UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

RONALD & FLORENCE D. BURCH, Case No. 06-10228

Debtors.

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matters before the court are the dueling motions of the United States Trustee ("UST") and Ronald and Florence Burch ("Debtors") regarding the disposition of this case. The material facts are not in dispute. The Debtors filed a chapter 13 petition on February 14, 2006[1] in order to stay the foreclosure sale of their home. On three occasions, the Debtors were advised of the pre-petition credit counseling required by BAPCPA within the 180-day period prior to the filing of their bankruptcy petition by their attorney or someone on his staff. Nevertheless, the

[1]Unless otherwise noted, all statutory references herein are to Title 11 as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") since the case was commenced after October 17, 2005, the effective date of BAPCPA.

Debtors did not obtain the pre-petition credit counseling or move for an extension of time to do so. The parties agree that the Debtors would not have qualified for a waiver of the required credit counseling. The Debtors have moved to have their case stricken, while the UST has moved to dismiss the Debtors' case. The court has jurisdiction over these contested matters pursuant to 28 U.S.C. §§ 157 (a), (b)(1), (b)(2)(A), and 1334.

ARGUMENTS

The UST argues that the Debtors' failure to obtain the pre-petition briefing required by § 109(h)(1) renders them ineligible to be debtors and, thus, there is cause to dismiss their case pursuant to § 1307(c). The UST asserts further that §109 does not pose a jurisdictional bar to filing a petition. As a result, the striking of the Debtors' petition is neither necessary nor appropriate. Additionally, the UST contends that striking the petition would cause uncertainties to all parties regarding their rights and obligations under Title 11. Finally, the UST takes the position that striking a petition would allow the unscrupulous debtor to escape the consequences of the limited stay provided for in § 362(c)(3) and/or (4).

The Debtors request that their case be stricken pursuant to 11 U.S.C. § 1109(h)[2] and Federal Rule of Bankruptcy Procedure 1007. In response to the arguments raised by the UST, the Debtors argue that under § 301(a) the filing of a petition by an ineligible debtor does not commence a case such that there is no case to dismiss. They further argue there is a distinction between a petition and a case, and the proper remedy for a § 109(h) violation is the striking or dismissal of the petition pursuant to §105(a). Additionally, they state that the intent of Congress

[2] The court assumes that any reference to §1109(h) is a scrivener error and should be read as § 109(h).

could not have been to impose the limited stay of § 362(c)(3) on innocent debtors who fail to comply with § 109(h).[3]

DISCUSSION

The pre-petition credit counseling requirement is found in § 109. Section 109(h) states in pertinent part:

> [A]n individual may not be a debtor under this title unless such individual has, during the 180-day period proceeding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 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.

11 U.S.C. § 109(h)(1). Section 521(b)(1) requires a debtor to file a certificate from the agency that provided the credit briefing, and Interim Bankruptcy Rule 1007(b) and (c) requires that the certificate of credit counseling or a certification requesting a waiver be filed with the petition. All parties agree that the Debtors' chapter 13 is a dead case walking based on the Debtors' failure to obtain the requisite pre-petition credit counseling or to seek a temporary waiver of the requirement pursuant to 11 U.S.C. § 109(h)(3).[4] The only question to answer is the appropriate

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[3] Although Debtors' counsel advances the "innocent debtor"argument, the Debtors in this case cannot argue that they were caught by surprise by the pre-petition credit counseling requirement under BAPCPA as they were told by counsel prior to their petition being filed of this prerequisite. For whatever reason, the Debtors chose to ignore his advice and the advice of his staff.

[4] Section 109(h)(3) allows a debtor to obtain a temporary exemption from filing the credit briefing certificate:
(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that -
(i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1);
(ii) states that the debtor requested credit counseling services from an approved nonprofit

methodology for its disposal.

