UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 95-13329
Chapter 13

TONY CALDWELL
JENNIFER CALDWELL

Debtors

M E M O R A N D U M

Appearances: C. Kelly Wilson, Shelbyville, Tennessee, Attorney for Debtors, Tony Caldwell and Jennifer Caldwell

Harold L. North, Jr., Shumacker & Thompson, Chattanooga, Tennessee, Attorney for C. Kenneth Still, Chapter 13 Trustee

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

The Chapter 13 trustee has objected to confirmation of the debtors' proposed Chapter 13 plan. The plan proposes to pay 30% on general (non-priority) unsecured claims. It proposes to pay three student loans and child support "outside the plan." The Chapter 13 trustee has raised two objections to confirmation.

The trustee's first objection deals with the provision for payment of the student loans outside the plan. A Chapter 13 plan can divide general unsecured claims into classes for the purpose of treating claims in one class differently than claims in another class, but the plan cannot discriminate unfairly. 11 U.S.C. § 1322(b)(1). The trustee contends the plan unfairly discriminates in favor of the student loan creditors and against the other general unsecured creditors.

The trustee's second objection deals with the provision to pay child support outside the plan. The trustee contends the claim for child support is a priority claim, and because a Chapter 13 plan must provide for full payment of priority claims, the claim cannot be paid outside the plan. 11 U.S.C. §§ 507(a)(7) & 1322(a)(2).

The debtors did not schedule the child support debt or the student loan debts. The plan does not explain what it means by payment outside the plan. It could mean direct payment, instead of payment through the Chapter 13 trustee, or it could mean the debt is not dealt with by the plan. It may not mean either. According to the debtors' brief, they are attempting to provide for payments on the student loans after completion of the plan. That is not what the plan provides and may not be the effect of the plan.

The debtors rely on the four part analysis set out in *In re Kovich*, 4 B.R. 403 (Bankr. W.D. Mich. 1980); *AMFAC Distribution Corp. v. Wolff (In re Wolff)*, 22 B.R. 510 (Bankr. 9th Cir. 1982); *Mickelson v. Leser (In re Leser)*, 939 F.2d 669 (8th Cir. 1992). The first test is whether there is a reasonable basis for the discrimination. The debtors argue that the nondischargeability of student loan debts justifies separate classification and better treatment than other unsecured claims.

This question is not whether the debtors have a reasonable basis, from their point of view, for favoring the student loan debts over other unsecured debts. In one case the court refused to confirm a plan that provided for 100% payment of student loans and payment of about 12% on other unsecured claims. The court said, "We believe that in order for discrimination to have a reasonable basis it must advance the purposes behind Chapter 13." *McDonald v. Sperna (In re Sperna)*, 173 B.R. 654, 658 (Bankr. 9th Cir. 1994).

The courts have generally denied confirmation of plans proposing to pay a much higher percentage on nondischargeable student loan debts than on other unsecured debts. *See, e.g., Groves v. LaBarge (In re Groves)*, 39 F.3d 212 (8th Cir. 1994); *In re Goewey*, 185 B.R. 444, 447 (Bankr. W.D.N.Y. 1995); *In re Smalberger*, 157 B.R. 472 (Bankr. D. Ore. 1993); *In re Tucker*, 150 B.R. 203 (Bankr. N. D. Ohio 1992); *In re Chapman*, 146 B.R. 411 (Bankr. N. D. Ill. 1992); *In re Scheiber*, 129 B.R. 604 (Bankr. D. Minn. 1991). "A majority of decisions applying the 1990 amendments have concluded that it is unfair discrimination to separately classify educational loans for more favorable treatment than other unsecured claims, notwithstanding that educational loans may be

nondischargeable at the completion of payments under the plan." *Keith M. Lundin, Chapter 13 Bankruptcy* § 4.66 at 4-152 (2d ed. 1994).

Some courts have held that discrimination in favor of nondischargeable student loans does not automatically prevent confirmation. These courts have taken an open-ended approach; i.e., nondischargeability by itself does not justify discrimination in favor of student loan debts, but additional facts may be proved to justify the discrimination. Even under this rule, however, debtors have had a difficult time obtaining confirmation of plans greatly favoring student loan debts. *In re Colfer*, 159 B.R. 602 (Bankr. D. Me. 1993); *In re Christophe*, 151 B.R. 475 (Bankr. N. D. Ill. 1993); *In re Eiland*, 170 B.R. 370 (Bankr. N. D. Ill. 1994); *In re Tucker*, 130 B.R. 71 (Bankr. S. D. Iowa 1991).

Under either of these tests, the debtors have the burden of justifying the proposed discrimination. *See, e.g., In re Christophe*, 151 B.R. 475 (Bankr. N. D. Ill. 1993); *In re Chapman*, 146 B.R. 411 (Bankr. N. D. Ill. 1992); *In re Scheiber*, 129 B.R. 604 (Bankr. D. Minn. 1991); *In re Tucker*, 130 B.R. 71 (Bankr. S. D. Iowa 1991). The evidence presented so far does not justify the proposed discrimination under either test.

The effect of the plan is not clear because the meaning of "outside the plan" is unclear. The debtors have not adequately explained the intended effect of the plan. Even if the debtors can explain the intent of the plan, it should be reasonably clear from the plan itself so that creditors and the Chapter 13 trustee can evaluate it. Requiring the plan to be clear also helps avoid future problems.

The debtors failed to schedule the student loans. This is a violation of the bankruptcy statutes and rules and could be cause for dismissing the case or refusing to confirm the plan. The statutes and the rules require all creditors to be scheduled so that they will receive notice of the Chapter 13 case and an opportunity to take part in the process. Omitting creditors is not the correct way of preventing the plan from dealing with their claims. 11 U.S.C. §§ 521(1), 101(10) 101(5), 341 & 342; *Fed. R. Bankr. P.* 1007, 2002, 2003 & 3002. The failure to schedule the student loan debts also deprives the court and other creditors of evidence that is relevant to evaluating the plan. Which debtor owes the student loan debts? How much are the debts? Are the debts nondischargeable? The court will deny confirmation of the proposed plan but will allow the debtors a reasonable time to modify the plan. 11 U.S.C. § 1323. The court will not confirm any amended plan until the schedules are amended to comply with the statutes and rules.

The court sustains the Chapter 13 trustee's other objection on similar grounds. The child support debt was not scheduled. The creditor has had no opportunity to take part in the Chapter 13 process. The evidence also does not show exactly when the child support became due or will become due. In this regard, ongoing support payments that become due during a Chapter 13 plan may not be a priority claim under § 507(a)(7). 11 U.S.C. § 502(b)(5); *Keith M. Lundin, Chapter 13 Bankruptcy* § 7.39 at 7-118 – 7-119 (2d ed. 1994). The parties have not addressed the question.

The court will enter an order accordingly. This memorandum constitutes findings of fact and conclusions of law as required by FED. R. BANKR. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

_____

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 95-13329
Chapter 13

TONY CALDWELL
JENNIFER CALDWELL

Debtors

ORDER

In accordance with the Memorandum Opinion entered by the court,

It is ORDERED that the objections to confirmation of the plan are sustained and confirmation is denied;

It is further ORDERED that the debtors shall have ten (10) days from the entry of this order to filed a modified plan; and

It is further ORDERED that if the plan is not modified within the time allowed, the case shall be dismissed without further hearing, there being no confirmable plan before the court. 11 U.S.C. §1307(c)(5).

ENTER:

BY THE COURT

_____
R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered December 12, 1995]