

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-13511-JMD
Chapter 13

Arnold W. Husemann,
Debtor

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Chapter 13 Trustee

MEMORANDUM OPINION

I. INTRODUCTION

Before the Court is confirmation of the Debtor's amended plan (the "Plan") to which the Chapter 13 Trustee has objected. The Chapter 13 Trustee objects to confirmation on the grounds that the Plan does not comply with two sections of Chapter 13 of the Bankruptcy Code, specifically, 11 U.S.C. §§ 1322(b)(1) and 1325(b)(1)(B). While the Debtor did not file a formal response to the Chapter 13 Trustee's objection, he has argued that the Plan should be confirmed as filed. For the reasons detailed below, the Court denies confirmation of the Plan.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The Debtor is a commercial airline pilot who filed a Chapter 13 bankruptcy petition on December 22, 2000. Schedule I, the statement of income that accompanied the Debtor's petition, shows that the Debtor earns \$17,500.00 per month or \$210,000.00 per year. Schedule I indicates that Debtor makes monthly contributions of \$500.00 to his 401(k) retirement plan and monthly payments of \$317.00 to repay a loan from his 401(k) plan. The Debtor notes further on the bottom of Schedule I that he is subject to mandatory retirement on July 17, 2002 and from that point forward his income will be derived solely from his pensions and will total \$5,887.00 per month. Schedule J shows that the Debtor has monthly expenses of \$7,489.00, including expenses of \$568.00 for life insurance and \$3,500.00 for the support of his estranged wife. The Chapter 13 Trustee objects to these monthly expenses as well as the 401(k) payments on the grounds that they are neither reasonable nor necessary living expenses.

The Plan requires the Debtor to make monthly plan payments of \$3,710.00 for months 1 through 17 and \$100.00 for months 18 through 36.¹ Plan payments will total \$64,970.00, and the Debtor proposes to distribute them as follows:

Distribution Amount	Party to Receive Distribution	Basis for Distribution
\$6,497.00	Chapter 13 Trustee	Commission— Administrative Expense
\$1,500.00	Debtor's attorney	Attorney's Fees/Expenses— Administrative Expense
\$27,667.25	Internal Revenue Service	Priority Claim
\$8,220.08	Class A Unsecured Creditor	Unsecured Claim
\$21,085.67	Class B Unsecured Creditors	Unsecured Claims

The Plan provides for more favorable treatment to the Class A unsecured creditor, namely, USAA Federal Savings Bank ("USAA"), on the grounds that this co-signed consumer debt benefitted the Debtor

¹ The Debtors' payments will be reduced because of the Debtor's forced retirement in July 2002. The \$100.00 per month plan payments are based on the Debtor's expected retirement income and expenses.

and not his estranged wife. The Debtor proposes paying USAA \$8,220.08, which will pay its unsecured claim in full, while other unsecured creditors filing claims in this case will receive only an eighteen percent dividend. The other unsecured, non-priority claims total \$116,711.71. The Chapter 13 Trustee argues that the Debtor's plan discriminates unfairly in favor USAA.

III. DISCUSSION

A. Disposable Income

Upon objection by the trustee, the Court must find that all of the debtor's disposable income for the three year period beginning on the date the first payment is due under the plan is applied to payments under the plan, if unsecured creditors are not being paid in full. 11 U.S.C. § 1325(b)(1)(B).² See also In re Cardillo, 170 B.R. 490, 490-91 (Bankr. D.N.H. 1994). For purposes of the "disposable income" test under section 1325(b)(1)(B), "disposable income" means "income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor" 11 U.S.C. § 1325(b)(2). The Chapter 13 Trustee argues that the Debtor's expenses for 401(k), life insurance, and support of his estranged wife should be included in the Debtor's disposable income and thus applied to payments under the Plan.

1. 401(k) Contribution and Loan Repayment

In In re Field, 190 B.R. 16, 19 (Bankr. D.N.H. 1995), Judge Yacos explained that "providing for retirement is recognized as a valid deduction as long as the deduction is a reasonable amount inasmuch as

² Section 1325(b)(1)(B) of the Bankruptcy Code specifically provides:

(b)(1) If the trustee . . . objects to confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

. . .

