

# In the United States Bankruptcy Court

## for the Northern District of Iowa

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MICHAEL EDWARD KRESSIG  
LINDA LEE KRESSIG  
*Debtor(s).*

Bankruptcy No. 00-02247-D

Chapter 7

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

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This matter came before the undersigned on October 11, 2000 on U.S. Trustee's Motion to Dismiss. Debtors Michael and Linda Kressig appeared with their attorney, Robert Klauer. John Schmillen appeared for the U.S. Trustee. After the presentation of evidence and argument, the Court took the matter under advisement. This matter is now ready for resolution. This is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A).

#### STATEMENT OF THE CASE

The U.S. Trustee requests an order dismissing this case for "substantial abuse" under 11 U.S.C. §707 (b). Debtors resist. They assert they do not have the ability to pay debts from future income.

#### FINDINGS OF FACT

Debtors filed their Chapter 7 petition on September 5, 2000. Debtors' Schedule I discloses \$3,210.98 of current monthly income. Debtors filed a Schedule J which discloses total monthly expenses of \$1,739. Therefore, at the time of filing, Debtors certified that they had \$1,471.98 of disposable income. This apparent availability of disposable income prompted the U.S. Trustee's Office to question whether Debtors' Chapter 7 case should be dismissed for substantial abuse under §707(b) and the U.S. Trustee's office filed this motion. On the morning of hearing, Debtors filed an amended Schedule J. The amended Schedule J reflects total monthly expenditures of \$3,234.

Both Debtors are employed. Mr. Kressig has been employed in the Dubuque County Auditor's Office for approximately 25 years. His gross monthly income is \$2,029.63. After deductions, he has net disposable income of \$1,461.42 per month. Mrs. Kressig is employed by the Dubuque County Clerk of Court. She works in small claims court and has been employed there for approximately 20 years. She has a gross income of \$2,515.07 per month. After deductions, she has a net disposable income of \$1,749.58. Debtors did not receive a State income tax refund last year. However, they received a Federal income tax refund of approximately \$700. They anticipate a similar refund this year. The \$700 refund was not factored into their total combined monthly disposable income.

Debtors live a fairly modest life style. They claim slightly in excess of \$12,000 of personal property. They do not own any real estate and rent their living quarters. The parties list \$11,620 as secured debt.

This consists of a \$9,100 loan on a 1997 motor vehicle and a \$2,500 loan for furniture. Debtors list approximately \$94,000 in unsecured debt. The overwhelming majority of this debt consists of credit card obligations. The nature of the purchases which form the basis of this debt is unclear.

According to Debtors, an amended Schedule J was necessary because they were not sufficiently careful in their original Schedule J to list all expenses. In addition, Debtors now project certain future expenditures not listed on their original Schedule J. Debtors indicate that they anticipate moving from their apartment into another apartment which will raise their monthly rental approximately \$175. Based on this, they also project that their monthly utility bills will increase by approximately \$100. Debtors testified that while they have been functioning with one automobile, they anticipate that they will now need a second automobile at a cost of \$200 per month. Based on this anticipated automobile purchase, they also anticipate additional insurance and transportation expense for this second auto. Mr. Kressig, in the amended Schedule J, stated that he now anticipates purchasing life insurance which will cost approximately \$100 per month. Mrs. Kressig testified that she anticipates having dental work done at an approximate cost of \$3,000. Debtors testified that they will be seeking marriage counseling. In addition to new expenses not previously listed, Debtors also have increased their food budget from a combined \$425 per month to \$600 per month.

### CONCLUSIONS OF LAW

Section 707(b) of the Bankruptcy Code 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 party 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). "Substantial abuse" is not a defined term. In the Eighth Circuit, "[a] Chapter 7 debtor's ability to fund a Chapter 13 plan 'is the primary factor to be considered in determining whether granting relief would be substantial abuse.'" In re Koch, 109 F.3d 1285, 1288 (8th Cir. 1997); In re Walton, 866 F.2d 981, 983 (8th Cir. 1989). The Eighth Circuit has declined to adopt the "totality of circumstances" approach. In re Harris, 960 F.2d 74, 77 (8th Cir. 1992). A debtor's "substantial ability to pay creditors standing alone warrants dismissal of a Chapter 7 petition for substantial abuse." Koch, 109 F.3d at 1288; Harris, 960 F.2d at 76. Egregious conduct is not a required element of substantial abuse dismissal. Harris, 960 F.2d at 76.

