

IN THE MATTER OF:)
)
KAREN RUF,) CASE NO. BK96-82117
)
DEBTOR) CH. 13

Hearing was held on March 7, 1997, on the Chapter 13 Plan. Appearances: Milo Alexander for the debtor and Kathleen Laughlin as Trustee. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(L).

The debtor has filed a Chapter 13 case. Her budget provides that she shall continue to make her regular payment of \$170.00 per month on a consolidated student loan outside the plan. That is, she will not treat the student loan as an unsecured claim to be paid through the trustee, but instead, will simply continue to make payments on the obligation directly. The student loan is finally due long after the expiration of the term of the Chapter 13 plan.

Facts

Debtor filed this case on September 23, 1996, to cure defaults on the first and second trust deeds on her home and prevent a trust deed sale. Debtor had an arrearage of

approximately \$5,733.00 on the first trust deed held by Norwest Mortgage Co. and an arrearage of approximately \$1,397.00 on the second. Debtor's plan proposes a monthly plan payment of \$185.00 for sixty months to cure these arrearages with interest. A priority claim of \$99.00 is also to be paid with interest.

Debtor has about \$24,300.00 in unsecured debt apart from her student loan. Under debtor's plan, allowed unsecured claims are to be paid on a pro rata basis after payments to secured and priority creditors. Debtor estimates that unsecured creditors will receive approximately 8% of their claims.

Debtor got student loans from various sources in 1985, 1986, 1992, 1993, and 1995. She received various deferrals or suspensions of repayment because she was attending school or was unemployed. None of these loans first became due more than seven years, exclusive of any applicable suspension, before this bankruptcy was filed.

Debtor consolidated these loans into a single student loan of \$15,674.74 on July 20, 1995. Debtor was to begin making payments of \$159.79 on February 8, 1996. Her last payment of \$162.57 is due on January 8, 2011.

Debtor lost her job early in 1996. She got a deferral on her student loan beginning in April, 1996. Payments were to begin again on November 8, 1996. Debtor resumed her payments at that time and has continued to make them. Debtor was not in default on her student loan at the time this bankruptcy was filed.

Debtor plans to complete her education as soon as possible and will need additional student loans to do so. She fears that she will not be able to obtain additional loans if she is in default on her consolidated loan.

Debtor has little or no equity in her home. Her only non-exempt asset is a 1982 Mercury Marquis car worth approximately \$300.00. If debtor filed a Chapter 7 case, unsecured creditors would receive nothing.

Decision

The objection of the Chapter 13 Trustee is denied. The student loan which was not in default on the petition date, is a long-term unsecured debt which may be treated differently and paid differently than general unsecured debts. See 11 U.S.C. § 1322(b)(5).

Discussion

The Bankruptcy Code, 11 U.S.C. § 1322(b)(1), provides that a Chapter 13 plan may "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. . . ." Section 1322(b)(5) of the Code provides that a plan may: ". . . provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due."

In Groves v. LaBarge (In Re Groves), 39 F.3d 212 (8th Cir. 1994), the Eighth Circuit held that Chapter 13 plans which proposed to pay student loans in full over the life of the plan while making payments of only 10 to 40% to other unsecured creditors could not be confirmed. The court held that such plans unfairly discriminated against the other unsecured creditors in violation of 11 U.S.C. § 1322(b)(1).

However, the Eighth Circuit explicitly recognized that student loan debtors may treat such debts as long-term debt in appropriate cases: "'Alternatively, the debtor may treat the student loan obligation as a long-term indebtedness under § 1322(b)(5), curing arrearages within a reasonable time and thereafter maintaining regular payments.'" Groves, supra, 39 F.3d at 215, quoting the bankruptcy court opinion.

