United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re: Robert Smith, Jr.

Bankruptcy Number: 21 B 12101

Adversary Caption: N/A

Adversary Number: N/A

Date of Issuance: February 17, 2022

Judge: David D. Cleary

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Case No. 21 B 12101
	)	
ROBERT SMITH,	)	Chapter 13
	)	
Debtor.	)	Judge David D. Cleary

ORDER SUSTAINING OBJECTION TO CONFIRMATION

This matter comes before the court on confirmation of Debtor Robert Smith's ("Debtor") chapter 13 plan ("Amended Plan"). Marilyn O. Marshall, Standing Chapter 13 Trustee, filed an objection to confirmation ("Objection") on the grounds that the Amended Plan unfairly discriminates. The court allowed Debtor time to file a response, which he did. Having read the papers and heard the arguments of the parties, the court will sustain the Objection.

Debtor filed for relief under chapter 13 on October 24, 2021. The Federal Emergency Management Agency ("FEMA") filed a timely proof of claim in the amount of $11,630.92. Pursuant to the Stipulation and Order entered at EOD 39 in Case No. 20 B 21737, FEMA's claim is not "dischargeable in bankruptcy in this or any subsequently filed bankruptcy case…". The Amended Plan provides for a 10% distribution to unsecured creditors. In section 5.3, however, the Amended Plan places FEMA in a separate class from other unsecured creditors and provides for full payment of FEMA's nondischargeable claim.

11 U.S.C. § 1322(b) states that a chapter 13 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[.]"[1] The Code allows for chapter 13 plans to discriminate among

[1] 11 U.S.C. § 1122:

(a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class.
[continued on next page]

unsecured creditors, but not to do so unfairly. As the Seventh Circuit tells us, the Code "does not explain what 'unfairly' means in this context." *In re Crawford*, 324 F.3d 539, 542 (7th Cir. 2003).

The *Crawford* panel reviewed four different tests used by various courts to clarify the definition of "unfairly," and rejected them all.

> We haven't been able to think of a good test ourselves. We conclude, at least provisionally, that this is one of those areas of the law in which it is not possible to do better than to instruct the first-line decision maker, the bankruptcy judge, to seek a result that is reasonable in light of the purposes of the relevant law, which in this case is Chapter 13 of the Bankruptcy Code; and to uphold his determination unless it is unreasonable (an abuse of discretion).

Id.

Thus, although undefined by the Code, the Seventh Circuit effectively applied the ordinary meaning of the terms of the statute to the facts of the case. *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) ("In the absence of such a definition, we construe a statutory term in accordance with its ordinary or natural meaning."). "Reasonable" is synonymous with "fair." *See* Black's (11th ed. 2019) (defining "reasonable" as "[f]air, proper, or moderate under the circumstances"). Fairness requires the treatment of claims to conform with applicable law. *See* Fair, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/fair (last visited February 17, 2022) ("1(b)(1): conforming with the established rules: ALLOWED"). Thus, if the discrimination is not reasonable and does not conform with the purpose of chapter 13, the treatment unfairly discriminates.

Although the *Crawford* court did not provide a bright-line test, it did suggest "that if without classification the debtor is unlikely to be able to fulfill a Chapter 13 plan and the result

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(b) A plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience.

will be to make his creditors as a whole worse off than they would be with classification, then classification will be a win-win outcome." *Id.* at 543.

The panel then described a range of situations involving discrimination. At one end would be discrimination in which a debtor proposes to pay "the state driver's license bureau which unless paid in full will yank his license, with the consequence that he won't have earnings out of which to make the payments called for in his plan." *Id.*

> At the other extreme is a nondischargeable debt consisting of a fine imposed, or restitution ordered, in respect of a criminal fraud that the Chapter 13 debtor committed, together with other unsecured debts, and he proposes a classification under which the nondischargeable debt will be paid in full and the other creditors will receive nothing at all. Approval of such a plan would be unreasonable. The effect of the plan if approved in such a case would be to make the debtor's other unsecured creditors pay his fine or restitution!

Id.

According to the attachment FEMA included with its proof of claim, it determined that Debtor was found ineligible for some or all of the disaster assistance funds it provided to him. Debtor seeks to separately classify his debt to FEMA so that it will be paid in full during the term of his plan. As the Circuit recognized in *Crawford*, however, the effect of the plan would be to make the Debtor's other unsecured creditors pay this debt. FEMA's claim is not of the type that should be paid in full because it enables the plan to be viable. Instead, it is more similar to the debts at the other end of *Crawford's* spectrum, "a nondischargeable debt consisting of a fine imposed, or restitution ordered, in respect of a criminal fraud that the Chapter 13 debtor committed[.]" *Id.*

Debtor argues that if he were to propose a plan that did not discriminate, all creditors would still receive 10% of their allowed claims. He does not include any calculations to support this argument, and his statement that the Trustee acknowledges it is wrong. The Trustee states in

paragraph 8 of her objection: "[W]ere FEMA not given preferential treatment over all other unsecured creditors, all currently filed allowed general unsecured claims would be paid 87%."

Debtor also contends that if he were only to pay 10% of FEMA's claim, he would still owe approximately $10,467.83 plus interest after the bankruptcy case concludes. While this is objectively a larger amount than the debtor would have been left with in *In re Belda*, 315 B.R. 477 (N.D. Ill. 2004), Debtor makes no showing that this amount is a "such a crushing load of undischarged debt as to make it inevitable or nearly so that he would soon be back in bankruptcy court, this time under Chapter 7…". *Crawford*, 324 F.3d at 543.

Separately classifying certain claims is not prohibited by the Code. Indeed, all reorganization and debt adjustment chapters provide that plans may include separate classifications. *See* 11 U.S.C. §§ 901(a), 1122(a), 1222(b)(1), 1322(b)(1). Discrimination also is not prohibited. While discrimination is permitted, unfair discrimination is not. 11 U.S.C. § 1322(b). *See also* 11 U.S.C. §§ 901(a), 1129(b)(1), 1222(b)(1). Here, the proposed separate classification of FEMA's claim is not reasonable in light of the purpose of chapter 13. It is not fair. For all the reasons stated above, the court finds that Debtor's plan discriminates unfairly when it places FEMA's claim in a separate class that will be paid 100 cents on the dollar.

IT IS HEREBY ORDERED THAT:

1. The Objection is **SUSTAINED**; and
2. The hearings on confirmation and on Debtor's attorney's application for compensation are reset to March 7, 2022, at 2:30 p.m.

ENTERED:

Date: February 17, 2022

DAVID D. CLEARY
United States Bankruptcy Judge