior to the October 17, 2005 enactment date of the Act. The court’s inquiry, therefore, necessarily ends here.

Two views have emerged about the legal consequences of a debtor’s non-compliance with 11 U.S.C. § 109(h). *Compare, e.g., In re Talib*, 2005 WL 3272411, at *5 (Bankr. W.D. Mo. Dec. 1, 2005) (“The Debtor’s ineligibility for relief constitutes cause for dismissal of the case under [11 U.S.C.] § 707(a).”), and *In re Watson*, 332 B.R. 740, 747 (Bankr. E.D. Va. 2005) (“[B]ecause Congress specifically sets forth requirements for eligibility for protection under the Bankruptcy Code in Section 109 and the Debtor has failed to fulfill those requirements, this Court must dismiss his . . . bankruptcy case.”), with *In re Rios*, 2005 WL 3462728, at *1 (Bankr. S.D.N.Y. Dec. 19,

2005) (debtor's ineligibility for bankruptcy relief rendered his case *void ab initio*), and *Hubbard*, 333 B.R. at 388 ("the plain language of [11 U.S.C.] § 301 does not provide for the commencement of a voluntary case by an entity that may not be a debtor under the chapter of bankruptcy sought by that debtor."). The court agrees with the underlying rationale of Judge Cecilia B. Morris in *Rios*:

If a filing is dismissed, as opposed to stricken, as [a] consequence of the failure to seek credit counseling prior to the bankruptcy filing, then debtors may not be eligible for the full panoply of protections provided by 11 U.S.C. § 362 if they choose, after rectifying their error in failing to seek credit counseling, to file for bankruptcy protection in the future. . . . The Court thinks that dismissal for failure to seek credit counseling achieves a result Congress intended to avoid; that is, future limitation of debtor protection under [the Act]. Indeed, Congress could have made failure to seek credit-counseling cause for dismissal under the revised 11 U.S.C. § 707, but did not. In enacting § 109(h)(1), Congress sought to enlarge debtors' options in the face of financial difficulty, not limit them. Congress intended that debtors would inform themselves of their options *prior* to bankruptcy filing by participating in credit counseling, and if bankruptcy continued to be the best option, debtors could avail themselves of that alternative. It is therefore apparent that Congress did not intend the credit-counseling requirement to limit the availability or extent of bankruptcy relief for debtors, which dismissal would accomplish, and thus, dismissal is inappropriate.

Rios, 2005 WL 3462728, at *2. Accordingly, the court strikes the Debtor's case. Having done so, the court sees no reason to address the other substantive arguments made by the UST.

IT IS SO ORDERED.

Dated: 1/3/06
Albany, New York

/s/ Robert E. Littlefield, Jr.

Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge