UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re:
Debra K. Harper, **Case No. 02-20235**
Debtor. **Chapter 7**

MEMORANDUM OPINION AND ORDER
ON UNITED STATES TRUSTEE'S MOTION TO DISMISS
FOR SUBSTANTIAL ABUSE

On July 25, 2002, the Court heard the motion filed by the United States Trustee to dismiss the Chapter 7 case filed by Debra K. Harper ("Debtor") for substantial abuse under 11 U.S.C. § 707(b).

ISSUE

The issue presented in this contested matter is whether the Debtor's ability to pay a percentage of her unsecured debt is a sufficient factor, standing alone, to require a finding of substantial abuse. Section 707(b) of the Bankruptcy Code provides, in relevant part:

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, ... may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b).

FACTS

The facts presented in this case are, of course, unique to this particular Debtor. The Debtor filed her Chapter 7 petition jointly with her spouse, but the United States Trustee's motion to dismiss is addressed only to Debra Harper. This is because Mr. Harper suffers from a serious illness, as well as unemployment, that dictates his inability to repay his creditors and that makes his need for Chapter 7 relief obvious. Unfortunately, Mr. Harper's illness caused him to incur substantial debt without the knowledge or consent of Debra Harper, and she filed for Chapter 7 relief after discovering the amount of the debt upon which she was personally liable.

It is not disputed that Debra Harper's debts are consumer debts, and she has approximately $58,000 of unsecured debt. Some of that debt is to family members or friends tp whom the Debtor holds hope of repayment. The bulk of the debt resulted from Mr. Harper's use of credit cards without the knowledge of this Debtor. Mr. Harper's detrimental credit actions led to the loss of the Debtor's home. In addition, he wrecked her automobile, causing her great difficulty in purchasing a replacement, due to their adverse credit history.

In its focus solely upon this Debtor, the motion points out that Debra Harper has excellent employment with Federal Express, earning at least $64,000 per year; that she may earn future bonuses; that she has a 401(k) retirement plan with a present value of approximately $18,000; that she is repaying a loan from her retirement account in the amount of $487 monthly and that this sum could be paid to other creditors; that she may be able to reduce her stated monthly expenses; and that under more stringent cost-reduction and reallocation efforts the Debtor could repay her unsecured creditors over 36 months more than 50% of such debt.

The relevant facts, as they were developed in the proof, will be discussed more fully below.

DISCUSSION

Substantial abuse is not defined in the Code, leaving it to judicial determinations in a case-by-case analysis. *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). In *Krohn*, the Court of Appeals for this Circuit made it clear that application of this standard involves a fact-intensive inquiry, one that may include many factors. A debtor's ability to repay creditors is certainly one of the factors the bankruptcy court should weigh, and in an appropriate case the ability to repay debts out of future income "alone may be sufficient to warrant dismissal." *Id.* (citation omitted). However, a debtor's ability to repay cannot be viewed in a vacuum; rather, a decision on substantial abuse requires a totality-of-circumstances examination. *Id.*

Viewed outside of the context of her total circumstances, it would appear that this Debtor has sufficient future income to repay a significant percentage of her unsecured debt in a Chapter 13 plan over three years. The total circumstances, however, lead the Court to conclude that the statutory presumption in favor of Chapter 7 relief for this particular Debtor has not been overcome and that the motion to dismiss should be denied.

First, the Court notes that the Debtor was an extremely credible witness as to the

circumstances leading up to her bankruptcy. There is absolutely no indication that Debra Harper was a credit abuser or that she took advantage of any of her creditors. The proof established that her financial difficulties resulted from her husband's mental illness, one that caused him to incur debt without her knowledge and that led to his loss of excellent employment. Debra Harper became the sole supporter of the household, after losing her home, her automobile and her good credit. Before filing for bankruptcy relief, this Debtor voluntarily did what Congress is currently attempting to require all debtors to do before filing bankruptcy: She sought assistance from credit counseling and attempted for several months to reach payment accommodation with her creditors. That effort was unsuccessful, principally because some of the creditors were unwilling to compromise. No creditor has filed a complaint disputing the dischargeability of debts. This is a Debtor who was put into financial disarray by the actions of her ill spouse.

After Mr. Harper wrecked her automobile, Debra Harper was forced to acquire a replacement, and she finally succeeded in financing a vehicle despite the ruin to her credit standing. As she said, only the lender's reliance upon her integrity persuaded the lender to extend credit in the face of the family's poor credit standing. The fact that she has a recently incurred secured debt does not indicate preferential treatment of one creditor over the unsecured creditors; rather, the Debtor found herself required to purchase an automobile in order to maintain her employment. Even if the Debtor were encouraged to file for Chapter 13 relief instead of Chapter 7, she would likely be required to maintain the full contractual payments for the automobile lender since the car was purchased only a few months ago. The Court notes, also, that the Debtor chose an economy rather than a luxury car, one that would be economical to operate.

