

00-5045

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re

SHARLENE DE ANN TAYLOR,

Debtor.

THE NEW YORK CITY EMPLOYEES' RETIREMENT
SYSTEM,

Appellant,

-against-

JEFFREY I. SAPIR, STANDING CHAPTER 13 TRUSTEE FOR
THE SOUTHERN DISTRICT OF NEW YORK, and
SHARLENE DE ANN TAYLOR,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF THE
NATIONAL ASSOCIATION OF CONSUMER
BANKRUPTCY ATTORNEYS, INC. AS *AMICUS CURIAE*
IN SUPPORT OF APPELLANTS**

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**STATEMENT OF IDENTITY, INTEREST, AUTHORITY, CONSENT TO AMICUS
AND CORPORATE DISCLOSURE
OF NACBA AS AMICUS CURIAE**

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non-profit organization of more than 1,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. Second Circuit NACBA members file many thousands of bankruptcy cases per year.

NACBA's corporate purposes include education of the bankruptcy bar and community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which cannot adequately be addressed by individual member attorneys. NACBA has filed amicus curiae briefs in various appellate courts seeking to protect the rights of consumer bankruptcy debtors. See, e.g., Kawaauhau v. Geiger, 118 S.Ct. 974 (1998); In Re Anes, 195 F.3d 177 (3d Circuit, 1999); Capital Comm. Fed. Credit union v. Boodrow (In Re Boodrow), 126 F.3d 43 (2d Circuit, 1997).

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low and moderate income wage earners. Many of those wage earners have extreme difficulty accumulating adequate retirement funds to supplement their social security benefits that will provide a basic subsistence upon retirement from the work force. Prohibiting such debtors from making even a minimal contribution towards their retirement during periods of financial distress requiring Chapter 13 relief will further erode the ability of debtors to provide vital and necessary support needed during their retirement years. NACBA members are very concerned that affirmance of the decision below will greatly discourage debtors from seeking needed relief under Chapter 13.

NACBA is a non-profit corporation that has no parent corporation. NACBA has not issued any stock. All of the parties have consented to the appearance of NACBA as amicus curiae on behalf of appellant.

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**BRIEF OF THE
NATIONAL ASSOCIATION OF CONSUMER
BANKRUPTCY ATTORNEYS, INC. AS *AMICUS CURIAE* IN
SUPPORT OF APPELLANTS AND FOR REVERSAL OF
THE LOWER COURT'S DECISION**

ARGUMENT

**I. THE COURTS BELOW ERRED IN HOLDING THAT RETIREMENT
CONTRIBUTIONS MADE DURING A CHAPTER 13 BANKRUPTCY ARE NOT
REASONABLY NECESSARY EXPENSES.**

The fundamental holding of the courts below is that a Chapter 13 debtor, for all practical purposes, never can make a voluntary or involuntary contribution to any retirement account or plan. Citing **In re Nation**, 236 B.R. 150, 154 (Bankr. S.D.N.Y. 1999), Judge Hellerstein

unequivocally stated that “ An employer created ‘mandatory’ savings plan may not be utilized to allow debtors to pay themselves rather than their creditors.” **In re Taylor**, 248 B.R. 37, 41 (Bankr. S.D.N.Y. 2000).

This holding is based on the courts’ unduly restrictive reading of Section 1325(b)(1) of the Bankruptcy Code, which provides that, after objection to confirmation of a plan by the Chapter 13 trustee, the court can confirm such plan only if, on its effective date:

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor’s projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. Section 1325(b)(1)(A) and (B)

The Bankruptcy Code only requires that “disposable income” be paid to the Chapter 13 trustee for the benefit of unsecured creditors. The Code defines disposable consumer income at 11 U.S.C. Section 1325(b)(2) as “income which is received by the debtor and which is not reasonably necessary to be expended (A) for the maintenance or support of the debtor or a dependent of the debtor...”