A Chapter 13 plan which proposes to maintain regular monthly payments on long-term student loans on which the last payment is due after completion of the plan is expressly permitted under § 1322(b)(5). Such a plan does not constitute unfair discrimination under § 1322(B)(1). In re Benner, 156 B.R. 631 (Bk. D. Minn. 1993); In re Cox, 186 B.R. 744 (Bk. N.D. Fla. 1995); In re Saulter, 133 B.R. 148 (Bk. W.D. Mo. 1991 dicta); In re Christophe, 151 B.R. 475 (Bk. N.D. Ill. 1993 dicta); In re Sullivan, 195 B.R. 649 (Bk. W.D. Tx. 1996 dicta).

In Benner and Cox, the bankruptcy court confirmed plans which proposed to maintain regular monthly payments on long-term student loans. In the other cited cases, the bankruptcy court denied confirmation to plans which proposed to pay student loans in full over the life of the plan, but stated that a plan proposing continued regular payments under § 1322(b)(5) would be confirmed.

The rationale in Benner is typical of these cases:

By its express terms, § 1322(b)(5) applies to both secured and unsecured debt. Long-term student loan obligations with payment terms that extend beyond completion of the plan fall squarely within the ambit of § 1322(b)(5). Since student loan debt and marital dissolution obligations are the only significant type of long-term debt carried by Chapter 13 debtors, § 1322(b)(5) would be rendered largely ineffective with respect to unsecured debt if student loans could not be treated thereunder solely because the creditor would receive better treatment than other nonpriority unsecured creditors. I conclude therefore, that student loan debt which is properly treated outside the plan in accordance with § 1322(b)(5), does not result in unfair discrimination in violation of § 1322(b)(1). Benner, supra, 156 B.R. at 634. (emphasis in original)

Plan provisions which are expressly authorized by the Code cannot constitute unfair discrimination. ". . .where the Bankruptcy Code gives the debtors the option of treating long-term debt in a certain manner if such treatment is in the debtors' best interest their election to do so can hardly be considered unfair." Benner, supra, 156 B.R. 15 635.

A provision for payment of long-term student loans outside the plan does not violate the § 1325(b) requirement that all of the debtors' disposable income be devoted to plan payments for at least three years. Sullivan, supra, 195 B.R. at 658. Section 1322(b)(5) allows a plan to provide for maintenance of payments on long-term unsecured debt. "Even if the debtor, rather than the trustee, is making these 'current payments,' they are nonetheless 'plan payments' insofar as the Section 1325(b) analysis is concerned." Sullivan, Id.

The fact that debtor was not in default on her consolidated student loan when this bankruptcy was filed does not preclude her use of § 1322(b)(5). Section 1322(b)(5) refers to the "curing of any default" which exists at the time the plan is filed. It does not require that such a default must exist. See Cox, supra. The bankruptcy court in Cox approved a plan which provided for payments of student loans according to the terms of the individual notes. There is no indication that the debtor was in default on any of the loans at the time the bankruptcy was filed or that the plan provided for payments to be made on arrearages.

Conclusion

Debtor's proposed treatment of her consolidated student loan is expressly permitted by 11 U.S.C. § 1322(b)(5). It does not constitute unfair discrimination under 11 U.S.C. § 1322(b)(1). Trustee's objection is denied. Debtor's plan may be confirmed.

Separate journal entry shall be filed.

DATED: March 12, 1997

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

ALEXANDER, MILO 348-1068

Copies mailed by the Court to

Kathleen Laughlin, Trustee:
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	
KAREN RUF,)	CASE NO. BK96-82117
<u>DEBTOR(S)</u>)	CH. 13
)	Filing No.
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	DATE: March 12, 1997
<u>Defendant(s)</u>)	HEARING DATE: March 7,
		1997

Before a United States Bankruptcy Judge for the District of
Nebraska regarding Chapter 13 Plan.

APPEARANCES

Milo Alexander, Attorney for debtor
Kathleen Laughlin, Trustee

IT IS ORDERED:

Debtor's proposed treatment of her consolidated student
loan is expressly permitted by 11 U.S.C. § 1322(b)(5). It
does not constitute unfair discrimination under 11 U.S.C. §
1322(b)(1). Trustee's objection is denied. Debtor's plan may
be confirmed. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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