While the Debtor's statement that she hopes to repay family and friends can be construed as proof of her ability to repay other unsecured creditors, the Court considered her statement to be one of hope rather than commitment. Moreover, a Chapter 7 discharge never precludes a debtor from voluntarily repaying any creditors. 11 U.S.C. § 524(f). Viewed from the perspective of Chapter 13, should the Debtor be encouraged to seek that relief, her payment of a percentage of unsecured debts to family and friends would diminish the return to other unsecured creditors. In other words, her hope of repaying family and friends after a Chapter 7 discharge is not necessarily detrimental to other unsecured creditors.

As to her 401(k) retirement account and repayment of a loan from this account, the Debtor testified that she was prohibited from borrowing more from the account until the present loan was repaid in full. The repayment is by withdrawal from her payroll check. Should the Debtor be in Chapter 13, it is certainly true that precedent in this Circuit would indicate that this loan could not be preferred while other creditors received less distribution. *Harshbarger v. Pees (In re Harshbarger),* 66 F.3d 775 (6th Cir. 1995). *Harshbarger* dealt with whether such loan repayments violated the disposable income requirements of § 1325(b) and whether the future income for the loan repayments was excluded from the Chapter 13 bankruptcy estate. These are different issues than the one before this Court. The Debtor's ability to pay creditors from future income, which would include the income now devoted to repay the 401(k) loan, is only a factor in the totality-of-circumstances examination. Moreover, we don't know whether the 401(k) creditor would assert in a Chapter 13 case a secured or setoff position, or whether other objections to a Chapter 13 plan would be filed by that creditor.

The Debtor testified that she doesn't expect that Mr. Harper will be able to obtain substantial employment; thus, she is essentially solely responsible for paying the Internal Revenue Service's $6,000 debt. She is currently under an installment repayment agreement with IRS. Although Chapter 13 might offer a means of repaying IRS without continuing interest and penalty charges, the Debtor is nevertheless voluntarily assuming a repayment method. Thus, IRS is not harmed by the Debtor's decision to seek Chapter 7 relief. Presumably, the IRS debt would be excepted from a Chapter 7 discharge anyway. *See* 11 U.S.C. § 523(a)(1).

The Debtor's amended schedule of expenses takes note of her increase in tax withholdings due to the loss of mortgage interest deduction. The Debtor is now a tenant rather than a homeowner.

The United States Trustee points to specific items in the Debtor's expense budget that could be eliminated or reduced. Certainly, more stringent cost-reduction measures could be taken, but the Court is not persuaded that the Debtor has exaggerated or inflated her expenses. For example, the motion asserts that the Debtor spends too much for food for herself, $450.00 monthly. The Debtor's response is that this amount is for all food and related items, relying in part upon a published Consumer Expenditure Survey showing monthly average food expenditures for a single person in the Debtor's income bracket of $362.00. The Court is more persuaded by the Debtor's testimony

that the $450 includes many items commonly purchased at groceries, such as housekeeping and hygiene supplies.

The United States Trustee argues that the Debtor, through all efforts, might be able to repay her unsecured creditors at least 59% over a three-year Chapter 13 plan and perhaps as much as 72%. The Debtor contends that a best-case scenario, based upon her income and projected expenses, is a 15½% distribution. Although the possibility of a significant distribution to unsecured creditors is a weighty factor in the substantial abuse analysis, it is not clear from the proof that the Debtor would be required, or able, in a Chapter 13 to repay the percentages suggested by the United States Trustee.

As the Circuit Court said in *Krohn*, "§707(b) allows a bankruptcy court to deal equitably with the unusual situation where an unscrupulous debtor seeks to enlist the court's assistance in a scheme to take unfair advantage of his creditors; it serves notice upon those tempted by unprincipled accumulation of consumer debt that they will be held to at least a rudimentary standard of fair play and honorable dealing." 886 F.2d at 126. Equity should apply as well to the scrupulous and principled debtor like Ms. Harper. She appears to be approaching her financial obligations responsibly, and the Court is persuaded that, absent her spouse's financial demise, she would not be in bankruptcy. As stated previously, there is no indication that this Debtor intentionally ran up credit card debt or took advantage of her creditors. Rather, this case presents a Debtor who was caught in the financial trap created by her ill spouse. She did not seek bankruptcy relief immediately; instead, she attempted to reach accommodation with creditors through credit counseling. Only when those efforts failed and after her spouse lost employment did she file for Chapter 7 relief. Denying her that relief now would continue to burden her with debts not of her creation.

CONCLUSION

There is a statutory presumption in § 707(b) in favor of granting the Chapter 7 relief sought by this Debtor. The United States Trustee properly brought and prosecuted this motion, as this case presents questions of whether the Debtor's apparent ability to repay something to unsecured creditors is sufficient for dismissal of the case. Notwithstanding an ability to pay some percentage to unsecured creditors, the totality of the circumstances in this case persuades the Court that the proof did not overcome the statutory presumption.

ORDER

Based upon the foregoing analysis and conclusion, it is

ORDERED that the motion to dismiss this case under § 707(b) is **DENIED**.

This 31st day of July, 2002.

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WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:
Debtor
Sean M. Haynes, Trial Attorney, United States Trustee
Michael E. New, Attorney for Debtor