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

everybody has to look ahead for their retirement these days, particularly with Congress indicating that entitlement plans may be cut substantially in the future.” This Court has routinely permitted debtors to make voluntary contributions to 401(k) plans and to repay loans from their retirement plans while in Chapter 13, on the basis that it is within the Court’s discretion to determine whether retirement contributions and loan repayments are reasonably necessary expenses for an individual debtor based on the particular circumstances confronting that debtor. See New York City Employees’ Retirement Sys. v. Sapir (In re Taylor), 243 F.3d 124, 129 (2^d Cir. 2001). If the Court finds that retirement contributions and loan repayments are reasonably necessary, such payments can continue in Chapter 13. Id. If the Court finds that the payments are not reasonably necessary, they will be included in the figure for disposable income and the debtor should discontinue such payments for the duration of the plan. Id. Factors that may be relevant in making such a determination include: the age of the debtor and the amount of time until expected retirement; the amount of the monthly contributions and the total amount of pension contributions the debtor may have to buy back if the payments are discontinued in a mandatory contribution situation; the likelihood that buy-back payments will jeopardize the debtor’s fresh start; the number and nature of the debtor’s dependents; evidence that the debtor will suffer adverse employment conditions if the contributions cease; the debtor’s yearly income; the debtor’s overall budget; and any other constraints on the debtor that make it likely that the pension contributions and/or repayments are reasonably necessary for that debtor. Id. at 129-30.

Under the facts of this case, the Court finds that the Debtor’s monthly contributions of \$500.00 to his 401(k) plan are not reasonably necessary to be expended for the maintenance or support of the Debtor or his dependents. On the petition date, the Debtor’s retirement account totaled \$176,903.00, less \$20,000.00 that the Debtor borrowed from the account and is repaying. The Court finds that the Debtor has a sizeable retirement account, even considering his age of fifty-nine and his imminent retirement. The

Court finds that by adding \$500.00 per month to the account for seventeen months³ the Debtor will add only \$8,500.00 to his retirement account or roughly five and a half percent. The Court notes that the Debtor's estranged wife is likely to receive some portion of these payments if and when the parties divorce. However, if the Debtor were to contribute the \$8,500.00 (or some lesser amount due to an increase in federal income taxes which would occur when his contributions stop) to the Plan, the dividend to the general unsecured creditors would increase from eighteen percent to twenty-five percent. The Debtor presented no evidence at the confirmation hearing that his retirement contributions are mandatory or that he would suffer adverse job consequences if he were to discontinue his contributions. Under these circumstances, the Court holds that additional contributions to the Debtor's retirement account are not reasonably necessary. The Court, however, will permit the Debtor to continue repaying his 401(k) loan on the grounds that it is reasonable for some smaller amount of money to be transferred to the Debtor's 401(k) plan. If the Debtor did not repay his 401(k) loan, he would be subject to a tax penalty which might affect the Debtor's ability to make payments under the Plan. For that reason, the Court will find that the 401(k) repayment is reasonably necessary.

2. Life Insurance

The Chapter 13 Trustee objected to the Debtor's monthly expense of \$568.00 for life insurance. Courts have held that "[l]ike other budget items, whether a life insurance premium is a necessary expense is a matter which must be determined on a case-by-case basis." Smith v. Spurgeon (In re Smith), 207 B.R. 888, 890 (B.A.P. 9th Cir. 1996) (citing Matter of Killough, 900 F.2d 61, 65 n.9 (5th Cir. 1990); In re Gillead, 171 B.R. 886, 890 (Bankr. E.D. Cal. 1994)). The focus of the Court's inquiry is whether the policies are reasonably necessary for the support of the debtor's dependents. Id. See In re Presley, 201 B.R. 570 (Bankr. N.D. Fla. 1996) (permitting an expense for life insurance where the "term life insurance is

³ The Debtor will make these contributions only until July 2002 when he must to retire.

not an investment asset”). Here, the Debtor has explained that he is in a high risk occupation which results in higher premiums and that his various insurance policies have no cash value to them.

