UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

J. MAURICE AUBIN
LOIS AUBIN

CASE NO. 9l-0l998

Chapter 12

Debtors

IN RE:

GALEN MILLER, d/b/a
Miller Trucking

CASE NO. 9l-02360

Chapter 12

Debtor

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the Objections to Confirmation filed by Robert E. Littlefield, Esq., the Chapter 12 Trustee ("Trustee"), in each of these Chapter 12 cases.

Since the issue raised by the Objections is identical in both cases, the Court has consolidated the cases solely for the purpose of ruling on the Objections.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of these contested matters pursuant to 11 U.S.C. §§1334(b) and 157(a)(b)(l) and (2)(L) and (O).

FACTS

J. Maurice Aubin and Lois Aubin filed a voluntary petition pursuant to Chapter 12 of the Bankruptcy Code (ll U.S.C. §§101-1330) ("Code") on July 12, l99l, while Galen G. Miller filed a voluntary Chapter 12 petition on August 27, 1991. The Aubins and Miller shall be referred to herein collectively as the "Debtors".

The Debtors each filed Chapter 12 Plans which, while containing differing treatment as to various classes of creditors, contain substantially identical provisions as to the unsecured creditor class. Those provisions which provide the basis for the Trustee's Objection, propose a percentage distribution to the unsecured creditors, to be accomplished by payments to that class for at least 36 months. Payments will terminate, however, as soon thereafter as the unsecured creditors holding filed and allowed claims shall have received the stated percentage dividend.[1]

Objections to the confirmation of both Plans on unrelated grounds have been filed by other creditors, but only the Objections of the Chapter 12 Trustee are being considered herein.

ARGUMENTS

The Trustee contends that Debtors' Plans run afoul of Code §§1222(c), 1225(a)(3) and 1225(b)(l)(B), primarily because the Debtors' stand to benefit from the failure of unsecured creditors to file proofs of claim. The Trustee argues that the Plans should run for a fixed number of months (he suggests 60), which would effectively entitle creditors who actually file claims to a significantly greater dividend than the 10% and 20% set forth respectively in the

[1] The Aubin Plan proposes a 10% dividend to unsecured creditors while the Miller Plan proposes a 20% dividend.

Plans. The Trustee bases his contention on a well-founded assumption that a significant number of unsecured creditors will not file proofs of claim and, therefore, will not receive any payments under the Plans.

The Trustee takes the position that the practice of limiting payments to a variable number of months, which will be sufficient only to pay unsecured creditors filing claims the exact percentage of their claims as set forth in the Plans, and not a dollar more, is evidence of the lack of good faith required by Code §1225(a)(3). The Trustee also relies upon the additional language of Code §1225(b)(l)(B) to the effect that a bankruptcy court may approve, pursuant to Code §1222(c), the extension of a Chapter 12 plan beyond 36 months, as proof of Congressional intent to maximize dividends to unsecured creditors in Chapter 12 cases.

The Debtors in both cases counter the Trustee's argument, contending that their Plans as to the unsecured creditors will run a maximum of 60 months and a minimum of 36 months, depending on the number and amount of unsecured claims actually filed and the number of months necessary to pay filed claims a specific dividend of 10% and 20% respectively.

Debtors argue that the issue upon which a the Court must focus is not whether filing unsecured creditors or the debtor should reap a benefit from those unsecured creditors who fail to file claims, but whether or not the debtor can be required to do anything other than commit all of his or her disposable income to a Chapter 12 plan for a minimum of 36 months pursuant to Code §1225(b)(l)(B).

DISCUSSION

Prior to the amendment of the Code in l984 (Bankruptcy Amendments and Federal Judgeship Act of l984) ("BAFJA") the issue of good faith found in Code §1325(a)(3) (adopted verbatim in Code §1225(a)(3)), frequently focused on the percentage of repayment to be made to unsecured creditors under a proposed plan.

It has been suggested, however, that with the enactment of BAFJA, specifically §1325(b), Congress once and for all removed that consideration from the concept of good faith. So long as the debtor commits all of his or her disposable income to a plan for a minimum of 36 months, the actual percentage of repayment received by unsecured creditors does not impact on the issue of good faith. See COLLIER ON BANKRUPTCY (15th ed.) ¶1225.02[3].

Thus, the Court must conclude that so long as these Debtors meet the requirements of Code §1225(b), the good faith requirement of Code §1225(a)(3) is not implicated in the Court's consideration of the confirmability of either Debtors' Plan.

Admittedly, the Plans sub judice do not meet the requirements of Code §1225(b)(l)(A); that is, they do not propose to pay unsecured creditors in full. The Court must, then, consider the Plans in light of Code §1225(b)(l)(B), the so-called "disposable income" test.

