IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

IN RE: MICHAEL DALE LOOS and
MARY LOUISE LOOS, Debtors **No. 5:10-bk-74032**
Ch. 7

ORDER

Before the Court is the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)(1), filed on October 15, 2010. The Court heard the United States Trustee's [UST] motion on March 9, 2011. Robert Jeffrey Conner appeared on behalf of the debtors, who also appeared, and Patti J. Stanley appeared for the UST. At the conclusion of the trial the Court took the matter under advisement. For the reasons stated below, the Court conditionally grants the UST's motion.

The debtors filed their voluntary chapter 7 bankruptcy petition on July 31, 2010. On the first page of their petition, the debtors indicated their debts were primarily consumer debts. They also included with their petition a completed Form B22A--Chapter 7 Statement of Current Monthly Income and Means-Test Calculation--and indicated on page one that a presumption of abuse arises under § 707(b)(2). The initial meeting of creditors was scheduled for September 7, 2010; on September 7, 2010, the chapter 7 trustee requested the meeting be continued to October 4, 2010. On October 4, 2010, the chapter 7 trustee filed her report of no distribution in the case.

On September 17, 2010, within 10 days of the initial setting of the meeting of creditors, the UST timely filed with the Court her statement that the debtors' case would be presumed to be an abuse under § 707(b), as required by § 704(b)(1). Then, pursuant to § 704(b)(2), on October 15, 2010, the UST timely filed the pending motion to dismiss. On January 24, 2011, the debtors amended their Form B22A (means test) to declare that their debts were not primarily consumer debts, rendering § 707(b)(1) not applicable to the

debtors' case.[1] Counsel for the debtors stated at trial that he had forgotten to amend the first page of the debtors' petition to indicate the debtors' debts were primarily business debts.

The UST has the initial burden of proof to support a dismissal motion under § 707(b). *In re Baker*, 400 B.R. 594, 597 (Bankr. N. D. Ohio 2009); *In re Booker*, 399 B.R. 662, 665 (Bankr. W.D. Mo. 2009). Once that burden has been met, the debtors have the burden of going forward with sufficient evidence to controvert the prima facie case. *Baker*, 400 B.R. at 597. In this instance, the Court finds the UST has met her burden with regard to § 707(b)(2). According to the UST's Exhibit 6, which is a worksheet to determine a presumption of abuse under § 707(b)(2), the debtors have a monthly disposable income of $4038.51. This results in a 60-month disposable income of $242,310.60, well in excess of the threshold limit of $11,725.00 to establish a presumption of abuse.[2]

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[1] Section 707(b)(1) states, in relevant part: "After notice and a hearing, the court . . . may dismiss a case filed by an individual debtor under this chapter *whose debts are primarily consumer debts*, or . . . convert such a case to a case under chapter 11 or 13 of this title . . . ." 11 U.S.C. § 707(b)(1) (emphasis added).

[2] According to the debtors' original means test, the debtors have a monthly disposable income of $3130.45, resulting in a 60-month disposable income of $187,827.00. Regardless of which figure is used, the debtors' 60-month disposable income under § 707(b)(2) exceeds $11,725.00 and a presumption of abuse exists. 11 U.S.C. § 707(b)(2)(A)(i).

The Court notes that on Exhibit 6, the UST increased the debtors' projected monthly expenses by $262.35 based on an average monthly administrative expense for a chapter 13 case, and reduced the debtors' monthly expenses by $416.00 based on the debtors' intention to surrender a timeshare in Hawaii. These adjustments deserve further scrutiny.

The inclusion of a chapter 13 administrative expense is only appropriate in cases in which a debtor is eligible for relief under chapter 13. 11 U.S.C. § 707(b)(2)(A)(ii)(III). According to the debtors' Schedule F--Creditors Holding Unsecured Nonpriority Claims--on the date of the filing of their petition, the debtors had unsecured claims totaling $376,300.45. Stip. Ex. 2. This exceeds $360,475.00, which is the amount of unsecured debt allowed in a chapter 13 case, thus making the debtors ineligible for chapter 13. 11

(continued...)