The Court finds that life insurance is a reasonably necessary expense in this case. While the amount of the premium is large, it appears that the Debtor’s life insurance is intended to legitimately protect the Debtor’s estate and/or his estranged wife should the Debtor die prior to retirement. See Smith, 207 B.R. at 890. Accordingly, the Chapter 13 Trustee’s objection to the life insurance expense is overruled.

3. Support Obligation

The Debtor makes a monthly payment of \$3,500.00 to his estranged wife pursuant to a legal separation agreement into which the Debtor and his wife entered in 1996. Although the agreement has not been approved by a state court in a separation or divorce proceeding, the Court finds that this fact does not affect the analysis. The Debtor indicates that the monthly payments are used for the support of his estranged wife. The Court finds the amount reasonable where the Debtor’s wife maintains a separate household and the Debtor is a high income earner. In addition, the Court notes there is no indication that the Debtor entered into the agreement in contemplation of bankruptcy. Accordingly, the Chapter 13 Trustee’s objection to confirmation on this ground is also overruled.

B. Unfair Discrimination

Section 1322(b)(1) of the Bankruptcy Code provides that a plan may “designate a class or classes of unsecured claims . . . but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims.” 11 U.S.C. § 1322(b)(1). In In re Battista, 180 B.R. 355, 356 (Bankr. D.N.H. 1995), Chief Judge Vaughn ruled that section 1322(b)(1) does not authorize different treatment of co-signed consumer debt claims without regard to the unfair discrimination test. A debtor must establish that the proposed discriminatory treatment is fair. See id. at 358; In re Cheak, 171 B.R. 55, 58 (Bankr. S.D. Ill. 1994) (“The debtor who seeks to discriminate in favor of a co-signed claim has the burden of showing that such discrimination is fair, and this determination must be made on a case by

case basis.”). Courts have explained that differences in treatment are not discriminatory if they “rationally further a legitimate interest of the debtor” and do not “disproportionately” benefit the co-signer. Ramirez v. Bracher (In re Ramirez), 204 F.3d 595, 596 (5th Cir. 2000); see Cheak, 171 B.R. at 58 (“The most important, and defining, factor in determining the fairness of discriminatory treatment is whether the treatment ‘rationally furthers an articulated, legitimate interest of the debtor,’ that is whether it relates to an objective interest of the debtor, either in bankruptcy—of completing a plan or obtaining a fresh start—or in maintaining a decent quality of life.”)

The Debtor made an offer of proof to the Court that the USAA debt is a consumer debt that was incurred solely by the Debtor after his and his wife’s separation. The Debtor indicated that he did not even realize that his wife had co-signed the obligation until her attorney contacted him. The Chapter 13 Trustee did not contest that offer of proof. It is likely that the Debtor’s wife will pursue the Debtor for any payments she makes on this debt in any divorce proceeding that is instituted. The Debtor would be required to pay the obligation and to indemnify his wife. Requiring the Debtor to pay the USAA claim pro rata with other unsecured claims may impede the Debtor’s fresh start as, in all likelihood, he will be required to pay the remaining balance on the USAA debt post-bankruptcy and after mandatory retirement. For those reasons, the Court finds that payment of USAA’s claim in full is not unfair discrimination and does not violate section 1322(b)(1) of the Bankruptcy Code.

IV. CONCLUSION

The Court sustains in part and overrules in part the Chapter 13 Trustee’s objection to confirmation. While the Court finds that the Debtor’s monthly payments for life insurance, support of his estranged wife, and the 401(k) loan are reasonably necessary for the support and maintenance of the Debtor and his estranged wife, the Court holds that the Debtor’s voluntary 401(k) contribution is not reasonably necessary. Because the Debtor’s \$500.00 per month contribution to his 401(k) plan constitutes disposable income within the meaning of section 1325(b)(2), which must be used to fund the Debtor’s plan in accordance with

section 1325(b)(1)(B), confirmation of the Plan is denied. To the extent that the Chapter 13 Trustee objects to the Debtor's discriminatory treatment of USAA's claim under section 1322(b)(1), the Court overrules that objection.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 4th day of September, 2001, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge