

IN THE UNITED STATES BANKRUPTCY COURT
 FOR THE
 SOUTHERN DISTRICT OF GEORGIA
 Augusta Division

IN RE:)	
)	Chapter 7 Case
)	Number <u>97-11527</u>
ROSA M. PRYOR)	
CURTIS PRYOR)	
)	FILED
Debtors)	at 11 O'clock & 20 min. A.M.
)	Date: 3-19-98
<hr style="border: 0.5px solid black;"/>		
)	
UNITED STATES TRUSTEE)	
)	
Movant)	
)	
vs.)	
)	
ROSA M. PRYOR)	
CURTIS PRYOR)	
)	
Respondents)	

ORDER

The United States Trustee filed a Motion to Dismiss this Chapter 7 bankruptcy case of Rosa and Curtis Pryor, under 11 U.S.C. § 707(b), 707(a), or, in the alternative, § 706(a).¹ The Trustee's motion is denied.

From the evidence presented at trial I make the following findings. Curtis Pryor retired from the military in 1995 at which time he moved with his wife and two minor children from California to his final transfer point at Fort Gordon,

¹The debtors have not sought conversion to another chapter under title 11.

Georgia. Mrs. Pryor found employment with Fort Gordon. However, Mr. Pryor remained unemployed for five to six months during 1996 in spite of his efforts to find a job. In 1995 and 1996, he took several temporary positions and a minimum wage job before he found a permanent position in February 1997. This period of sporadic underemployment resulted in a significant reduction in Mr. Pryor's income. During this period the family used credit cards to meet their modest living expenses. The death of Mrs. Pryor's mother in December 1996 added to their credit card debt because Mrs. Pryor had to take several weeks off from work and make several trips to deal with the situation. Mrs. Pryor borrowed from her retirement to pay bills. She received notice terminating her job effective March 11, 1998, however she believes she has a good chance to be rehired.

In an effort to deal with their high credit card debt, but to no avail, Mrs. Pryor contacted the credit card creditors to try and work out the debt. Debtors also contemplated trading their 1994 GMAC van, with a \$16,000.00 debt, for one with lower payments, but determined a trade in was not feasible. The couple's second automobile is a 1987 Oldsmobile with over 150,000 miles. Between them, Debtors drive a hundred miles a day to work making two cars necessary. Debtors live in a home they purchased and financed in 1991 for \$50,000.00. Mr. Pryor makes most of the repairs on the home and the motor vehicles. No vacations have been taken by the family. Debtors filed this Chapter 7 on July 12, 1997 when the accumulated debt proved unmanageable.

The Trustee points out that several of the expenses in the schedules submitted by Debtors are excessive and unreasonable, income is low, and if these factors were adjusted could fund a seventy (70%) percent dividend to unsecured creditors under a Chapter 13 plan. The Trustee established at the hearing that Mrs. Pryor's net monthly income is \$1,438.86, Mr. Pryor's net monthly income is \$1,230.67, and Mr. Pryor's monthly military retirement pay is \$1,068.00 totaling \$3,737.53, which is \$195.20 higher than Schedule I provides. Analyzing Schedule J, I found the Debtors transportation, medical, dental and clothing expenses were not unreasonable. However, the food expense was excessive by \$150.00, children's expense by \$100.00, and charitable deduction by \$125.00. These adjustments together with the monthly payments to secured creditors to be reaffirmed under their Chapter 7 case resulted in approximately \$1,050.00 per month available for a Chapter 13 plan payment.

The United States Trustee urges dismissal under § 707(b) because their debts are primarily consumer, the Debtors are able to repay a substantial portion of the debt in a Chapter 13, and bad faith exists from their attempt to gain an unfair advantage over their creditors as indicated by their current disposable income.

11 U.S.C. § 707(b) provides:

(b) After notice and a hearing, 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 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.

There is no dispute that the Debtors, as individuals, with primarily consumer debt fall within § 707(b). The Trustee must therefore, show that the granting of relief under Chapter 7 would constitute a substantial abuse of the Code.

The § 707(b) analysis in this district in two recent cases Matter of Ackerberg, Chapter 7 Case No. 97-20495 (Bankr. S.D. Ga. January 26, 1998) (Davis, J.), and Walton v. Smith (In re Smith), Chapter 7 Case No. 96-11160 (Bankr. S.D. Ga. March 31, 1997) (Dalis, J.), controls here.