### ABILITY TO PAY

For §707(b) purposes, ability to pay creditors is measured by evaluating Debtors' financial condition in a hypothetical Chapter 13 proceeding. Koch, 109 F.3d at 1288. Confirmation of Chapter 13 plans requires, if an objection to confirmation is advanced, that the plan provide that all of the debtors' projected disposable income to be received during a three-year plan will be applied to plan payments. 11 U.S.C. §1325(b)(1)(B). "Disposable income" is income not reasonably necessary for support of the debtors, debtors' dependents or debtors' business. 11 U.S.C. §1325(b)(2). Evaluating Debtors' ability to fund a Chapter 13 plan necessitates a review of Debtor's disposable income.

Revenues received from exempt sources during the life of a Chapter 13 plan are "income," the disposable portion of which must be paid to unsecured creditors if the plan is to be confirmed. Koch, 109 F.3d at 1289. This court has held that regular tax refunds should be taken into account in this

analysis. In re Nelson, No. 97-03710S, slip op. at 5-6 (Bankr. N.D. Iowa March 16, 1998), aff'd, 223 B.R. 349 (B.A.P. 8th Cir. 1998). An analysis of projected disposable income necessarily considers the amount of the debtor's current income tax withholdings and whether any tax refund will be generated. In re O'Brien, 181 B.R. 71, 76 (Bankr. D. Ariz. 1995).

Including a cushion for emergencies or general maintenance in debtors' schedule of expenses may be appropriate if it is not excessive and is sufficiently evidenced in the record. In re Smith, 222 B.R. 846, 859 (Bankr. N.D. Ind. 1998). Treating payment for nonessential assets as expenses, however, operates to the detriment of unsecured creditors and violates the disposable income requirement. In re Kasun, 186 B.R. 62, 65 (Bankr. E.D. Va. 1995). Payments on a 40-acre parcel of non-income producing investment real property was not necessary for the support of the debtors or their dependants and was considered a violation of the disposable income requirement in In re Lindsey, 122 B.R. 157, 158 (Bankr. M.D. Fla. 1991).

Debtors' income in this case is stable and constant. While Debtors may receive cost-of-living adjustments, there is nothing to indicate a substantial increase in income in the foreseeable future. However, Debtors have not included tax refunds in their disposable income analysis. Debtors received \$700 in tax refunds in 1999. This amount should be included as part of Debtors' disposable income. This is approximately \$58.00 per month and should increase disposable income accordingly.

The primary controversy in this case involves Debtors' monthly expenses. Debtors originally listed monthly expenses of \$1,739 but now claim \$3,234 per month in their amended Schedule J. It is the appropriateness of these amended expenses which forms the core of the U.S. Trustee's motion.

Debtors originally claimed food expense of \$300 and clothing expense of \$125 per month for a total of \$425. In their amended Schedule J, Debtors now claim \$400 per month in food and \$200 per month in clothing for a total of \$600. This is an increase of \$175 per month. The only explanation provided by Debtors as to this increase is that they were not adequately careful in their original schedules and upon recalculation, determined that they spent more per month on these categories. Nevertheless, at the time of hearing, Debtors did not present records upon which these alleged expenditures are based.

Debtors have been married eight years and have lived in the same apartment the entire time. They now assert that they need a larger apartment and that this apartment would cost \$175 more per month than their present living quarters. However, Debtors' newly claimed expenditure is merely hypothetical. Debtors did not specify any apartments which they visited. Debtors continue to reside in the same apartment which was listed in their original Schedule J. They have made no commitment to move in the near future.

Debtors originally listed a total of \$255 for utilities and other expenses associated with their apartment. The amended Schedule lists \$360 for the utilities on a new apartment. This increase of claimed expenditure of \$105 for utilities is purely hypothetical as Debtors continue with the same living arrangements upon which their original utility costs were based.

In their original Schedule J, Debtors listed monthly medical and dental expenses as "open". This Schedule J also reflected that insurance pays 80% of this bill. The amended Schedule J lists \$500 monthly in medical and dental expenses. There is nothing in the new Schedule J to reflect that this is payable over a short term. The testimony reflects that Mrs. Kressig intends to get a dental bridge which will cost approximately \$3,000. However, there is little testimony to indicate whether this dental work is immediately necessary. The testimony is also vague as to whether this is, in fact, the actual cost for the dental prosthesis. Finally, the parties testified that they have insurance which pays

up to 80% of their dental costs. However, they were vague as to exactly how much out-of-pocket expense would be attributable directly to them if this dental work were done. In fact, Mrs. Kressig has not set up an appointment to have this done.