To controvert the UST's motion, the debtors argue that their debts are not primarily consumer debt (as indicated on their amended means test), which would make the means test and § 707(b)(1) not applicable in their case. The basis for their argument is that the student loans are non-consumer debt because the debt was incurred with a profit motive. Kerry Cone, a bankruptcy analyst for the UST, testified that the debts listed on the debtors' schedules consisted of credit card debt, medical debt, and educational debt (which include the student loans the debtors argue are non-consumer debt). He also testified that there was no indication on the schedules that any of the debt was for a business purpose and when additional information was requested and received from the debtors, there was no additional information given regarding business debt.

In support of their argument regarding the nature of their debt, separate debtor Mary Loos testified that when the debtors returned to Arkansas from Wyoming, she used her credit cards to purchase office furniture and equipment for her law office and that those credit cards are listed in their bankruptcy schedules. She also stated that she incurred debt in the approximate amount of $10,000.00 in opening her law office.[3] Ms. Loos also testified that in addition to her tuition and related education expenses, part of her law

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[2] (...continued)
U.S.C. § 109(e). As a result, they would not be entitled to an increase of their expenses based on the chapter 13 administrative expense.

Additionally, the UST has reduced the debtors' monthly expenses by $416.00 because the debtors have proposed to surrender a timeshare. However, at the time the debtors filed their petition, they were still obligated for that expense. According to a recent Missouri bankruptcy case, the vast majority of courts that have addressed the subsequent surrender of property in relation to the inclusion of the debt on the chapter 7 means test have concluded that allowing the expense is proper, even though the debtor intends to surrender the property. *In re Suess*, 387 B.R. 243, 246 (Bankr. W.D. Mo. 2008) (collecting cases); *see also In re Coleman*, 382 B.R. 759, 763 (Bankr. W.D. Ark. 2008) (dictum).

[3] The debtors scheduled a total of $77,201.00 of credit card debt on their Schedule F. Stip. Ex. 2. There was no evidence as to what part, if any, of the $10,000.00 had been paid prior to filing their petition.

school student loans were used to pay living expenses, food, and medical expenses; however, no further evidence was provided to the Court regarding the amount spent on each item--either specific, approximate, or a percentage.

According to the debtors' schedules, they have secured debt totaling $218,969.00 and unsecured debt totaling $376,300.45. The secured debt consists of a mortgage on their residence, three timeshare interests, a 403(b) debt (presumably a loan from a retirement account), and a PMSI in a vehicle. The unsecured debt consists of credit card debt, medical bills, charge account debt, and student loans. Although Ms. Loos testified that part of the credit card debt relates to furniture and equipment for her law office (and, as such, may be non-consumer debt), the Court was not provided with a specific amount and will not speculate how much, if any, of the approximately $10,000.00 remains unpaid. None of the remaining unsecured debt was listed or described as business or non-consumer debt.

Regardless, even if the Court were to find that the student loans were non-consumer debt,[4] the debtors' remaining consumer debt exceeds their non-consumer debt:

Secured debt	$218,969.00	
plus Unsecured debt	376,300.00	(including student loans)
Total	595,269.00	
less Student loans	(295,742.00)	
Remaining debt	299,527.00	

In this instance, the debtors' remaining consumer debt totals $299,527.00 and their non-consumer debt/student loans total $295,742.00.

[4] So there is no misunderstanding, the Court is not making such a finding, and is not deciding at this time (1) whether the student loan debt should be classified either consumer debt or non-consumer debt, or (2) if it is only consumer debt in part, what part, if any, should be classified non-consumer debt. For a discussion of those particular issues, see *In re Millikan*, 2007 WL 6260855 (Bankr. S.D. Ind. Sept. 4, 2007) and the *Stewart* line of cases culminating with *Stewart v. United States Trustee* (*In re Stewart*), 175 F.3d 796 (10th Cir. 1999).