The primary closure theories espoused by the developing case law on this question are: dismissal of the case pursuant to § 707(a) or § 1307(c) for cause, s*ee e.g. In re Wilson*, 346 B.R. 59 (Bankr. N.D.N.Y. 2006); *In re Seaman*, 340 B.R. 698 (Bankr. E.D.N.Y. 2006)*; In re Tomco*, 339 B.R. 145 (Bankr. W.D. Pa. 2006); *In re Ross* 338 B.R. 134 (Bankr. N.D. Ga. 2006), or striking of the petition, s*ee e.g. In re Elmendorf*, 345 B.R.486 (Bankr. S.D.N.Y. 2006); *In re Salazar*, 339 B.R. 622 (Bankr. S.D. Tex. 2006); *In re* Rios, 336 B.R. 177 (Bankr. S.D.N.Y. 2005); *In re Hubbard*, 333 B.R. 377 (Bankr. S.D. Tex. 2005).[5]

The court is uncomfortable with the conclusions reached by both camps, despite having ruled in an unpublished decision shortly after the enactment of BAPCPA that a petition should be stricken where a debtor failed to obtain the required pre-petition credit counseling.[6] Whether a case is dismissed or stricken is more than a matter of semantics because the result could impact the extent of the automatic stay of § 362(a) in a subsequent case filed by a debtor.[7] The

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budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and

(iii) is satisfactory to the court.

11 U.S.C. § 109(h)(3)(A).

[5]Another court concluded that it has authority to exercise discretion when determining whether to dismiss a case based upon a debtor's failure to meet the eligibility requirement of §109(h) where dismissal of a case would result in manifest injustice. *See In re Hess*, 347 B.R. 489 (Bankr. D. Vt. 2006).

[6] *In re Hubel*, Case No. 05-20260 (Bankr. N.D.N.Y. January 3, 2006). Since *Hubel*, this issue has generated an explosion of case law and analysis unavailable early in the life of BAPCPA. The scholarly discussion by a multitude of courts on both sides of the issue has caused this court to further dissect the question presented.

[7]In cases involving "serial" bankruptcy filers, § 362(c) either limits or eliminates the automatic stay.

court, however, does not believe, as the "striking" courts do, that the potential of a limited or non-existence stay in a subsequently filed case should sway the court's decision on the disposition of this case. Section 362(c)(3) and (4) were effectuated by Congress to prevent abusive refilings, primarily those directed at staying foreclosure sales. If a case is dismissed, as opposed to stricken, seemingly, a first time filer who inadvertently runs afoul of § 109(h)'s briefing requirements could argue a subsequent refiling should not carry the taint of a serial filer's multiple efforts at frustrating a secured creditor's legitimate state court rights.

Section 301 provides that "[a] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter ***by an entity that may be a debtor under such chapter.***"[8] 11 U.S.C. § 301(a) (emphasis added). Pursuant to the plain meaning of the statute, a voluntary case may not be commenced by an individual that may not be a debtor under the chapter of the bankruptcy code sought by the debtor. The "dismissal" courts have effectively placed a period in the middle of § 301(a) where none exists. Under their interpretation, that subsection would read "[a] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter." *Id*. By effectively eliminating the closing phrase of § 301(a), "[b]y an entity that may be a debtor under such chapter," commencement would have nothing to do with eligibility and instead it would merely constitute an additional cause to dismiss under §§ 707(a) or 1307(c). Continuing with this line of reasoning, the "dismissal" courts obviously conclude that the automatic stay is in

[8]As this is a joint case, § 302 entitled "Joint cases," the parallel provision to § 301, would be applicable. Section 302 provides that "[a] voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a single petition under such chapter **by an individual that may be a debtor under such chapter and such individual's spouse**." 11 U.S.C. § 302(a) (emphasis added).

effect, despite a debtor's ineligibility, because, under their theory, a case was commenced.[9]

The "striking" courts, on the other hand, look at the totality of § 301' s sentence structure and conclude that because a case may only be commenced by an eligible debtor, a petition filed by one who has not complied with § 109(h)'s credit briefing requirements does not give rise to a case.[10] The "striking" courts thus conclude that "[b]ecause no case was commenced under § 301, there is no "case" to dismiss." *In re Hubbard*, 333 B.R. at 388. As a result, a case initiated by an ineligible debtor is void *ab initio*. Also, because they opine there is no case, under their rational, there is no automatic stay. As stated by the *Salazar* court:

> The legal question is: Did Congress intend to impose an eligibility requirement on putative debtors, but also intend for an ineligible person to receive the benefits of the automatic stay? The answer is: *It is implausible to believe that Congress specifically identified people to exclude from the bankruptcy process, yet permitted those same people to benefit from bankruptcy's most powerful protection: the automatic stay.*
>
> Both logic and the statute dictate that no automatic stay arises on the filing of a petition by an ineligible person.

