

11 U.S.C. § 1325(1) (3)  
11 U.S.C. § 727(a) (8)

In re Michael A. Monniere

Case No. 395-35991-psh13

1/31/96

PSH

Unpublished

Debtor who had no priority or secured debt proposed plan under which he would make payments of \$41 per month. All money paid into the plan would be paid to attorney fees and administrative costs with no payments of any kind being made to any creditors. The debtor conceded that he filed the plan because he was ineligible for relief under Chapter 7. The court held that a Chapter 13 plan which provides for no payments to any creditors is merely a "disguised liquidation" and did not comply with the provisions of Chapter 13 within the meaning of § 1325(a)(1). The court further that a debtor may not use Chapter 13 to circumvent the clear purposes behind § 727(a)(8) that liquidation not be available to a debtor who has within the preceding six years obtained a discharge in bankruptcy.

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE )  
MICHAEL A. MONNIERE, ) Case No. 395-35991psh13  
 ) MEMORANDUM OPINION  
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Debtor. )

This case came before the court for confirmation of the debtor's Chapter 13 plan. The debtor has no priority debts. All of his assets are exempt. The plan requires the debtor to pay the sum of \$41 monthly to the trustee for a period of not less than 36 months. All money paid into the plan by the debtor will be paid to attorney fees and administrative expenses with no payments of any kind being made to any creditor.<sup>1</sup> The debtor concedes that he filed a Chapter 13 because he was granted a discharge under 11 U.S.C. § 727 within 6

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<sup>1</sup> The debtor's one secured creditor, which holds a security interest in the debtor's mobile home, is to be paid directly by the debtor outside the plan. There is no arrearage to be paid through the plan.

1 years before the date of the Chapter 13 filing and cannot file  
2 another Chapter 7 at this time and receive a discharge of his debts.<sup>2</sup>  
3 The issue before the court is whether this plan complies with §  
4 1325(a)(1) and (3) and thus may be confirmed.<sup>3</sup>

5 In In re Erwin 10 BR 138 (Bankr.D.CO. 1981) the debtor had no  
6 priority or secured debts. Her general unsecured debt totaled  
7 approximately \$3,600. Her plan provided for payments of \$1 over the  
8 life of the plan to each of the general unsecured creditors. The  
9 Erwin Court concluded that a Chapter 13 plan which is simply a  
10 disguised liquidation is not within the contemplation of any part of  
11 the Bankruptcy Code. In reaching this conclusion the court looked to  
12 legislative history. That history states, in part, "Chapter 13  
13 encourages more debtors to repay their debts over an extended period  
14 rather than opt for straight bankruptcy liquidation and discharge."  
15 House Rep.No. 95-595, 95th Cong. 1st Sess. (1977), p 5. It further  
16 states that a "plan may provide for full or partial payment of  
17 creditors." Id at 123. The court concluded that this language  
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20 <sup>2</sup> 11 U.S.C. § 727(a)(8).

21 <sup>3</sup> Section 1325 of the Code states in relevant part:

22 "(a) Except as provided in subsection (b), the court  
23 shall confirm a plan if -

24 (1) the plan complies with the provisions of  
25 this chapter and with the other applicable  
26 provisions of this title;

\* \* \*

(3) the plan has been proposed in good faith  
and not by any means forbidden by law;

1 "clearly reveals a pervasive intent that a Chapter 13 debtor make  
2 'payments to creditors' thus distinguishing Chapter 13 from Chapter  
3 7." Erwin at 139.

4 The court reached a similar conclusion in In re Cook 3 B.R. 480  
5 (Bankr.S.D.W V. 1980). In Cook the debtor had no priority or secured  
6 debt. He originally filed schedules that showed that he had no  
7 excess income and could make no plan payments of any kind. He later  
8 conceded that in a Chapter 13 "there is persuasive authority for the  
9 requirement that some payments be made." Consequently, he filed a  
10 modified plan which provided for payments of \$10 per month for 36  
11 months. Despite the increase the unsecured creditors would receive  
12 virtually nothing during the course of the plan.

