

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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DAVID R. HEGG  
ELAINE A. HEGG  
*Debtor(s).*

Bankruptcy No. 95-20920KD

Chapter 13

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### ORDER RE MOTION FOR CONFIRMATION OF AUTOMATIC STAY OR INJUNCTION PENDING APPEAL

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On October 11, 1995, the above-captioned matter came on for hearing pursuant to assignment in Dubuque, Iowa. Debtors appeared by Attorney Brian Peters. Creditor Durwin Hegg appeared with Attorney Richard Zahasky. The matter before the Court is a Motion for Confirmation of Automatic Stay or Injunction Pending Appeal. A resistance was filed by Creditor Durwin Hegg. The matter was argued to the Court after which it was taken under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G).

#### FINDINGS OF FACT

Debtors' Chapter 13 Petition was filed on May 18, 1995. A Plan was proposed and a confirmation hearing was held on August 2, 1995. Debtors proposed to fund their Plan entirely from proceeds from a lawsuit. The Plan anticipated one lump sum payment in the amount of \$348,000 upon resolution of a pending lawsuit which Debtors estimated would occur in less than one year.

The parties presented evidence and arguments to the Court at the time of the confirmation hearing. Thereafter, the Court took the matter under advisement and rendered its ruling on August 29, 1995. The ruling, in summary, held that it was inappropriate under Chapter 13 to attempt to fund a Plan from the proceeds of a lawsuit which were speculative and contingent with no reasonable probability of immediate payment in the foreseeable future. The Court denied the confirmation and allowed Debtors ten days to either convert to Chapter 7 or the matter would be dismissed under § 1307(c)(5).

Debtors filed a Notice of Appeal on September 7, 1995. On September 25, 1995, Debtors filed the pending Motion for Confirmation of Automatic Stay or Injunction Pending Appeal. Creditor Durwin Hegg filed a resistance September 28, 1995.

Debtors' Motion states that Creditor Durwin Hegg served Debtors with a three-day notice to quit regarding certain real estate in which Durwin Hegg allegedly holds a security interest. Debtors assert that § 362 provides that the automatic stay will continue until the earliest of the date the case is closed, the date the case is dismissed, or the date that Debtors receive a discharge. They argue that since none of these events have occurred, the automatic stay continues in effect. Alternatively, Debtors assert that if the Court concludes that the automatic stay does not remain in effect at this time, the Court should issue a stay pending appeal without bond to prohibit collection efforts by Creditor Durwin Hegg pending completion of their appeal. Debtors argue that the issuance of a stay pending

appeal would not substantially harm Creditor Hegg in that he is oversecured based upon information contained in the existing schedules and the filed proofs of claim.

Creditor Hegg resists Debtors' Motion. He asserts that, as Debtors failed to convert to Chapter 7 within ten days, the Court's Order of August 29, 1995 affectively dismissed the Chapter 13 without further Order. Creditor Hegg asserts that the filing of Notice of Appeal does not automatically stay the effect of a Court's Ruling. While this Creditor acknowledges that the Court can issue a stay pending appeal, he asserts that, contrary to Debtors' assertions, he is not oversecured and would suffer irreparable damage if a stay was issued. Alternatively, Creditor Hegg asserts that if a stay is issued pending appeal, his undersecured status warrants a substantial supersedeas bond.

### CONCLUSIONS OF LAW

Under § 362(c), the automatic stay continues until the case is closed, the case is dismissed or a discharge is granted or denied. The stay may also be modified on request of a party in interest under certain conditions. 11 U.S.C. § 362(d).

Generally, an order which denies confirmation of a Chapter 13 plan but does not dismiss the case does not act to terminate the automatic stay. See Maiorino v. Branford Savs. Bank, 691 F.2d 89, 90 (2d Cir. 1982). For that reason, this order's finality is somewhat problematic as courts have held that such orders are not final for purposes of appeal. Lewis v. United States Farmer's Home Admin., 992 F.2d 767, 774 (8th Cir. 1993). In Lewis, the bankruptcy court denied confirmation, allowing the debtor 10 days to modify the plan or face dismissal. Id. at 768. The debtor appealed before the 10 days expired. Id. The Eighth Circuit held that it did not have jurisdiction to hear the appeal and remanded for further proceedings which would result in a final appealable order. Id. at 774; see also In re Sutherland, 161 B.R. 657, 660 (Bankr. E.D. Ark. 1993) (noting that order denying confirmation is not a final order).

In a case decided prior to the Eighth Circuit's decision in Lewis, a district court considered the finality of an order denying confirmation of a Chapter 13 plan and giving the debtor 20 days to convert to Chapter 7 or 11 or face dismissal. Gould v. Gregg, Hart Farris & Rutledge, 137 B.R. 761, 762 (W.D. Ark. 1992). The court stated that the order was a final order because it effectively ended the Chapter 13 proceeding by requiring conversion. Id. at 763. One of the bases for denying confirmation of the plan was that the debtor was ineligible for Chapter 13. Id. at 762. The court did not address whether the automatic stay remained in effect pending the appeal.

