IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

(102)

COUNTER COPY - DO NOT REMOVE -

In re	)	Bankruptcy Case No. 81A-02157
LINDSEY FRANCIS MOUNTEER and SUSAN DALE MOUNTEER,	)	
Debtors.	)	MEMORANDUM OPINION

Appearances: Rulon T. Burton, of Burton & Schiess, for the debtors; Barbara W. Richman, Assistant United States Attorney, for the United States of America; Judith A. Boulden, of Boulden & Gillman, Standing Chapter 13 Trustee.

Debtors filed their chapter 13 petition on June 22, 1981. The debtors' plan provided for payments in the following order: first, to secured claims; second, to unsecured claims; and third, to § 507(a)(b) priority claims. Debtors propose to fund the plan with $300.00 a month. There is one secured claim totaling $2,600.00. General unsecured claims total approximately $3,000.00. The priority tax claim is in the amount of $10,093.89.

The Internal Revenue Service (IRS) objected to confirmation of the proposed plan because the plan failed to comply with 11 U.S.C. § 1325(a)(1) which requires a plan to comply with all applicable provisions of Title 11. Specifically, the IRS asserted that the Code requires payment of § 507(a)(6) claims before general unsecured claims, or in the alternative, payment concurrently with unsecured claims.

Section 1322(a)(2) states that a plan must provide for the full payment, in deferred cash payments, of all claims entitled to priority under Section 507. The section is silent, however, as to when priority claims must be paid. Only one category of priority claims, fees and administrative expenses pursuant to § 507(a)(1), must be paid before other creditors. 11 U.S.C. § 1326(a)(1).

While a plan must propose payment in full of priority claims, "there is no requirement that any of these priority claims, except for fees and administrative expenses, be paid temporally in the prescribed order of priority or in advance of unsecured claims generally." 5 COLLIER ON BANKRUPTCY ¶ 1322.01[2][B], at 1322-6 (15th ed. 1980).

In chapter 11 cases, Congress has provided specific requirements for the payment of priority claims. See 11 U.S.C. § 1129(a)(9). The absence of any similar requirement under chapter 13 leads the court to conclude that § 1322(a)(2) does not entitle the IRS to receive payment ahead of other creditors.

The IRS argues, in the alternative, that it is at least entitled to payment concurrently with the unsecured claims. It relies on § 1322(b)(4) which states that the plan may "provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any unsecured claim." The IRS interprets this section as authorizing payment of tax claims

concurrently with other unsecured claims, but argues that it prohibits payment of unsecured claims before tax claims.

Collier, however, has a different interpretation.

> Although the plan must propose to pay priority claims in full . . . priority claims are not entitled to payment in advance of unsecured claims as a matter of right.

5 COLLIER ON BANKRUPTCY ¶ 1322.01[3][D], at 1322-10 (15th ed. 1980).

The language of § 1322(b) is permissive; a plan "may" provide for concurrent payments, but it need not. Debtors' plan in this case complies with § 1322(b)(4).

While § 1322(b) does not mandate concurrent payment of all unsecured claims, it does prohibit unfair discrimination against any class of unsecured claims.

> [T]he 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.

11 U.S.C. § 1322(b)(1).

The above language indicates that unsecured claims may, under certain circumstances, receive different treatment under a plan. However, this different treatment cannot result in unfair discrimination.

The Ninth Circuit Bankruptcy Appellate Panel has promulgated a four part test to determine whether different treatment of unsecured claims is acceptable under § 1322(b)(1). In re Wolff, 6 CBC 2d 1282 (9th Cir. B.A.P., 1982). The test is (1) whether

the discrimination has a reasonable basis; (2) whether the debtor can carry out a plan without the discrimination; (3) whether the discrimination is proposed in good faith; and (4) whether the degree of discrimination is directly related to the basis or rationale for the discrimination.

The debtors have put forward no basis for their discrimination against the IRS and none is apparent to the Court. Accordingly, parts one and four of the test are not met. As to whether the debtors can carry out the plan without the discrimination, it appears to the Court that concurrent payment of general unsecured claims with the IRS claim on a pro rata basis is just as feasible as the proposed plan of debtor. Such a plan would not require additional time or funding.

There is no evidence regarding the good faith of debtors in their proposed treatment of the IRS. The Court is not imputing bad faith to the debtors, but finds that having failed to satisfy three of the four factors, the debtors cannot meet the burden imposed by Wolff.

The debtors' plan, as proposed, does not comply with § 1322(b)(1) and cannot be confirmed.

DATED this 7 day of October, 1983.

BY THE COURT:

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE