

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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VIA FACSIMILE TRANSFER

December 9, 2002

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Suite 502, 230 South Phillips Avenue
Sioux Falls, South Dakota 57104-6321

Subject: *In re James M. and Mary L. Delozier,*
Chapter 7; Bankr. No. 02-40659

Dear Counsel:

The matter before the Court is the issue of whether Debtor Mary L. Delozier's obligation to repay a student loan for Debtors' son's education can be treated as a priority claim ahead of other unsecured claims. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision shall constitute the Court's findings and conclusions on this issue under Fed.Rs.Bankr.P. 7052 and 9014. As discussed below, for purposes of a § 707(b) analysis and treatment under a Chapter 13 plan, the student loan obligation, though nondischargeable, must be treated as a general unsecured claim in a Chapter 13 plan.

Summary of facts. The facts are not in dispute. On the date of Debtors James M. and Mary L. Delozier's Chapter 7 petition, Debtor Mary L. Delozier owed \$12,301 in student loans for the education of Debtors' sons. Debtor Mary Delozier is the primary obligor, not a guarantor, of the notes.

The United States Trustee has filed a motion under 11 U.S.C. § 707(b) to dismiss the Debtors' Chapter 7 case for substantial abuse. In part, Debtors argue that they cannot fund a Chapter 13 plan because the student loan debt must be treated as a priority unsecured claim and they would not have any other disposable income available to pay general unsecured claim holders after making the

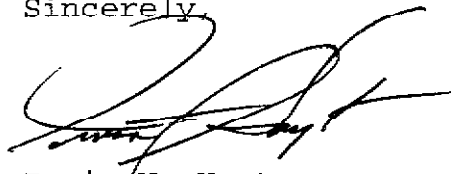
Re: James and Mary Delozier
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student loan payment. The Court requested and received briefs on this issue, which this letter decision resolves.

Discussion. Debtors' brief failed to set forth any change in the law applicable in this Circuit. As discussed in *Groves v. LeBarge (In re LaBarge)*, 39 F.3d 212, 214-16 (8th Cir. 1994), in a Chapter 13 case a student loan debt cannot receive better treatment than other general unsecured debts absent justification. No justification of a priority classification has been established in this case. Though the student loan debt may be nondischargeable, it must stand on the same footing as other general unsecured claims in a hypothetical Chapter 13 plan. *In re Randy A. and Tracey L. Swink*, Bankr. No. 01-13109C-7C, 2002 WL 1022136, slip op. at 3 (Bankr. M.D.N.C. May 16, 2002). Accordingly, as this Court previously held in *In re Myron L. and Charmain R. Harr*, Bankr. No. 00-10183, slip op. (Bankr. D.S.D. May 7, 2001), for the purpose of calculating Debtors' ability to fund a Chapter 13 plan, the student loan debt owed by Debtor Mary Delozier must be classified and treated the same as all other general unsecured claims.

An evidentiary hearing is set for December 11, 2002, at 1:00 p.m. in Sioux Falls to receive evidence on: what are Debtor James M. Delozier's expected overtime hours in the coming three to five years; what is his ability to continue working in the coming three to five years in light of any impairment from health problems; and how much attorneys' fees do Debtors presently owe and what will they expect to pay in attorneys' fees over the next three to five years if their case is converted to Chapter 13. As the Court previously noted in its summary judgment decision entered November 6, 2002, Debtors should not rely on their testimony alone to make their record on the issues regarding Debtor James Delozier's health or his expected overtime hours.

Sincerely,




Irvin N. Hoyt
Bankruptcy Judge

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DEC 09 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By: 

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CC: docket original; serve copies on parties in interest)

DEC 09 2002

Charles L. Nail, Jr., Clerk

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