

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
BRENDA RUTH FREEMAN,	:	06-10651-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

The Debtor's proposed Chapter 13 plan provides for the Debtor to make regular monthly payments of principal and interest on a student loan directly to the creditor while other unsecured creditors receive payment of only one percent of their claims. The Chapter 13 trustee has objected to confirmation on the ground that the plan violates section 1322(b)(10) of the Bankruptcy Code, which prohibits payment of post-petition interest on an unsecured, non-dischargeable debt unless the Debtor proposes to pay all other allowed claims in full. This matter constitutes a core proceeding within the Court's subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(L); § 1334.

FINDINGS OF FACT

The Debtor's proposed Chapter 13 plan provides for plan payments of \$200 per month for 36 months, which will produce a 1% dividend to unsecured creditors. The plan also provides that the Debtor would continue to maintain direct payments of \$74 per month on her unsecured student loan debt. Each monthly payment on the student loan includes post-petition interest at the contract rate. Regular payments will continue after the date of the last payment under the Debtor's plan.

The Trustee asserts that the Debtor's plan does not comply with section 1322(b)(10), which states that a plan may provide for the payment of post-petition interest on an unsecured,

nondischargeable debt only if the plan also provides for full payment of all unsecured claims. The Debtor contends that the direct payments to the student loan creditor are not prohibited by section 1322(b) because the payments are being made directly by the Debtor rather than from payments made by the Debtor to the Trustee and, alternatively, that section 1322(b)(5) acts as an exception to section 1322(b)(10) because it permits the Debtor to cure any default and maintain payments on any unsecured claim on which the final payment is due after the last plan payment is due.

CONCLUSIONS OF LAW

Pursuant to section 1322(b) of the Bankruptcy Code, a debtor's Chapter 13 plan "may" contain certain provisions. At issue in this case are those provisions found in subsections (b)(5) and (b)(10). Section 1322(b)(5) permits a debtor's plan to "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." 11 U.S.C. § 1322(b)(5). Pursuant to section 1322(b)(10), the debtor's plan may "provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims." 11 U.S.C. § 1322(b)(10). These two subsections appear to conflict with one another, as curing a default and maintaining payments on an unsecured, long-term debt requires the debtor to pay interest on the balance of the debt, *see In re Hanson*, 310 B.R. 131, 134 (Bankr. W.D. Wisc. 2004) ("Maintenance of payments' under 11 U.S.C. § 1322(b)(5) means that the debtor must respect the interest rate and the monthly payment in the

original contract during the plan.”), and a long-term debt addressed under section 1322(b)(5) becomes nondischargeable under section 1328(a), regardless of whether it is a student loan debt. *See* 11 U.S.C. § 1328(a)(1). This conflict prompts the question of whether Congress intended section 1322(b)(5) to permit a debtor to pay interest on a long-term debt as part of the cure and maintenance of the long-term unsecured debt, notwithstanding the prohibition against paying interest on nondischargeable debts without paying all other allowed claims in full.

The Eleventh Circuit Court of Appeals has noted the “interlocking nature of the bankruptcy code.” *In re Bateman*, 331 F.3d 821, 825 (11th Cir. 2003). In interpreting the Code’s provisions, the court stated that the provisions must be “read to be consistent whenever possible” and, “[i]f the two provisions may not be harmonized, then the more specific will control over the general.” *Id.*; *see also Matter of Thornhill Way I*, 636 F.2d 1151, 1156 (7th Cir. 1980) (“Where there are two provisions in a statute, one of which is general and designed to apply to cases generally, and the other is particular and relates only to one case or subject within the scope of the general provision, then the particular provision must prevail; and if both cannot apply, the particular provision will be treated as an exception to the general provision.”).

The Trustee argues that section 1322(b)(10) is the more specific provision because it directly prohibits the payment of interest on unsecured debts that are nondischargeable, absent full payment to other unsecured creditors, and because, even when section 1322(b)(10) is applicable, section 1322(b)(5) remains available to debtors to cure and maintain (through the payment of interest) debts that are not nondischargeable. This argument has two flaws. First, if a debtor chooses to cure and maintain a long-term debt, the debt becomes nondischargeable under section 1328(a)(1). Accordingly, if the Trustee is correct that section 1322(b)(10) should be considered an exception

to section 1322(b)(5), it is an exception that swallows the rule. In other words, it would be impossible for a debtor to pay interest on a long-term debt as part of a cure and maintenance of that debt under section 1322(b)(5), even if the debt is not nondischargeable under any provision of section 523(a). Second, one could just as easily argue that section 1322(b)(5) is the more specific provision because not all nondischargeable debts are entitled to be cured and maintained in accordance with section 1322(b)(5), but only those with payment terms that extend beyond the plan term. This leaves a large realm of nondischargeable, short-term debts to which section 1322(b)(10) would continue to apply if section 1322(b)(5) constitutes an exception to section 1322(b)(10).

Having considered the various arguments, the Court concludes that Congress intended to permit the cure and maintenance of long-term unsecured debts, notwithstanding the applicability of section 1322(b)(10). As noted above, prohibiting the payment of interest on nondischargeable debts would make the cure and maintenance of any long-term debt impermissible. Such a result could not have been intended by Congress.¹

CONCLUSION

For the above-stated reasons, the Court concludes that the Debtor's proposed plan does not

¹ Although the Chapter 13 Trustee has not objected to the Debtor's proposed plan on the basis that the direct payment of the student loan debt unfairly discriminates against other unsecured creditors and is prohibited by section 1322(b)(1), the Court agrees with the decision in *In re Jackson*, Case No. 05-85212 (Bankr. N.D. Ga. Mar. 16, 2006) (Mullins, J.), that curing and maintaining a long-term student loan debt by making direct payments to the creditor generally does not unfairly discriminate against a debtor's other unsecured creditors. Unfair discrimination may result, however, if a plan provides for payment of a student loan on an accelerated basis within the term of the plan. See, e.g., *In re Williams*, 253 B.R. 220 (Bankr. W.D. Tenn. 2000); *In re Mulkey*, Case No. 04-81390-JEM (Bankr. N.D. Ga. Sept. 28, 2005).

violate section 1322(b)(10). The Trustee's Objection to Confirmation is hereby overruled. If the Debtor's plan remains otherwise confirmable, the Trustee shall file a request for entry of a confirmation order within ten (10) days of the entry of this Order.

IT IS SO ORDERED.

At Newnan, Georgia, this _____ day of December, 2006.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE