

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)
)
ALVIN & TANYA AVANT,) CASE NO. BK88-54
)
DEBTORS) CH. 13

MEMORANDUM

This matter came before the Court on the objection to confirmation by the University of Nebraska. John Wiltse appeared for University of Nebraska, and Mary Powers appeared for Alvin and Tanya Avant, debtors. At the hearing, the Court ordered legal arguments from both parties. The Court has received and reviewed these arguments.

Statement of Facts

Debtors filed for Chapter 13 relief on January 12, 1988. Debtors' plan proposes that the unsecured claim of \$680 owed to Computer Cheque will be paid in full by the trustee. The remaining unsecured creditors, including objector, University of Nebraska, will receive under debtors' plan a pro rata distribution of the balance of debtors' payments after payment of all secured and priority claims. The University of Nebraska's total claim is \$1,934.84. Debtors' plan, as proposed, provides for monthly payments of \$169.12 to the trustee over the plan's sixty-month term.

The University of Nebraska contends that debtors' plan, which grants Computer Cheque's unsecured claim priority, unfairly discriminates between or among unsecured claims in violation of 11 U.S.C. § 1322(a)(3), (b)(1). Debtors argue that the debt owed to Computer Cheque is the result of an insufficient fund check which could subject them to criminal prosecution. In addition, such a claim would be nondischargeable in Chapter 7. Therefore, although debtors admit they are discriminating between unsecured claims, they believe that the discrimination is not unfair.

Analysis

The relevant portions of 11 U.S.C. § 1322 read:

FILED
DISTRICT OF NEBRASKA
47
JUL - 1 1988
Judith M. Napier
Clerk, U.S. Bankruptcy Court
By Deputy

(a) The plan shall--

. . .

(3) if the plan classifies claims, provide the same treatment for each claim within a particular class.

(b) Subject to subsections (a) and (c) of this section, the plan may--

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, 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 secured claims.

11 U.S.C. § 1322(a)(3), (b)(1) (1987) (emphasis added.)

The University of Nebraska relies on In re Gay, 3 Bankr. 336 (Bankr. D. Colo. 1980) to support its argument that the discrimination is unfair. The Court in Gay held that classifying a debt owed on insufficient funds checks separately from all other unsecured creditors was unfairly discriminatory. Because there was no evidence that the debtors would be prosecuted for their failure to pay the amount due on the checks, the Gay Court held that the possibility of prosecution was not sufficient to justify the disparate treatment of the unsecured creditors.

While the decision in Gay is not binding on this Court, its holding is reasonable. As in Gay, this Court has no evidence that Computer Cheque will bring criminal proceedings if debtors' plan does not pay the debt in full.

The issuer of a bad check under Nebraska law commits either a felony or a misdemeanor depending on the amount of the check. Neb. Rev. Stat. § 28-611(1) (Reissue 1985). If convicted under this section, the violator may be ordered, inter alia, to make full restitution. Neb. Rev. Stat. § 28-611(b) (Reissue 1985). Although criminal proceedings are excepted from the automatic stay, 11 U.S.C. § 362(b)(1) (1987), an order of restitution can be considered an order in aid of collecting a prepetition debt which may not be excepted as a judgment in a proceeding to enforce a police or regulatory function. 11 U.S.C. § 362(b)(5) (1987). If prosecution occurs, debtors could, at that time, request an

amendment to their plan. Anticipating what may happen is not sufficient justification for discriminating between unsecured claims.

It is ordered that debtors' plan shall treat all unsecured creditors the same. Debtors have thirty days to amend their plan consistent with this decision.

Separate Journal Entry to be entered.

DATED: June 30, 1988.

BY THE COURT:



Chief Judge