The order here is very similar to the final order in Gould as it also effectively ended the Chapter 13 case by requiring conversion or dismissal. The question remains, however, whether the automatic stay remains in effect subsequent to Debtor's appeal. It is settled law that an appeal of an order of a supersedeas bond is filed or the court grants a stay pending appeal. In re K. Simpson Enters., Inc., 139 B.R. 161, 162 (E.D. Va. 1991), aff'd, 989 F.2d 493 (4th Cir. 1993). Therefore, the ten days allowed in the Order for Debtors to convert to Chapter 7 has expired and the case is subject to dismissal. The language of the order does not provide that dismissal is self-executing. The effect of the order, however, is to terminate Debtors' Chapter 13 proceeding. Upon Debtors' failure to convert to Chapter 7, the case was effectively, if not actually, dismissed. The only remaining act was the formal dismissal. Under these circumstances, the Court concludes that the case is dismissed and the automatic stay is terminated under § 362(c)(2)(B).

Debtors are now requesting a stay to avoid collection efforts by Creditor Hegg while their appeal is pending. Stays pending appeal are governed by Bankruptcy Rule 8005. The Court applies a four-part

analysis which is similar to the standard that applies to a request for a preliminary injunction. In re Wiston XXIV Ltd. Partnership, 161 B.R. 70, 72 (D. Kan. 1993). Specifically, Debtors must demonstrate: (1) they are likely to prevail on the merits of the appeal; (2) they will suffer irreparable injury if the stay is denied; (3) Creditor Hegg will not be substantially harmed by the stay; and (4) the public interest will be served by the granting of the stay. In re Cockings, 172 B.R. 257, 259 (Bankr. E.D. Ark. 1994); In re Larken Hotel Ltd. Partnership, Adv. No. 94-1027KC, slip op. at 4 (Bankr. N.D. Iowa Apr. 6, 1994).

This standard was applied in In re Hi-Toc Development Corp., 159 B.R. 691, 692 (S.D.N.Y. 1993), in determining whether to grant a stay pending appeal of an order converting a case from Chapter 11 to Chapter 7. The court denied the stay. Id. at 693. It noted that success on the merits was not likely and the debtor would not suffer irreparable injury because there was no real possibility of reorganization; creditors would be injured because the stay would prolong the bankruptcy proceeding with no foreseeable gain; and permitting such use of Chapter 11 is contrary to the public interest. Id.

Applying the four-part analysis to Debtors' Motion in this case, the Court concludes that a stay pending appeal is not warranted. The Court's Order denying confirmation concludes as follows:

Debtors' schedules reveal that they do not have sufficient regular and stable income beyond that required to meet their monthly expenses with which to fund their plan. Proceeds of the lawsuit are at this time contingent and speculative such that the Court cannot conclude that it is reasonably probable that Debtors will be able to comply with their plan. Considering the contentious nature of the lawsuit, it is debatable whether Debtors proposed the plan in good faith or merely as a delaying tactic to avoid paying their debts for the duration of the litigation. Confirming Debtors plan funded by contingent proceeds from the lawsuit would stymy creditor activity for probably two or more years with no guarantee to creditors of any return from the lawsuit with which to eventually fund the plan.

Considering the multiple grounds upon which the Court based its decision to deny confirmation, this Court feels that Debtors are not likely to prevail on the merits of their appeal. For the same reason, the Court concludes that there is little chance of Debtors' proposing a feasible Chapter 13 plan. Therefore, Debtors have not shown that a stay pending appeal will result in irreparable injury to them. Keeping Creditor Hegg and other creditors on hold during their appeal will have the effect of granting the relief they sought in their plan, i.e. delaying payments until consummation of their litigation. This constitutes substantial harm to creditors. Debtors' assertion that Creditor Hegg is oversecured is not clearly supported in the record. Creditor Hegg denies it and asserts that further delay will substantially harm his economic interests. Finally, the public interest will not be served by allowing Debtors to accomplish through appeal what this Court would not allow through their proposed Chapter 13 plan, that is, delay of payout to creditors based on contingent litigation pending in another court.

**WHEREFORE**, Debtors' Motion for Confirmation of Automatic Stay or Injunction Pending Appeal is DENIED.

**FURTHER**, the Court concludes that this case is effectively dismissed and the automatic stay is terminated pursuant to 11 U.S.C. § 362(c)(2)(B).

**FURTHER**, the Court refuses to grant a stay pending appeal without bond under Bankruptcy Rule 8005.

**SO ORDERED** this 2nd day of November, 1995.

Paul J. Kilburg  
U.S. Bankruptcy Judge