Contrary to the holding in **In Re Taylor, supra**, amicus curiae asserts that modest pension contributions, after a review of all of the factors, may indeed be a “reasonably necessary” expense.

A. BASIC, “REASONABLY NECESSARY” EXPENSES ARE NON-LUXURY EXPENSES MADE BY AVERAGE AMERICANS.

The Bankruptcy Amendment and Federal Judgeship Act of 1984, Pub. L. No. 98-3543, 98 Stat.333 (1984), amended the existing Bankruptcy Code by adding a “disposable income”

requirement. Under that requirement, a debtor must commit all of her projected disposable income for three years to the Chapter 13 plan. Disposable income excludes income that is “reasonably necessary to be expended for the maintenance or support of the debtor or dependant of the debtor.” 11 U.S.C. Section 1325(b)(2). Prior to this amendment, debtors were not required to commit any particular sums of money to a Chapter 13 plan.

The Code does not define the phrase “reasonably necessary”. A companion section to 1325 (b)(2) added to the Code at the same time provides some guidance. Under section 523(a)(2)(C), certain debts incurred for “luxury goods and services” are presumed to be nondischargeable. The section further states that luxury goods and services do not include goods or services...”reasonably acquired for the support or maintenance of the debtor or a dependant of the debtor...” 11 U.S.C. Section 523(a)(2)(C).

Courts have relied upon this comparable code section to scrutinize a debtor’s expenses for luxury expenses and other unnecessary expenditures. **In Re Hedges**, 69 B.R. 18 (Bankr, E.D. VA 1986) [expensive boat]; **In Re Rogers**, 65 B.R. 1018 (Bankr E.D. Mich 1986) [red Corvette]. Most courts have held that “reasonably” means expenses necessary to support an adequate standard of living, but not a first class existence. **In Re Easley**, 72 B.R. 948 (Bankr, M.D. Tenn 1987); **In Re Reyes**, 106 B.R. 155 (Bankr. N.D. Ill 1989).

B. WHETHER A PARTICULAR EXPENSE IS “REASONABLY NECESSARY” SHOULD BE DETERMINED ON A CASE BY CASE BASIS, WITHOUT APPLICATION OF A RIGID “PER SE” RULE.

The question to be determined by a bankruptcy judge should be whether a particular expenditure is “reasonably necessary” for the maintenance and support of the debtor or a dependent. A duty is imposed on the court to look at a debtor’s particular situation and decide

whether a debtor's expenses are "reasonably necessary." **In Re Esquivel**, 239 B.R. 146 (Bankr. E.D. Mich 1999).

The courts below (and other courts that have followed the same reasoning) abdicated their responsibility to analyze each case on its facts, instead relying on a rigid "per se" rule that retirement contributions are not "reasonably necessary" for the support or maintenance of the debtor. Nothing in the Bankruptcy Code itself requires such an inflexible approach to analyzing a debtor's budget.

If a "per se" rule is applied, the court fails to analyze relevant factors, including the amount of the contribution. There is no analysis of the age of the debtor, the health of the debtor or dependents and the length of time before retirement, in relation to the proposed expense. There is no review of other budget items, to determine whether the debtor chose to make a modest retirement contribution, instead of other allowable items such as charitable contributions, entertainment expense, or even a lower than normal food or clothing allowances. Ironically, more discretion is exercised by bankruptcy courts when evaluating expenditures for obvious luxury items such as expensive homes, boats, or cars.

Also lacking is any attempt to examine the debtor's total financial situation. In evaluating expenses, the court should view the totality of a debtor's circumstances in determining what is, in fact, reasonable for a particular debtor. Failure to examine the debtor's total financial situation can cause inequitable results, such as one debtor being allowed house payments or car payments totaling thousands of dollars per month, while another debtor, with much lower housing or vehicle expenses, is denied a fifty or sixty dollars bi-weekly contribution to a retirement account. A debtor with a high mortgage payment builds up significant equity, thereby improving her financial future. In contrast, the unfortunate debtor who is renting but

desires to modestly supplement her social security benefits with a small contribution to a retirement fund, is denied such an expenditure.