Salazar, 339 B.R. at 624. However, the "striking" courts also argue that eligibility is more than a disposal question; it is a jurisdictional issue going to the heart of the bankruptcy process. When the petition is stricken, all actions taken by the court or the parties are necessarily stricken as well. Because subject matter jurisdiction could be raised at any time, the list of potential problems is breathtaking (e.g. invalid sale orders, invalid confirmation orders leading to trustee misdisbursements, invalid discharges, etc.).

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[9] 11 U.S.C. § 362(a) provides, in part, that "a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities . . . ."

[10] Additionally, with no case commenced under §301(a), there would be no order for relief under § 301(b).

The court cannot accept the proposition that a finding of non-eligibility divests this court of jurisdiction.

> The conclusion that a bankruptcy filing by an ineligible debtor is not *void ab initio* is consistent with the provisions of the 2005 Act. The 2005 Act's amendments to Section 362 confirm that Congress did not view §109 as being jurisdictional. The 2005 Act provides an exception to the automatic stay of Section 362(a) with regard to foreclosure of real property if the consumer is ineligible to be a debtor under §109(g). *See* 11 U.S.C. § 362(b)(21)(A). If a bankruptcy filing of an ineligible debtor was *void ab initio* and did not result in the automatic stay, the amendments to Section 362(b) would not have been necessary. As Congress "is presumed to know the state of existing law when it enacts legislation," the enactment of additional exceptions to the automatic stay evidences the understanding of Congress that a bankruptcy filing in violation of Section 109 commences a case and results in an automatic stay.

In re Tomco, 339 B.R. at 160. Additionally, one learned treatise implies that eligibility requirements may be waived if a party in interest does not raise them. COLLIER ON BANKRUPTCY ¶ 109.09[3] at 109-60 (15th ed. rev 2005). Thus, any proceedings, actions, or orders issued in the bankruptcy would be effective unless specifically invalidated *nunc pro tunc*.

Further, a close reading of § 362(a), contrary to the "striking" courts' interpretation, leads to the conclusion that a stay is applicable whether or not the debtor is eligible.[11] The trigger to the stay is not the commencement of a case, but the filing of a petition. The references to §§ 301 ("Voluntary cases"), 302 ("Joint cases") and 303 ("Involuntary cases") are simply because those are the operative sections to file a petition under. If Congress had intended the stay to arise upon the commencement of a case, it could have so stated. Once a petition is filed by a debtor, eligible or not, a stay arises. That stay may be annulled *nunc pro tunc*, but only by a court order under appropriate circumstances.

The difficult question to answer is how to give finality to the petition that was filed by an

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[11] *See supra* note 9.

ineligible debtor. While it is true that the Debtors' chapter 13 has a "case" number and a "case" docket, those numbers were automatically assigned by the Clerk's Office. With all due respect, the ministerial actions of the Clerk's Office do not create a "case" as contemplated by §§ 301, 302, or 303. The Bankruptcy Clerk has simply created an administrative shell within which the court and the parties may conduct the proceedings necessary under Title 11. Two of those proceedings are the current motions to either dismiss or strike. The expedient solution would be to ignore the clear, unambiguous Congressional mandate that a "case" may only be commenced by an eligible debtor and dismiss what Congress did not want created in the first place. Equally unattractive would be to strike the petition and render the automatic stay a nullity that was created when the petition was filed.

The court believes the more accurate approach would be to simply dismiss what is before it, namely the chapter 13 petition. Less than the "case" contemplated by § 301, but certainly more than the nullity the "striking" courts suggest. By dismissing the petition, the court acknowledges the existence of the automatic stay of § 362 and the other proceedings before it but does not ignore the clear fact that the Debtors were not eligible to commence a case under Title 11.

Based upon all of the foregoing, the Clerk is directed to (1) dismiss the petition and close the misnomed case that exists in its office, and (2) notice this Decision and Order in lieu of the standard Notice of Dismissal to all creditors and parties in interest via the Bankruptcy Noticing Center ("BNC").

It is so ORDERED.

Dated: October 23, 2006

/s/ Robert E. Littlefield, Jr.
Hon. Robert E. Littlefield, Jr.

U.S. Bankruptcy Judge