

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	
JASON DALE OSBORNE,)	Case No. 02-24999-HRT
SSN: xxx-xx-6105)	Chapter 13
and JESSICA ERNESTA OSBORNE,)	
SSN: xxx-xx-4636)	
)	
Debtors.)	
_____)	

ORDER DENYING CONFIRMATION OF DEBTORS' CHAPTER 13 PLAN

This case comes before the Court on Debtors' Motion to Confirm Chapter 13 Plan dated 10/02 [sic] and Trustee's Objection to Motion to Confirm Chapter 13 Plan.

The matter was heard by the Court on February 27, 2003, and the parties informed the Court that Trustee's objections had been narrowed to the single issue of whether Debtors' Chapter 13 Plan satisfies the best efforts test of 11 U.S.C. § 1325(b)(1)(B) where the Debtors propose to make a contribution of \$90.00 per month to a 401(k) retirement savings plan while their Chapter 13 Plan projects a total payment of \$200.00 to unsecured creditors – a dividend of 2% of the \$10,444.00 in unsecured claims that have been filed in the case.

The Court asked to parties to brief the issue, and both parties have done so. The Court has considered the arguments of counsel and their written submissions and is ready to rule.

For the reasons that follow, the Court finds that, under the facts of this case, the Debtors' proposed monthly payment of \$90.00 into their 401(k) retirement savings account is not "reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependant of the debtor." 11 U.S.C. § 1325(b)(2)(A). The Court will, therefore, deny confirmation of Debtors' Chapter 13 Plan.

Facts¹

1. Debtors commenced this Chapter 13 proceeding on September 20, 2002.

¹ This is not a complete rendition of the parties' stipulated facts. The Court only includes those facts that are necessary to an understanding of the context of this matter and which the Court considered in making its decision.

2. On October 8, 2002,² the Debtors filed their Chapter 13 Plan, which provides for monthly payments of \$530.00 for 36 months.
3. Mr. Osborne is 32 years old and employed as an automotive technician. Mrs. Osborne is 33 years old and employed as a daycare provider. Debtors are the parents of two children, a daughter, Janee, age 13, and a son, Justin, age 6. Mr. Osborne has gross income of \$5,508.00 per month, with payroll deductions totaling \$1,170.00, leaving net income of \$4,388.00 per month. Among the deductions is \$90.00 for a voluntary contribution to his 401(k) plan. Mrs. Osborne has gross income of \$432.00 per month, for a total family net income of \$4,770.00.
4. Debtors have not included in their budget any amount to serve as a cushion for unexpected emergency expenses. Debtors have chosen to participate in the 401(k) plan to enable them to use the tax-deferred plan to set aside funds that, in case of emergency, would be available for medical and other purposes as the plan permits. The funds would also be available if Mr. Osborne, the major breadwinner of the family, was unable to work.
5. The Debtors' schedule F lists a total of \$5,398.00 in general unsecured claims, however, a total of \$10,444.00 in unsecured claims have actually been filed in the case. According to the Debtors' calculations, if the Debtors repay \$200.00 to the allowed unsecured claims as proposed by the Plan, the repayment will be approximately 2 percent. If the Debtors forego their voluntary pension contribution of \$90.00 per month and increase the Plan payment by such amount, the repayment will be approximately 27 percent.³

Discussion

Trustee invites the Court to adopt a *per se* rule that contributions to voluntary pension plans in the budget of a Chapter 13 debtor are not reasonable and necessary under any circumstances and such contributions render a plan which pays less than 100% to unsecured creditors unable to be confirmed because it violates 11 U.S.C. § 1325(b)(1)(B). On the other

² This date is shown in the parties' stipulated facts as being October 30, 2002, but the Chapter 13 Plan currently under consideration by the Court was filed on October 8, 2002.

³ These figures differ from the parties' stipulated facts. In the parties' stipulation, the estimated payout to unsecured creditors was based on the amount of unsecured debt which appears in the Debtors' schedules. Under that assumption, the parties estimated a payout of 4% to unsecured creditors, under the proposed plan, and a payout of 64% to unsecured creditors if the plan payment is increased by the \$90.00 per month which is currently devoted to the pension plan.

hand, Debtors invite the Court to adopt a case-by-case analysis of the determination of whether such pension plan contributions are reasonably necessary, and to confirm their plan notwithstanding that their budget includes a \$90.00 per month pension plan contribution.