The issue here, however, is not truly one of "disposable income." Rather it involves a balance of equities between debtor and creditors, resulting from a phenomena perhaps not considered by Congress in enacting either Code §1325(b) or §1225(b). Not all creditors, though given ample opportunity to do so, file proofs of claim in bankruptcy cases. Thus, unless confirmation of a plan is postponed until the date for filing of claims has expired, the so-called "bar date", it is impossible to accurately project the actual percentage dividend to be received by unsecured creditors. The typical Chapter 12 or Chapter 13 plan simply provides for a periodic payment for a fixed number of months with a minimum percentage dividend to be received by unsecured creditors. The percentage dividend is based on the assumption that all creditors will file proofs of claim for the precise amounts listed in the debtor's petition and schedules.

The Trustee asserted at oral argument that statistics support the conclusion that only 45% to 50% of the listed unsecured creditors actually file proofs of claim and thus, those who do file generally receive a much higher percentage of their claim than was anticipated in the plan, at the "expense" of non-filing unsecured creditors.

The Plans presently before the Court are typical except in one significant aspect, namely that the actual duration of the Plans is omitted and in its place is the provision that the payments to unsecured creditors will continue for a minimum of 36 months, but only thereafter until the unsecured creditors who have filed proofs of claim have received the fixed percentage dividend. (See Class VII of the Miller Plan and Class X of the Aubin Plan).

The Trustee asserts that such a provision leaves the term of the Plans undetermined and thus runs afoul of Code §1222(c) because the Plans will admittedly run at least 36 months, but they may run longer than that. The Trustee also points to the portion of Code §1225(b)(l)(B) which differs from its counterpart, Code §1325(b)(l)(B). The Trustee asserts that the additional language permits the Court to impose a high disposable income burden on a Chapter l2 debtor by forcing an extension of the plan beyond 36 months.

The Court has difficulty accepting either argument of the Trustee. The argument that the Plans run afoul of Code §1222(c) apparently because they are too speculative in length and may extend beyond 36 months without a showing of cause is not persuasive.

While it is true that Congress, in enacting Chapter 13 sought to discourage plans of longer than 36 months in duration, courts routinely confirm plans that voluntarily extend beyond three years.[2] It would appear that in the instant cases, cause could be found in the Debtors' desire to pay a specific percentage dividend to unsecured creditors which might conceivably take more than 36 months to accomplish. Thus, the Court is unable to conclude that, because the Plans may expire somewhere between 36 and 60 months, they violate the "cause" requirement of Code §1222(c).[3]

The Trustee's argument that Code §1225(b)(l)(B) is intended to impose a higher disposable income burden on Chapter 12 debtors is likewise unconvincing. Admittedly, though Congress in enacting Code §1225(b)(l)(B) inserted the phrase, "or such longer period as the court may approve under section 1222(c)" - which phrase is not contained in Code §1325(b)(l)(B), there is no legislative history to suggest the rationale for its inclusion.

In the absence of any pertinent legislative history, this Court is of the opinion that the inclusion of the subject phrase in Code §1225(b)(l)(B)

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[2] See H.R.Rep. No. 595, 95th Cong. lst Sess. 117 (l977).

[3] Paragraph 3 of both Plans limits the maximum number of payments to the Trustee to 60 months.

was intended to simply provide a point of reference between that section and Code §1222(c) rather than suggesting that Chapter 12 debtors, as opposed to Chapter l3 debtors, can somehow be compelled by creditors to file plans for a specific period of months in excess of 36. See In re Gossett, 86 B.R. 94l, 944 (Bankr. S.D.Ohio l988).

Finally, the Trustee's contention that equity dictates that, as between the debtor and his or her creditors, the latter should enjoy the windfall created by non-filing creditors is not compelling. This Court can find no legislative history, Congressional mood or case law which would require a Chapter l2 debtor to make payments for a specific period beyond 36 months so as to provide unsecured creditors who file proofs of claim with a greater percentage of debt re-payment than has been proposed in a Chapter 12 plan, and to which those creditors have presumably consented, due to the failure of numerous other unsecured creditors to file any proof of claim. Conversely, should the proposed percentage dividend be paid in less than 36 months, the plan payments must continue a minimum of three years. See In re Schwarz, 85 B.R. 829, 832 (Bankr. S.D.Iowa l988).

Based upon the foregoing, it is

ORDERED that the Trustee's Objection the Chapter l2 Plan filed by Miller on October 22, l99l is denied and it is further

ORDERED that the Trustee's Objection to the Chapter l2 Plan filed by Aubin on October 4, l99l is likewise denied.

Dated at Utica, New York
this   day of May, l992

STEPHEN D. GERLING
U.S. Bankruptcy Judge