

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE**

IN RE:

ROBERT F. BLOSE, JR. and
SUE V. BLOSE,
Debtors

Case No. 96-22525-WHB
Chapter 7

**MEMORANDUM OPINION ON UNITED STATES TRUSTEE'S
SECTION 707(b) MOTION TO DISMISS**

The United States Trustee filed a motion to dismiss this chapter 7 case under § 707(b) of the Bankruptcy Code, which provides for dismissal of such a case if filed by an individual debtor whose “debts are primarily consumer debts,” and if it is found by the court “that the granting of [chapter 7] relief would be a substantial abuse of the provisions of this chapter.” The debtors filed a response to that motion, admitting that they are individuals with primarily consumer debts but denying that the United States Trustee could overcome the statutory presumption in favor of the chapter 7 relief sought by them. An evidential hearing was held, and the Court took the contested motion under advisement. This opinion contains findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052, and a separate Order will be entered granting the motion for dismissal.

Mr. Robert F. Blose, Jr., one of the joint debtors, testified that at the time of the bankruptcy filing he worked in car sales at Bluff City Nissan in Memphis, Tennessee, but that within two weeks of the filing he received and accepted an offer from a competing dealer, Jim Kerras Nissan, and that he received a \$14,000 signing bonus and a one year salary guarantee of \$9,000 per month. After that one year, he will be placed on a straight commission. Mr. Blose admitted that this was an unusual

arrangement for the automobile business, but that he was “quite good at what he does.” That is obviously true, and the dealership must have confidence in his sales ability. In his prior employment he was quite good also, reporting income of \$118,000 in tax year 1995, \$120,000 in tax year 1994, and around the same in tax year 1993. His wife, from whom he is separated but attempting a reconciliation, has worked at Travel Design for approximately three months, netting \$1,650 per month. Combined with Mr. Blose’s monthly net income of \$5,700, the couple takes home \$7,300 per month. He testified that they had around \$6,500 in monthly expenses but of that only \$4,000 to \$4,500 were basic expenses.

The difference between basic and total expenses is reflected in the payment of credit cards and other debts that the debtors either reaffirmed or voluntarily continue to pay. For example, the debtors continue to pay Avco Finance \$210 per month and American General Finance \$285 per month despite the fact that both creditors hold security in household goods with liens that appear to be avoidable under § 522(f). The debtors had not considered seeking such avoidance which, if granted, would have the effect of making Avco and American General unsecured creditors. In addition to this preferential treatment of some creditors that the debtors simply chose to continue to pay, they used Mr. Blose’s signing bonus to pay unsecured family and other preferred creditors: Mr. Blose’s brother, \$4,000; Mrs. Blose’s mother, \$3,000; pawn shops to recover the family’s jewelry, \$2,800; Bluff City Nissan, \$2,500. In addition, the debtors caught up their delinquent house and car notes. They live in Stonebridge subdivision in a home valued at \$135,000, with a mortgage debt of \$113,000. They have two vehicles, plus Mr. Blose drives a demonstrator automobile at no cost to him.

In an act that is understandable but not legally required, Mr. Blose is paying his daughter’s

college education expense of \$1,200 per month, rather than financing her education with student loans.

Mr. Blose testified that the couple's financial trouble began in 1992 when his wife lost her job at Delta Airlines and the couple decided to try to live on his income alone. He admitted that the financial trouble was in part their fault for not cutting back lifestyle choices in the face of the reduced income. There was no proof that the couple had attempted to modify their expenses; rather, they began to borrow more to finance their lifestyle, paying "what they could" and getting behind in bills.

The United States Trustee argues that this is a classic § 707(b) case, with the debtors able to pay at least 70% of their creditors from the \$1,500 per month estimated by the Trustee to be left over after the payment of basic expenses. In other words, rather than paying a few selected creditors, the debtors, it is argued, could pay all unsecured creditors a proportionate share. The Trustee also argues that it is extravagant for the debtors to fund their daughter's college expense rather than pay creditors, and the Trustee's attorney points out that the debtors chose to pay a few creditors out of the signing bonus rather than treat all creditors the same.

In response, the debtors' attorney argues that Mr. Blose is only guaranteed his high income for one year and that his actual income becomes speculative at that point, and he argues that the expenses shown on Schedule J of the debtors' petition are conservative estimates.

The Court does not agree with the debtors' assessment. Schedule J is not conservative. It shows that the debtors are paying \$3,643 per month in discretionary monthly installment payments, including two car payments. The proof and the case file support a finding that the debtors voluntarily reaffirmed several debts and that they continue to pay debts with no effort made at

treating similarly situated creditors the same. For example, the debtors are paying Avco and American General, creditors that appear to be unsecured if the debtors had exercised their opportunity under the Bankruptcy Code to avoid the nonpurchase-money, nonpossessory liens of those creditors. Also, the debtors' choice to pay their daughter's college education on an ongoing basis rather than through student loans indicates that the debtors are more concerned with their and their family's lifestyles than with repayment of creditors. The Court saw no evidence that the debtors had attempted to reduce their discretionary spending or that the debtors had attempted to do anything except prefer those creditors that they chose to pay.

The Court also discounts the debtors' attorney's argument that Mr. Blose's future income is speculative. It is obvious that Mr. Blose has great ability to sell automobiles. This is the first instance before this Court of a signing bonus to an automobile salesperson, and it is not plausible to infer that Jim Kerras Nissan would so sign Mr. Blose if it had any doubt about his sales ability in the future.

Mr. Blose contends that the Court should consider that his financial troubles have caused the marital strain and that repayment of debt in a chapter 13 plan may cause further strain. The Court is not persuaded that it should determine the appropriate chapter of bankruptcy relief based upon the strain that the relief would cause or not cause on family relationships. It is common for financial difficulty to accompany marital strains, but the bankruptcy court is not a domestic relations forum.

Similar to this Court's finding in *In re Barnes*, 158 B.R. 105, 109 (Bankr. W.D. Tenn. 1993), "the Court is persuaded from all of the facts before it that these debtors have chosen to pay only those creditors that would enable them to maintain a lifestyle of their choosing." Moreover, as the Court observed in *Barnes*, "the facts of this case would cause the public to perceive Chapter 7

bankruptcy as an easy way out of unnecessary consumer debt.” *Id.*

As the Court of Appeals for the Sixth Circuit observed in *In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989), the “Congress, within the limits set by the Constitution, is free to deny access to bankruptcy as it sees fit.” The grant of a discharge in chapter 7 is not a right; rather, it is a privilege conditioned upon the limits imposed by Congress. Section 707(b) is one of those limits.

Krohn teaches that bankruptcy courts must evaluate the totality of the circumstances when deciding a § 707(b) motion. This Court has considered all of the evidence and the totality of the circumstances, from which the Court finds and concludes that the granting of chapter 7 relief to these debtors would be a substantial abuse of the provisions of chapter 7. The totality of the circumstances overcomes the statutory presumption in favor of chapter 7 relief.

By a separate Order, the chapter 7 petition filed by these joint debtors will be dismissed. The dismissal will be without prejudice to the debtors refiling for relief under a debt reorganization chapter if they so choose.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

Dated: August 21, 1996

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