THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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IN RE	)	CASE NO. 98-53906
	)	
WILLIE J. HAWKINS	)	CHAPTER 13
DAFNEY A. HAWKINS,	)	
	)	
DEBTORS.	)	
	)	**ORDER RE: DEBTORS MOTION TO**
	)	**MODIFY PLAN SUBSEQUENT TO**
	)	**CONFIRMATION**

This matter came before the Court on Debtors' Motion to Modify Plan Subsequent to Confirmation (the "Motion") and the Trustee's objection to the Motion. Appearing at the evidentiary hearings were Robert M. Whittington, counsel for Debtors; Willie J. Hawkins and Dafney A. Hawkins, Debtors; and Jerome L. Holub, Chapter 13 Trustee. Debtors proposed to modify their chapter 13 plan so that payment to unsecured creditors would be reduced from 100% to 34%. The debtors assert that unforeseen and under estimated expenses resulted in the need to modify the confirmed plan. Under the modified plan, the Debtors would continue to repay a retirement account loan (the "Loan") and voluntarily contribute to their respective retirement accounts. The trustee objected to the proposed modifications under 11 U.S.C.§§ 1325(a)(3) and (b)(1)(B). The parties agreed to submit their closing arguments in writing.

This proceeding arises in a case referred to this Court by Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(A) and (L) over which this Court has jurisdiction pursuant to 28 U.S.C. 1334(b).

Issues:

1. Whether Debtors' modified plan satisfies the requirements of the disposable income test under 11 U.S.C. § 1325(b)(1)(B).

2. Whether Debtors' modified plan is proposed in good faith under 11 § 1325(a)(3).

<u>Facts:</u>

In accordance with Bankruptcy Rule 7052, the Court makes the following findings of fact based upon the parties closing statements submitted to the Court and other evidence of record:

1. On December 10, 1998, Debtors filed a joint chapter 13 petition (the "Plan"). On February 17, 1999, the Plan was confirmed. The Plan proposed to pay unsecured creditors 100% of their allowed claims and the duration of the plan was set at 60 months. Debtors' Schedule I listed a combined gross monthly income of $7,266.83 and net monthly income of $4,564.57. Debtors' Schedule J listed total monthly expenditures as $3,050.00. Debtors committed to pay approximately $1,512.00 per month into the Plan. Schedule J.

2. On August 30, 1999, Debtors filed the Motion. In the Motion, Debtors alleged that their necessary expenditures had increased and that the plan payments would have to be reduced from $1,512.00 a month to $753.00 a month. Debtors requested that the duration of the Plan remain the same, i.e., 51 months, and that the dividend to unsecured creditors be reduced from 100% to 34%. Debtors's amended Schedule J listed total monthly expenditures of $3,811.00 or an increase of approximately $761.00 per month. The Debtors did not amend Schedule I. The increase in expenditures resulted from the need to replace a car and other expenses which Mr. Hawkins testified were underestimated in the Plan. The Debtors amended the following expenses: (1) rent or home mortgage $614 to $650; (2) electricity and heating fuel $185 to $200; (3) cable television $30 to $65; (4) home maintenance $0 to $100; (5) transportation $150 to $250;

(6) charitable donations $225 to $259; (7) life insurance $25 to $40; (8) auto insurance $120 to $150; (9) auto payment (for replacement car) $0 to $255; and (10) children's school activities $100 to $250. Amended Schedule J. The $255 change in auto payment resulted from the Debtors having to purchase another car to replace their 1990 Mercury Sable which Mr. Hawkins testified became unusable shortly before the first hearing on this matter. The Debtors intended to replace the Sable with a 1996 Ford Taurus with a monthly payment of approximately $255 per month. However, the Debtors were unable to obtain the 1996 Ford Taurus and instead purchased a 1997 Ford Taurus, with the trustee's approval, for $356.26 per month. The total increase in expenditures, with the 1997 Taurus, is $860.17. The $150 increase in children's school activities resulted from an increase in Debtors' son's college expenses. Mr. Hawkins testified that one of his son's college roommates moved out and that although his son is on a football scholarship, he still needs additional funds for rent and utilities to make up for the lost roommate. Of the additional $150 per month requested for the son's college expenses, $30 month is allocated to assist with Debtors' son's cable television bill. Debtors' Exhibit (hereinafter "DX")1.

3. Debtors' schedule I lists payroll deductions in the amount of $357.40 for the repayment of a loan taken out against Mr. Hawkins' 401-K plan. Debtors' schedule I shows that Debtors are voluntarily contributing $223.16 per month to Mr. Hawkins' 401-K plan. In total, the Debtors spend $580.56 per month repaying the Loan and making voluntary retirement contributions. The pay stubs submitted by Debtors show that Mr. Hawkins' gross monthly income has increased to approximately $5,579 per month or $66,948 per year as compared to $5,072 per month. This compares to estimated annual income in 1998 of $60,864 listed on Debtors' Schedule I. DX A. This reflects an increase

of approximately $6,084 per year in gross income or a net increase of approximately $4,000 per year. The $4,000 net increase equates to approximately $333 per month. The Debtor wife is also employed, contributing $1350 net each month to the family's income.