That precise inequity is present in this case. Ms. Taylor earns \$22, 790 per year. On that sum she supports herself and two dependants. She filed bankruptcy because she was behind on her rental payments. She does not own a home. She is not accumulating any equity in a home from her allowed housing expense, in contrast to many other debtors with monthly mortgage payments far in excess of her rental payment. Her monthly pension deduction of \$134.20 is a small amount compared to many debtors' allowed expenses for mortgage payments.

C. A MODEST CONTRIBUTION TO A RETIREMENT FUND IS AS REASONABLE AN EXPENSE AS OTHER EXPENSES COMMONLY ACCEPTED BY COURTS.

Currently, debtors incur a wide range of expenses to meet future needs, which are not questioned as reasonably necessary expenses. As noted in **In re Awuku**, 248 B.R. (Bankr. E.D.N.Y.2000), there is a wide range of expenses that debtors incur to meet future needs that are not questioned as reasonably necessary expenses. Expenses incurred by a debtor to educate her children are justified because they are reasonably necessary to equip those children for future employment. Expenses for medical, dental and optical insurance are reasonably necessary to protect against ordinary future medical expenses and to insure the good health of the debtor and the debtor's dependants. Union dues are expenses used in part to protect workers from the vagaries of employment and to help insure a future income reasonably necessary to survive in modern life. Expenses for life and disability insurance policies are reasonably necessary to protect the debtor and the debtors' dependants from a future loss of income due to death or serious injury.

Many Chapter 13 plans include a contingency fund designed to insulate the debtor from the unexpected expenses that can occur in ordinary life. Most courts recognize the need to budget a contingency fund to pay to fix a broken pipe, repair a leaking roof, buy the additional school books, replace worn car tires or to fix an unexpected oil leak in the family car. **In Re Fries**, 68 B.R. 676 (Bankr. E.D. Pa 1986) [contingency fund of \$92.16 allowed as a cushion to guard against life's expectancies]; **In Re Crompton**, 73 B.R. 800 (Bankr. E.D. Pa 1987)[cushion of \$96.63 allowed].

Before the changes to the Code institutionalized a deduction of up to 15% from gross income for tithing, many courts recognized this expense as a reasonably necessary expense that related to spiritual needs of debtors and dependants. **In Re Bien**, 95 B.R. 281 (Bankr. Conn 1989) [\$391.65 per month allowed]; **In Re Wood**, 92 B.R. 264 (Bankr. S.D. Ohio 1988) [\$43.00 per month allowed].

Courts have also held that payments for tuition and educational expenses for dependents are reasonably necessary for the future support and maintenance of such dependent. Courts, of course, can and do analyze each case on its facts to determine reasonableness. See **In Re Riegodedios**, 146 B.R. 691 (Bankr, E.D. Va 1992) [\$614.00 per month allowed for daughter's college education]; **In Re Gonzales**, 157 B.R. 604 (Bankr. E.D. Mich 1993) [Payments of \$300.00 per month and \$400.00 per month allowed for two separate children's college].

Pension contributions should not be treated differently than these other expenses. Pension payments protect a debtor against future loss of income, much like disability or life insurance policies. Mandatory deductions for social security are already recognized as appropriate expenses, again designed to provide income when a debtor no longer is in the work force. Supplemental pension contributions are just as necessary. As noted in **In Re Awuku**,

supra, at page 17, “There can be no legitimate dispute that social security benefits will be radically insufficient to meet the basic needs of our population in their retirement years.”

One need only to listen to the current Presidential debates to hear the variety of proposals not only to protect but to supplement that social security. Whether it is investments in the stock market to supplement social security or “social security plus”, the harsh reality is that future income protection is a necessity in the 21st century.

The court in **In Re Awuku**, supra, at page 30, came to the same conclusion stating “... in this day and age, it is “reasonably necessary” throughout a debtor’s entire employment history to contribute to a tax-qualified plan to supplement social security.”