The Court will decline both invitations. The Court does believe that such a *per se* rule is inappropriate and will not adopt it. Even though this Court will make a case-by-case determination of whether pension plan contributions are reasonably necessary, it finds that the Debtors' contribution is not reasonably necessary in this case.

The Court recognizes that the majority of published opinions that consider whether a Chapter 13 Plan may be confirmed, where the debtor's budget includes a pension plan contribution, deny confirmation. Most of the opinions that the Court has reviewed appear to follow a *per se* rule that such pension plan contributions can never be reasonably necessary in the context of a Chapter 13 confirmation. *See, e.g. In re Anes*, 195 F. 3d 177 (3rd Cir. 1999); *In re Harshbarger*, 66 F. 3d 775 (6th Cir. 1995); *In re Prout*, 273 B.R. 673 (Bankr. M.D. Fla. 2002); *In re Aliffi*, 285 B.R. 550 (Bankr. S.D. Ga. 2002); *In re Helms*, 262 B.R. 136 (Bankr. M.D. Fla. 2001); *In re Padro*, 252 B.R. 809 (Bankr. M.D. Fla. 2000); *In re Hansen*, 244 B.R. 799 (Bankr. N.D. Ill. 2000); *In re Merrill*, 255 B.R. 320 (Bankr. D. Or. 2000); *In re Moore*, 188 B.R. 671 (Bankr. D. Idaho 1995); *In re Cavanaugh*, 175 B.R. 369 (Bankr. D. Idaho 1994).

The Trustee characterizes Judge Brooks' decision in *In re Cohen*, 246 B.R. 658 (Bankr. Colo. 2000), as a case that adheres to such a *per se* rule. The Court disagrees. The context of that opinion is a Chapter 7 motion to dismiss for substantial abuse under 11 U.S.C. § 707(b). In that opinion, Judge Brooks noted that the Tenth Circuit has adopted "totality of the circumstances" approach to analyzing whether to dismiss a case under § 707(b). *Id.* at 664. He also notes that the ability of a debtor to repay her debts is a primary factor to be examined under a § 707(b) analysis.⁴ *Id.* In that case, the debtor proposed to discharge 100% of her unsecured debts in her Chapter 7 proceeding while paying \$804.00 per month in 401(k) related retirement savings contributions. She had already accumulated approximately \$70,000.00 in her 401(k) plan. The court stated that "[s]uch contributions, however, are not necessary for the 'maintenance or support' of *this Debtor*" *Id.* at 666 (emphasis added). Nowhere in that opinion does Judge Brooks state that he is adopting a *per se* rule and he does not state that retirement savings contributions can never be reasonably necessary for the maintenance and support of the debtor and her dependents. This Court's reading of *Cohen* is consistent with a case-by-case analysis of whether such contributions should be part of a debtor's disposable income.

Neither the U.S. Court of Appeals for the Tenth Circuit nor the Bankruptcy Appellate Panel for the Tenth Circuit have addressed the question. The only other case from a Tenth

⁴ "[A]bility to pay for § 707(b) purposes is measured by evaluating Debtors' financial condition in a hypothetical Chapter 13 proceeding." *In re Koch*, 109 F.3d 1285, 1288 (8th Cir. 1997). Thus, the best efforts analysis in 11 U.S.C. § 1325(b)(1)(B) is necessarily implicated in proceedings to dismiss a Chapter 7 case under 11 U.S.C. § 707(b).

Circuit court to have spoken to the issue does opt for the *per se* rule. *In re Bayless*, 264 B.R. 719 (Bankr. W.D. Okla. 1999).

Nonetheless, the universe is not devoid of courts which choose to analyze the issue on a case by case basis. The leading case adopting that approach is *The New York City Employees' Retirement System v. Sapir (In re Taylor)*, 243 F.3d 124 (2nd Cir. 2001). That case addressed the situation where a debtor's participation in, and contribution to, a retirement plan was mandated by her employment. The trustee had objected to confirmation of the debtor's plan on the grounds that it violated § 1325(b)(1)(B) by not providing for payment of all of the debtor's disposable income to the Chapter 13 trustee. In compliance with the trustee's objection, the debtor had made a motion requesting the court to order her employer to discontinue her pension contributions. The retirement system objected to that motion. *Id.* at 126-27. The parties invited the court to adopt a bright line test which would focus on whether or not a retirement fund contribution is mandatory or voluntary. *Id.* at 128. The court refused to adopt a strict rule. Instead it chose "a more flexible solution." *Id.* at 129. The court said that "It is within the discretion of the bankruptcy court judge to make a decision, based on the facts of each individual case, whether or not the pension contributions qualify as a reasonably necessary expense for that debtor. *Id.* The court quoted a Montana case: "The use of a phrase such as 'reasonably necessary' appears to invite the Court to look at the circumstances of each case and each individual debtor, and his or her obligations under State law or contract, to determine whether such obligations are in fact reasonably necessary for the support of debtors and their dependents.'" *Id.* (quoting *In re Davis*, 241 B.R. 704, 709 (Bankr. D. Mont. 1999)).