Conclusions of Law:

Modification of a chapter 13 plan may be requested at any time between the confirmation of the plan and the completion of all payments due under the plan. 11 U.S.C. §1329(a). Debtors may modify their plan to "increase or reduce the amount of payments on claims of a particular class provided for by the plan," or "extend or reduce the time for such payments." *Id.* A modified plan must comply with the Bankruptcy Code's provisions governing duration, contents, and acceptance of a chapter 13 plan. 11 U.S.C. §1329(b) specifically provides that modified plans satisfy the requirements of §§1322(a) and (b), 1323(c) and 1325(a).

In this case, the chapter 13 trustee objects to the Debtors' proposed modifications of the Plan. In *Harshbarger v. Pees*, 66 F.3d 775 (6th Cir. 1995) (citing *In re Jones*, 138 B.R. 536, 539 (Bankr. S.D. Ohio 1991), the Sixth Circuit held that a Chapter 13 debtor is prohibited from allocating income "not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor" towards repayment of a pension loan while unsecured creditors are being paid less than a 100% dividend. In rejecting the use of disposable income by Chapter 13 debtors for this purpose, the Sixth Circuit stated:

> Debtors' Plan proposes to deduct $61.67 per month from the disposable income available to pay unsecured creditors so that Mrs. Harshbarger may restore her full interest in the ERISA account. This expenditure may represent prudent financial planning, but is not necessary for the "maintenance or support" of the debtors. [Citations Omitted] Accordingly, the District Court was correct in affirming the decision to reject the plan . . . . Debtors' plan must treat these funds as part of the disposable income in the bankruptcy estate.

Harshbarger, 66 F.3d at 777.

The proposed downward percentage payment included in the modification of this currently 100 percent plan raises the following issues, which this court has not addressed in any prior decisions:

1. What is the status in the chapter 13 case of the post-petition repayment of funds received by the Debtor in the pre-petition time frame from his ERISA-qualified deferred compensation program? Some courts have concluded that the repayment obligation should not be treated as any sort of post-petition claim comparing the obligation to an insured's advance from the reserve fund of his insurance policy. *See Mullen v. United States*, 696 F.2d 470 (6th Cir. 1983); *New York City Employees' Retirement Benefit System v. Villarie*, 648 F.2d 810 (2nd Cir. 1981). Further, other courts have concluded that, in relation to a debtor's chapter 13 estate, the repayment obligation to the ERISA-qualified plan is not a secured claim because the withdrawals at issue created no right to repayment that the ERISA plan could assert against the debtors in each case. *See In re Esquivel*, 239 B.R. 146 (Bankr. E.D. Mich. 1999); *In re Fulton*, 211 B.R. 247 (Bankr. S.D. Ohio 1997); *In re Gilliam*, 227 B.R. 849 (Bankr. S.D. Indiana 1998); *In re Scott*, 142 B.R. 126 (Bankr. E.D. Virginia 1992); *In re Jones*, 138 B.R. 536 (S.D. Ohio 1991). Still, other courts have recognized the obligee in such circumstances to be, not the debtor, but the plan trustee and thus viewed the repayment obligation as coming within the definition of claim in the Bankruptcy Code. *In re MacDonanld*, 222 B.R. 69 (Bankr. E.D. Penn. 1998); *In re Buchferer*, 216 B.R. 332 (Bankr. E.D. New York 1997). If the repayment obligation is a claim, are there any Bankruptcy Code impediments to it being paid *pari passu* with other general unsecured claims?

2. Several courts have read *Harshbarger* as requiring not simply the repayment by

the debtor of all excess income as measured by a three year duration into a plan that also addresses repayment to a debtor's qualified pension plan, but rather payment of a 100 percent dividend to holders of unsecured claims. Does *Harshbarger* bind bankruptcy courts in the Sixth Circuit to deny confirmation to chapter 13 plans that would channel an amount equal to all of the Debtor's excess income for a three year period to holders of claims who are free of insider status, requiring 100% dividend to such creditors, before repayment to pension plans will be allowed?

The Debtors are making monthly payments of $356.17, outside the Plan, on the Loan. In addition, the Debtors voluntarily contribute $223 a month to various retirement funds. In total, the Debtors expend $580.56 per month on these contributions and loan payments. Now, the Debtors propose to modify the Plan and reduce the dividend to unsecured creditors from 100% to 34% by changing the Plan payments from $1,512 per month to less than $753 per month. It is undisputed that the money going to repay the Loan is income received by the Debtors. Under the plain meaning of §1325(b)(2)(A), the only way it can be excluded from the Debtors' "disposable income" is through a showing by the Debtors that the loan repayments are reasonably necessary for the Debtors' or a dependent's maintenance or support. *Harshbarger* makes such a showing difficult if not impossible.

Debtors' counsel argued that continued repayment of the Loan was essential because of the tax penalties that Debtors would suffer as a result of failure to repay it and the possibility that Mr. Hawkins would lose his employment if the loan was not repaid. No evidence was adduced on either point. In particular, the necessity of such payments to the Debtors' ability to produce income to fund the Plan was not specifically addressed.

Finally, the Debtors' modified plan does not take into account the increase in Mr. Hawkins' wages. Mr. Hawkins' pay stubs reflect an increase from the income reported on Schedule I of approximately $6,084 per year in gross income or a net increase of approximately $4,000 per year. The $4,000 net increase equates to approximately $333

per month.

Conclusion:

For the foregoing reasons, the Motion is denied without prejudice to the Debtors' seeking to modify their plan in a manner that addresses the issues identified in this decision. In light of this ruling, it is not necessary for the Court to decide whether the Debtors' modified plan was proposed in good faith under § 1325(a)(3).

IT IS SO ORDERED

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 3/31/00