As a part of the medical and dental expense, Debtors indicate that they have had marital problems and are considering marriage counseling. They now anticipate an expense of \$100 per month for this counseling. However, they have merely talked to the Gannon Center in Dubuque and have not had any actual marital counseling nor have they set up an appointment to do so. In summary, the only verifiable medical expenses are approximately \$50 per month expense for medication for Mr. Kressig's high blood pressure.

Debtors, in their amended Schedule J, list a second automobile with an expense of \$200 per month. Debtors testified that this will be a necessary expense because Mr. Kressig's work site will be moved from the Courthouse to an undetermined facility on the west side of Dubuque next year. However, it is not clear that this move will occur and, if so, it is not certain that the move will be to the west side. Debtors were not able to provide any location other than conjecture that it is near the fairgrounds. Under any circumstance, the move is not anticipated until next year, if at all. Debtors have not in fact purchased a second automobile and this is merely an anticipated expense. In conjunction with the anticipated purchase of an automobile, Debtors increased their transportation expense from \$110 to \$200 per month. This is in fact another hypothetical expense.

Mr. Kressig indicates that he has not had life insurance but would now like to purchase life insurance. He has not in fact done so. The evidence is vague as to the type of insurance he would buy or from whom. He estimates that he would pay premiums of \$100 per month.

In their original Schedule J, Debtors listed recreation expenses, clubs and entertainment, newspapers, magazines, etc. as \$100 per month. In their new Schedule J, they continue to list this category as \$100 but they have also added \$150 in other largely undefined expenses.

The Court has considered the evidence presented. Debtors in general are allowed to amend their schedules at any time to conform to their financial condition. However, when debtors amend their schedules on the eve of hearing and the amended schedules assure that there will be no disposable income, their credibility is immediately placed in question. This suspicion is enhanced in this case because of the nature of the amendment. Most, if not all, of the amended expenditures do not in fact exist. They are items which Debtors would like to purchase or intend to purchase in the future. The actual necessity for these items is in considerable dispute. Debtors' amended Schedule J is really nothing more than an anticipated "wish list" of obligations they would like to incur in the future. Schedule J is intended as a list of current expenditures. When the speculative expenditures listed by Debtors are eliminated, Debtors' actual current expenditures very closely resemble the original Schedule J. It is difficult to evaluate with any precision the exact amount of expenses because Debtors present a constantly moving target. While some expenditures listed on the amended Schedule J may in fact be necessary expenses in the future, they are obligations which presently do not exist and which are difficult to define based on the record presented.

This Court must conclude that the U.S. Trustee has established that Debtors have disposable income. Under the original schedules, Debtors had \$1,471 in income which could be applied toward a Chapter 13 plan. This does not include the \$700 in tax refunds which should also be appropriately allocated toward disposable income. Including the tax refund and Debtors' combined monthly income, Debtors have approximately \$3,269 per month in combined monthly income. Even under their amended Schedule J, Debtors still reflect positive disposable income of \$35 per month. Based upon the fact that

much of Debtors' amended expenditures consist of nothing more than anticipated expenses, Debtors are certainly in a position to pay a reasonable sum toward a hypothetical Chapter 13 plan. Under the original schedules adjusted to include the tax refund, Debtors were capable of paying approximately \$1,530 per month. It is possible that some of the expenses which they project will become absolutely necessary and will reduce this disposable income by some amount. However, the Court need not speculate as to which of these expenses are or will become necessary. Much more substantial evidence is necessary than has been presented in order to convince the Court of the immediacy of some, if not all, of these expenses. The Court is convinced that Debtors could pay a substantial amount of their unsecured debt with a concerted effort. This warrants dismissal of their Chapter 7 petition for substantial abuse.

**WHEREFORE**, the U.S. Trustee's Motion to Dismiss is SUSTAINED.

**FURTHER**, Debtors are given ten days from the date of this Order to file a Motion to Convert to Chapter 13 if they wish to do so.

**FURTHER**, if Debtors do not convert to Chapter 13 within the ten day period, this case will be dismissed without further notice or hearing.

**SO ORDERED** this 18th day of October, 2000.

Paul J. Kilburg  
Chief Bankruptcy Judge