In *Taylor*, the court made a non-exhaustive list of factors that a court should look at in making a determination whether pension plan contributions are a reasonably necessary expense:

In making a determination of whether or not pension contributions are reasonably necessary for an individual debtor, the bankruptcy judge may consider any factors properly before the court, including but not limited to: 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 debtor will have to buy back if the payments are discontinued; the likelihood that buy-back payments will jeopardize the debtor's fresh start; the number and nature of the debtor's dependants; evidence that the debtor will suffer adverse employment conditions if the contributions are ceased; the debtor's yearly income; the debtor's overall budget; who moved for an order to discontinue payments; and any other constraints on the debtor that make it likely that the pension contributions are reasonably necessary expenses for that debtor.

In re Taylor, 243 F.3d at 129-30.

Other courts have allowed plans in circumstances where the debtor is making contributions to a retirement plan or have specifically opted to follow a case-by-case analysis. See, e.g., *In re Guild*, 269 B.R. 470, 474 (Bankr. D. Mass. 2001) (“There is an inherent unfairness in adopting a *per se* rule . . .”); *In re Bell*, 264 B.R. 512, 516-17 (Bankr. S.D. Ill 2001) (“the court must look at each debtor’s particular situation in order to balance the equities presented and weigh the competing interests of the debtor and unsecured creditors.”); *In re Awuku*, 248 B.R. 21, 32 (Bankr. E.D. N.Y. 2000) (“There is absolutely no support in the legislative history to either chapter 13 as a whole or to section 1325 more specifically to warrant a *per se* rule . . .”); *In re Mills*, 246 B.R. 395, 401-402 (Bankr. S.D. Cal. 2000) (“The reasonableness of the debtor’s expenses must be determined from the totality of the debtor’s individual circumstances.”); *In re Davis*, 241 B.R. 704, 710 (Bankr. D. Mont. 1999) (found mandatory participation in retirement plan to be reasonable and necessary).

Although this Court rejects a *per se* rule that would find that a contribution to a pension plan is not reasonable and necessary in every case, it is not at all clear that choice will have much practical effect. Individuals voluntarily seek the shelter of the bankruptcy court in a Chapter 13 case. Through the coercive effect of the statute, rather severe adjustments are made to the debtor’s obligations to unsecured creditors. Although open to the possibility, the Court would not anticipate encountering numerous circumstances where it will be reasonable and necessary for a debtor to divert funds into a retirement plan for his or her own benefit while paying little or nothing to unsecured creditors under a Chapter 13 plan.

In the current case, the Debtors are relatively young; Mr. Osborne is 32 years old and Mrs. Osborne is 33 years old. The hiatus in their retirement contributions will, in the scheme of things, be relatively brief – only three years. The difference in payments made to unsecured creditors will be very significant – the difference between a 2% dividend and a 27% dividend. The Debtors’ stated purpose for contributing to the account is not even primarily as a retirement savings. They stated that they simply regard it as a savings account for unexpected contingencies. Mr. Osborne’s retirement plan is purely voluntary, so he will suffer no negative consequences to his employment from not participating in the plan.

Conclusion

Under the facts and circumstances of this particular case, the Court finds that Mr. Osborne’s \$90.00 per month contribution to a 401(k) retirement plan is not reasonably necessary. Consequently, his plan violates the best efforts test embodied in 11 U.S.C. § 1325(b)(1)(B). Since this plan proposes to pay less than 100% to unsecured creditors and the Trustee has objected to the plan, confirmation must be denied. It is, therefore,

ORDERED, that the Trustee's Objection to Motion to Confirm Chapter 13 Plan is hereby SUSTAINED and Debtors' Motion to Confirm Chapter 13 Plan dated 10/02 [sic] is DENIED.

Dated this 8th day of April, 2003.

BY THE COURT:

Howard R. Tallman, Judge
United States Bankruptcy Court