

# In the United States Bankruptcy Court

## for the Northern District of Iowa

---

JAMES WILLIAM HOGAN  
NANCY SUE HOGAN

Bankruptcy No. 99-00047-D

*Debtor(s).*

Chapter 7

---

### ORDER RE U.S. TRUSTEE'S MOTION TO DISMISS

---

On March 3, 1999, the above-captioned matter came on for hearing in Dubuque, Iowa on the U.S. Trustee's Motion to Dismiss. Debtors have filed a resistance. Debtors appeared in person with Attorney Brian Peters. Also present were Assistant U.S. Trustee John Schmillen and Chapter 7 Trustee Paul Fitzsimmons. Evidence was presented and the matter was taken under advisement. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(O).

#### STATEMENT OF THE CASE

Debtors filed a Chapter 7 petition on January 11, 1999. The U.S. Trustee filed the pending Motion to Dismiss under 11 U.S.C. §707(b) on February 3, 1999. The U.S. Trustee seeks dismissal of this case asserting substantial abuse. The U.S. Trustee asserts that Debtors could, by eliminating certain expenses, generate sufficient disposable income to fund a Chapter 13 Plan which would allow a substantial payment to unsecured creditors. Debtors resist asserting that their financial condition and medical problems would not allow a feasible Chapter 13 Plan with any reasonable expectation of long-term success.

#### FINDINGS OF FACT

Debtors reside in a mobile home park in Bellevue, Iowa. Debtor James W. Hogan is a retired member of the U.S. Air Force and is 61 years of age. In addition to Air Force retirement payments, he receives social security benefits. He receives \$2,104 per month in pension benefits and \$881 per month in social security. The total income of \$2,985 constitutes the entire family income. Mrs. Hogan testified that Mr. Hogan has mental problems which periodically create confusion on his part.

Mrs. Hogan was employed in the past but has not worked for the past six years. She has had significant medical problems. She underwent brain and carotid surgery within the last several years. She continues to have brain aneurysms which are being monitored. She also has migraine headaches, a heart condition, asthma and depression. The surgeries were partially paid by Champus Insurance. Debtors liquidated a substantial amount of their savings and other assets to pay medical bills.

At present, the medical status of both Debtors appears stable though both continue to have serious medical conditions. Mrs. Hogan takes medication for many of her conditions. She pays approximately \$50 per month for medications.

Debtors are originally from Iowa but lived in Arizona for a period of time in 1998. Their intentions were to build a home in Arizona, however, their attempts at purchasing property and building a home were unsuccessful. They would like to move back to Arizona within two years, if possible, and build a home. However, at present, their finances do not allow this move.

When Debtors moved back most recently from Arizona, it was because of the medical condition of Mrs. Hogan. They left furniture and other household goods in storage in Arizona. Also in Arizona is a 1992 pickup and a 1998 Mazda. Since returning, Debtors have bought a 1998 Chevrolet Venture van for approximately \$22,000. Debtors list medical and dental expenses in their Schedule J of \$200 per month though it appears that only \$50 per month of this expense is going toward medications. A portion of the remainder is being paid toward past medical bills which are listed in Debtors' Statement of Liabilities.

Debtors continue to make payments on the 1992 pickup which is located in Arizona. Apparently, this pickup is functional and in good condition with the possible exception that the front end needs realignment. A payment is being made each month on this pickup to American Trust & Savings Bank. Debtors, in their Statement of Intentions, indicate that they will surrender this pickup to American Trust & Savings Bank.

The 1998 Mazda is also located in Arizona. This is apparently a fully functional automobile which remains with friends in Arizona. When Debtors returned to Iowa, the vehicle was left behind. Since that time, they continue to make payments of \$225.80 per month to East Dubuque Savings Bank. Debtors traded a 1994 Buick for this Mazda. It was, at the time of acquisition, an even trade. However, when Debtors paid off medical expenses, they took out a loan and used the Mazda for collateral. Since Debtors had no vehicle upon their return from Arizona, they purchased a 1998 Venture which is a Chevrolet van. They are making payments of \$442.26 per month on this vehicle.

When Debtors left Arizona, they placed their furniture and other items in storage in two locations in Mesa, Arizona. They now pay \$239 per month in storage charges. Debtors claim in their Schedules that the total value of the furniture and other stored items is approximately \$1,000. Since Debtors have returned to Iowa, they have spent substantial funds purchasing home furnishings. This includes furniture, a washer and dryer, a dishwasher, a vacuum cleaner as well as other items to furnish their mobile home.

Debtors recently filed Amended Schedules I and J which they assert more accurately reflect their financial condition. Counsel for Debtors states that he was first contacted by Debtors about filing for bankruptcy approximately one month prior to the filing of the Chapter 7 petition on January 11, 1999.

### **CONCLUSIONS**

The U.S. Trustee filed this Motion to Dismiss under §707(b) asserting substantial abuse. This Code section provides that:

The court, on its own motion, or on a motion by the United States trustee, but not at the request or suggestion of any part in interest, may dismiss a case filed by an individual

debtor under [chapter 7] whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of [chapter 7]. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. §707(b).