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14 Two creditors objected, contending that the plan was not a  
15 "plan" at all under Chapter 13 and that, in any event, the debtor had  
16 not filed the plan in good faith. The debtor argued that the plan  
17 met the requirements for confirmation because he was required to  
18 commit all of his disposable income to it for 3 years and it allowed  
19 his unsecured creditors to receive as much as they would have  
20 received had he filed a Chapter 7. The court disagreed, stating:

21 "A proposal to pay creditors nothing is not a Plan in the  
22 context of Chapter 13. The absence of a precise  
23 requirement in Section 1322 for a payout to creditors does  
24 not excuse its omission from a plan. Some distribution to  
creditors is presumed within the requirement of Section  
1321 to 'file a plan'".

25 The court concluded therefore that:  
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1 "A proposal in Chapter 13 which does not provide for some  
2 payment to creditors is not a 'plan,' it is a scheme, and  
3 it leaves its proponent deficient in meeting the simple  
4 requirement of § 1321 that "the debtor shall file a plan."

5 This court finds the rationale of the Erwin and Cook courts  
6 persuasive. The legislative purpose in providing debt repayment as  
7 Chapter 13 was to encourage debtors to keep their assets, continue to  
8 work and to repay a portion or all of their debts rather than to lose  
9 their non-exempt assets to pay, in most cases, a small portion of  
10 their indebtedness. In exchange debtors who complete such payments  
11 earn a better discharge than obtainable in Chapter 7. It would  
12 certainly not comply with the provisions of Chapter 13 to furnish a  
13 debtor who pays nothing to his creditors a better debt discharge than  
14 available in Chapter 7. Consequently, the court concludes that a  
15 plan which provides for no payments to any creditors is merely a  
16 "disguised liquidation". It is not a plan which complies with the  
17 provisions of Chapter 13 within the meaning of § 1325(a)(1).

18 The court also believes that a "no pay" plan fails to meet the  
19 good faith requirement of § 1325(a)(3). In the Ninth Circuit  
20 "bankruptcy courts must 'determine a debtor's good faith on a case-  
21 by-case basis, taking into account the particular features of each  
22 Chapter 13 plan.'" In re Porter 102 B.R. 773 (9th Cir BAP 1989).  
23 Among the factors to be considered in determining whether a plan is  
24 proposed in good faith are "whether the [debtors] acted equitably in  
25 proposing their Chapter 13 plan....whether the debtor has  
26 misrepresented facts in his plan, unfairly manipulated the Bankruptcy

1 Code or otherwise proposed his Chapter 13 plan in an inequitable  
2 manner." Id at 775. (citations omitted) "[T]he mere fact that [the  
3 debtor obtained a] previous discharge in bankruptcy within six years  
4 of filing for Chapter 13 relief does not automatically bar relief  
5 under Chapter 13." In re Baker 736 F.2d 481 (8th Cir 1984). However,  
6 a debtor may not "use Chapter 13 to circumvent the clear purpose  
7 behind section 727(a)(8) and (9), namely that liquidation not be  
8 available to a debtor who has within the preceding six years obtained  
9 a discharge in bankruptcy." Id at 482.

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11 In In re Terry 630 F2d 634 (8th Cir. 1980) the debtors proposed  
12 a plan under which they would pay nothing to their creditors. All of  
13 the creditors were unsecured and all of the debtors' property would  
14 be exempt. The bankruptcy court confirmed the plan over the  
15 trustee's objection and the trustee appealed. The Circuit court  
16 reversed the bankruptcy court stating:

17 "We cannot agree that a Chapter 13 plan to pay nothing may  
18 be in good faith. Such a plan amounts to an abuse of §  
19 1328 (granting a more generous discharge than Chapter 7)  
20 and of the spirit of the chapter, that the debtor 'make  
21 payments' under the plan.

22 Id at 634 See Also In re Strauss 184 B.R. 349 (Bankr. D. Neb.  
23 1995); In re Stone 145 B.R. 38 (Bankr. C.D. Ill. 1992) and In re  
24 Gavia 24 B.R. 573 (9th Cir. BAP 1982).

25 In this case the debtor received a Chapter 7 discharge within 6  
26 years of filing his Chapter 13. Section 727 would bar the debtor  
from obtaining a discharge in a Chapter 7 case filed on the date this

1 Chapter 13 case was commenced. The plan proposed by the debtor  
2 clearly amounts to no more than a Chapter 7 liquidation. Under these  
3 circumstances this court concludes that the debtor's plan was filed

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7 in contravention of § 1325(a)(3). For the reasons stated the  
8 confirmation of the debtor's Chapter 13 plan is denied and the case  
9 will be dismissed.  
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12 POLLY S. HIGDON  
13 Bankruptcy Judge  
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