Next, the Court must determine whether the debtors have "primarily consumer debts" as that phrase is used in the bankruptcy code. Courts have interpreted the phrase in several different ways, with the majority view looking at the aggregate dollar amount of the consumer debt: if the consumer debt exceeds 50% of the debtor's total liabilities, then the debtor has primarily consumer debt. *In re Hlavin*, 394 B.R. 441, 447 (Bankr. S.D. Ohio 2008); *accord Stewart v. United States Trustee* (*In re Stewart*), 175 F.3d 796 (10th Cir. 1999); *Zolg v. Kelly* (*In re Kelly*), 841 F.2d 908, 913 (9th Cir. 1988). The minority views include considering the relative numbers of consumer and non-consumer debts, and considering only the amount of consumer debt being discharged and not reaffirmed. *Hlavin*, 394 B.R. 447 (listing three examples of minority approaches). After reviewing all approaches, the Court finds the majority view is the better reasoned interpretation. Because the debtors' consumer debt exceeds their non-consumer debt (again, without finding that the student loans are, in fact, non-consumer debt), the Court finds that the debt listed in the debtors' petition and schedules is primarily consumer debt. As a result, the debtors failed to meet their burden of going forward with sufficient evidence to controvert the UST's prima facie case and the Court finds that a presumption of abuse under § 707(b)(2) arises.

Under the code, the debtors can rebut a presumption of abuse based on special circumstances. *In re Rieck*, 427 B.R. 141, 145 (Bankr. D. Minn. 2010). Section 707(b)(2)(B) is the roadmap for that rebuttal:

> (i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.
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> (ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide--
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> (I) documentation for such expense or adjustment to income; and

> (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.
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> (iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.
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> (iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of--
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> (I) 25 percent of the debtor's nonpriority unsecured claims, or $7,025, whichever is greater; or
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> (II) $11,725.

11 U.S.C. § 707(b)(2)(B). According to subsection (ii), to establish special circumstances, the debtors are required to itemize each additional expense and provide documentation for the expense. The only explanation given by the debtors to establish special circumstances is a statement involving one of the debtor's medical condition and the continuing occurrence of healthcare related expenses; no specific expenses were disclosed. Regardless, to rebut the presumption of abuse, any additional expenses or adjustments to income must result in a 60-month disposable income that does not exceed $11,725.00. 11 U.S.C. § 707(b)(2)(B)(iv). To meet that figure, based on their current income, the debtors would have to increase their monthly expenses by approximately $2900.00. Even though no specific expenses were disclosed in the debtors' explanation of special circumstances, the debtors' 2009 tax return reflects medical and dental expenses totaling $13,756.00. Stip. Ex. 9. To comply with the subsection (iv) requirement that the debtors' 60-month disposable income does not exceed $11,725.00, the debtors would need to have annual medical expenses characterized as special circumstances of approximately $34,800.00, not $13,756.00. Based on this information, the Court finds that the debtors failed to meet their burden to rebut the presumption of abuse under § 707(b)(2).

Accordingly, the UST's motion to dismiss is granted subject to the following conditions. As stated earlier in note 2, according to the debtors' Schedule F--Creditors Holding Unsecured Nonpriority Claims--on the date of the filing of their petition, the debtors had unsecured claims totaling $376,300.45. This exceeds the amount of unsecured debt allowed in a chapter 13 case, thus making the debtors ineligible for chapter 13. 11 U.S.C. § 109(e). However, under § 707(b)(1), the court may dismiss or, with the debtors' consent, convert a case in which the court finds a presumption of abuse exists to either chapter 13 or chapter 11. The Court will allow the debtors 14 days from the date of this order to file with the Court a notice of consent to convert their case to a case under chapter 11 pursuant to § 707(b)(1). If the debtors file the notice, the Court will enter its order converting the case to a case under chapter 11. If the debtors do not file a timely notice of consent within 14 days, the case shall be dismissed.

IT IS SO ORDERED.

March 31, 2011
DATE

Ben Barry
BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: Robert Jeffrey Conner, attorney for the debtors
Patti J. Stanley, attorney for the UST
Jill R. Jacoway, chapter 7 trustee