In this case, the debtor is faced with a mandatory deduction from annual wages to the retirement system, in order to be eligible for certain defined benefits at retirement. This is an expense of \$31.89 per week or \$138.19 per month, less than one half of the amount that she could contribute to a religious, charitable, scientific, literary, educational, or amateur athletic organization under the under Section 1325(b)(2)(A) of the Bankruptcy Code. *See also* section 548(d)(4) of the Bankruptcy Code and Section 170(c)(2) of the Internal Revenue Code.

Under the circumstances of this case, this pension contribution in this case is modest and should be allowed.

II. THE MANDATORY “MAKE UP” PAYMENTS THAT WILL BE REQUIRED IF THE PENSION CONTRIBUTION IS NOT ALLOWED WILL JEOPARDIZE THIS DEBTOR’S FRESH START.

The primary purpose of consumer bankruptcy is to provide the individual debtor with a “fresh start.” The “fresh start” allows individuals mired in debt to free themselves from that overwhelming burden and to begin their financial life anew. It encourages debtors to look to the future when, free from debt, their hard work will reward them as a newly productive member of

society. The Supreme Court has described this “fresh start” as “ a new opportunity in life, unhampered by the pressure and discouragement of pre-existing debt.” **Local Loan Co. v. Hunt**, 292 U.S. 234,244(1934).

Congress, in passing the 1978 Bankruptcy Act, stressed the importance of this fresh start by providing a broad discharge from debts, and more significantly, enacting strict restrictions on the practice of reaffirming debt. Underscoring Congressional concerns that debtors might leave bankruptcy with an empty discharge, still burdened with debt, the Code imposes strict limits on the reaffirmation of debt. Unrepresented debtors must obtain court approval before any debt can be reaffirmed. The court must determine that reaffirmation will not cause an undue hardship on the debtor, or a dependant of the debtor and is in the best interest of the debtor. Represented debtors must obtain an affidavit from the attorney who negotiated the reaffirmation, asserting that the agreement to pay the debt will not cause an undue hardship. 11 U.S.C. 524(c)(3).The Congressional policy is clear. Debtors should leave bankruptcy unburdened by pre-existing debt.

Appellant in its brief makes much of the fact that the required payments on behalf of the debtor are mandatory under New York law. If the expense is not allowed, the debtor will have to make up the missing payments (with interest) upon completion of her Chapter 13 case, out of then current income, as a condition of employment. She will have just emerged from her Chapter 13, but immediately will be saddled with almost \$4,975.00 in delinquent pension payments, putting her “fresh start” at significant risk. *Amicus curiae* submits that such as result is certainly contrary to the spirit of the Code. This “make up” requirement significantly affects the debtor’s ability to make ends meet after her bankruptcy discharge. This mandatory feature alone should determine that this pension deduction is reasonably necessary for the support of the debtor and her dependants.

CONCLUSION

The national objective of prudently providing for one's retirement is, in itself, a reasonable and necessary expense for this and any other debtor. This is not to say that any and all retirement contributions should be allowed in Chapter 13. A blanket prohibition against debtors' attempt to improve their lot on retirement, however, is equally repugnant. The court must not abandon its responsibility to evaluate each debtor's case where questions of the propriety of a claimed expense arise. There can be no doubt that a primary goal of government and society in general is to promote each individual's goal of financial independence as they depart the work force for retirement. This factor should be considered along with all of the debtor's other circumstances before a decision is made. In this case the debtor has a mandatory 5.85 % contribution required to her retirement system. In light of her income and other expenses, this amount is reasonably necessary for her and her dependants' support and should be allowed. Amicus curiae urges this Court to reverse the lower court's decision, adopt the factor analysis articulated in **In re Awuku**, supra, and enter an order determining that this retirement expense is reasonably necessary for the support of the debtor or the debtor's dependants.

Respectfully submitted,

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