Section 707(b) was added to the Bankruptcy Code in 1984 to promote fairness by reducing the use of Chapter 7 when unnecessary and encouraging repayment of obligations under Chapter 13. The primary factor for evaluating substantial abuse is the "debtor's ability to pay his debts when due as determined by his ability to fund a chapter 13 plan." In re Walton, 866 F.2d 981, 984-85 (8th Cir. 1989). The applicable law in this Circuit and in the Northern District of Iowa is fully and completely set out by Chief Judge Edmonds in In re Rustige, No. 98-01227F, slip op. at 3 (Bankr. N.D. Iowa, Nov. 17, 1998). The Court feels no purpose would be served by reciting all of the authority carefully analyzed in Rustige. Rather, the Court will focus upon Debtors' financial condition and their ability to finance a Chapter 13 plan. Also, the Court will evaluate this record to determine whether the presumption that Debtors should receive relief under Chapter 7 has been rebutted.

The U.S. Trustee has focused his attention primarily on three areas of Debtors' financial schedules. First, Debtors, in their amended Schedule J, state that they have current medical and dental expenses of \$200 per month. However, Mrs. Hogan testified that she presently is taking medications costing approximately \$50 per month. A portion, if not all of the remaining allocated medical expense, is being used to pay off prior medical debt. These are unsecured obligations listed on Debtors' Schedules which would be paid pro rata along with other unsecured creditors under a confirmed Chapter 13 plan.

Secondly, the U.S. Trustee focuses upon the various issues raised by Debtors' ownership of three or four automobiles. Debtors apparently own a 1976 Oldsmobile which is of insignificant value and is not considered in this analysis. However, Debtors own a 1992 pickup and a 1998 Mazda, both of which are located in Arizona. These vehicles are not with family members but were left with casual acquaintances. Debtors derive no benefit from their friends' use of the vehicles. In their Schedule of Intentions, Debtors indicate that they will surrender the pickup, however, they intend to reaffirm the 1998 Mazda obligation. This requires a payment of \$225.80 per month. Since Debtors returned from Arizona, they have purchased a new 1998 Chevrolet Van with monthly payments of \$442.26. This vehicle is currently in the possession of Debtors and is their only transportation.

Third, the U.S. Trustee focuses upon payments which are made to storage facilities in Arizona in the amount of \$239.32 per month. These storage facilities keep furniture with a scheduled value of \$1,000. Debtors are paying approximately \$2,870 per year for storage of furniture and other items with a value of \$1,000.

The U.S. Trustee argues that if these categories of items were corrected, Debtors would be able to redirect sufficient income each month to fund a Chapter 13 plan. Debtors have unsecured debts of \$28,537.28. There are no priority creditors. The total amount of secured claims is \$65,190. The secured debt consists of the three motor vehicles and a \$23,000 obligation owing on Debtors' mobile home. Debtors assert that their various medical conditions would make this a very difficult Chapter 13 to administer. Counsel for Debtors asserts that a Chapter 13 plan would eventually fail.

Debtors present themselves as honest and sincere individuals who have experienced a series of setbacks which have left their personal lives in some disarray. Because of illness, Debtors have assets

located in Arizona for which they continue to be financially responsible. Debtors also have assets and obligations in the State of Iowa for which they are also financially responsible. Debtors seem legitimately overwhelmed by their present financial picture. Nevertheless, this, in and of itself, is not the criteria for evaluating dismissal under §707(b). There is approximately \$100 per month left over under the medical and dental expenses category each month. No reason exists for paying the \$225.80 per month for the 1998 Mazda which is in Arizona and of no value to Debtors. This is also true of the 1992 pickup though Debtors recognize this and intended to surrender it. Finally, Debtors are paying almost \$3,000 per year in storage expenses for household items with a value of \$1,000.

While Debtors have significant financial problems, they are problems which are no more easily resolved in a Chapter 7 than in a Chapter 13. If the storage expenses and the motor vehicles expenses on non-used automobiles were terminated, and excess medical and dental allocations were redirected toward a plan, Debtors would generate \$565 per month. Debtors have unsecured debt in the amount of \$28,500. If Debtors dedicated this sum each month toward a 36 month plan, they could pay in excess of \$20,000 toward the Chapter 13 plan. After administrative costs, this would generate a payout in excess of 60% of unsecured debt. Even a partial adjustment of these issues would generate sufficient funds to adequately fund a plan.

Debtors argue that their medical conditions could deteriorate and any payments under a Chapter 13 plan would become impossible. While this is certainly possible and while Debtors' health problems are legitimate and significant, the result urged by Debtors is not warranted at this time. If these circumstances should occur, Chapter 13 provides various alternatives for reduced payments or in a worst case situation, a Chapter 7 case then becomes a realistic option. However, to presume the worst result at this point is inconsistent with Debtors' present financial picture.

It is the ultimate conclusion of this Court that Debtors can generate sufficient sums of disposable income to pay a substantial part of their unsecured obligation through a Chapter 13 case. The steps necessary to generate these funds are no more onerous or unnecessary than will be required under a Chapter 7 filing. With modest adjustments of Debtors' present circumstances, a substantial payment can be made to unsecured creditors. It is the conclusion of this Court that the presumption that Debtors should receive the relief they seek under Chapter 7 has been rebutted in this case. The U.S. Trustee has, through an analysis of Debtors' financial condition, established an ability to pay which would constitute legal bad faith if not redirected toward a Chapter 13 plan.

**WHEREFORE**, for the reasons set forth in this opinion, it is ordered the Chapter 7 petition of Debtors James W. Hogan and Nancy S. Hogan will be dismissed effective March 31, 1999 unless prior to that date Debtors elect to convert to a case under Chapter 13.

**SO ORDERED** this 11th day of March, 1999.

PAUL J. KILBURG

Paul J. Kilburg  
U.S. Bankruptcy Judge