The primary purpose of bankruptcy relief is to provide the honest but unfortunate debtors with a fresh start through the discharge of their debts. Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S. Ct. 695, 699, 78 L. Ed. 1230 (1934). See also, In re Krohn, 886 F.2d 123, 125 (6th Cir. 1989). However, limitations such as § 707(b) on the extent or availability of an individuals access to a bankruptcy discharge are designed to prevent a debtor from taking 'unfair advantage of his creditors.' Id. at 126. Section 707(b) provides the debtor with a presumption in favor of relief under Chapter 7, which presumption may be rebutted by the U.S. Trustee, bearing the burden of proof on the substantial abuse issue. Green v. Staples (In re Green), 934 F.2d 568 (4th Cir. 1991), Matter of Dubberke, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990); Matter of Woodhall, 104 B.R. 544, 545 (Bankr. M.D. Ga. 1989). Section 707(b) is intended 'to deny Chapter 7 relief to the dishonest or non-needy debtor.' Krohn, 886 F.2d at 126; see also, In re Walton, 866 F.2d 981, 983 (8th Cir. 1989). The totality of the circumstances should be used in determining whether the debtors'

Chapter 7 filing constitutes a substantial abuse of the bankruptcy process warranting dismissal. Factors for consideration are :

1. debtor's future income and ability to pay their debts;
2. whether the Chapter 7 petition was filed in response to sudden illness, calamity, disability or unemployment;
3. whether the debtors incurred cash advances or made consumer purchases far in excess of their ability to pay;
4. whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect debtor's true financial condition; and
5. debtor's subjective good faith in filing for Chapter 7 relief.

In re Green, 934 F.2d at 572 (4th Cir. 1991); Krohn, 886 F.2d at 126; United States Trustee v. Rowell (In re Rowell), Ch. 7 No. 92-50228 slip op. at 7 (Bankr. S.D. Ga. Dec. 16, 1992). The Debtors' future income and ability to repay their debts is a primary factor in finding substantial abuse, but standing alone this factor is insufficient to warrant dismissal. Id. at 11.

In re Smith, Chapter 7 Case No. 96-11160 slip op. at 6-7. Matter of Ackerberg, Chapter 7 Case No. 97-20495 slip op. at 4-7.

In this case, Debtors' Chapter 7 filing resulted from Mr. Pryor's inability to find stable permanent employment upon his retirement from the military. Mr. Pryor's efforts resulted in only temporary jobs, and even a minimum wage position to help supplement his wife's income. Comparing these facts with those in In re Smith, the debtors in In re Smith sought credit counseling and were able to reduce their expenses by surrendering two more expensive automobiles in an attempt to avoid bankruptcy. The Debtors in this case attempted also to deal with their debt. Mrs. Pryor contacted the credit companies in an unsuccessful

attempt to alleviate the immediate payments due. Unlike Smith, Debtors did not surrender an automobile, however the Pryors' testimony shows that two cars are needed for their long commutes to work each day. Debtors contemplated trading in their 1994 van for a less expensive automobile, but the trade in due to the amount owed was not feasible. Debtors kept the van, which, unlike the Smiths, they cannot afford to surrender because of their commuting demands. Similarly, Debtors live a modest life style and had little luxury to give up to avoid bankruptcy.

Considering the totality of the circumstances surrounding Debtors' filing, their ability to pay a 50% dividend to unsecured creditors under a Chapter 13 plan standing alone is not sufficient to warrant dismissal. The debtors in Smith were able to pay a 72% dividend, however this finding did not result in dismissal of the Chapter 7 case. Id. slip op. at 8. This Chapter 7 case resulted from Mr. Pryor's substantial reduction in income, forcing Debtors to live on credit to supplement Mrs. Pryor's income. The mere fact that Debtors used credit cards to maintain a modest lifestyle during Mr. Pryor's unemployment and the seeking of a discharge of debt does not evidence bad faith by Debtors. This petition was brought in good faith after Debtors determined that their modest lifestyle could not be realistically reduced and workout efforts with individual creditors proved fruitless. This case does not constitute substantial abuse of the bankruptcy process nor do I find cause to dismiss.

It is, therefore, ORDERED that the motion of the United

States Trustee to dismiss this case under 11 U.S.C. § 707(a) and (b) is denied.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 19th day of March, 1998.