

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>93-11588</u>
VICTOR LEE ALLEN)	
)	
Debtor)	
_____)	
)	
BARNEE C. BAXTER,)	
CHAPTER 13 TRUSTEE)	
)	
Movant)	
)	
vs.)	
)	
VICTOR LEE ALLEN)	
)	
Respondent)	

ORDER

Debtor Victor Lee Allen filed a chapter 13 petition with this court on October 1, 1993. Commercial Federal Mortgage ("Commercial Federal"), the holder of a security interest in debtor's principal residence, filed proofs of claim asserting a secured claim in the principal amount of \$56,184.22 and a secured arrearage claim in the amount of \$3,191.00. Debtor's plan proposes for debtor to continue making direct monthly payments to Commercial Federal on the principal obligation and to pay the arrearage claim without interest by distributions from the Chapter 13 trustee. Commercial Federal did not object to this proposed treatment and did

not appear through counsel at the confirmation hearing on February 14, 1994. The Chapter 13 trustee objected at hearing to debtor's proposal to pay the arrearage claim without interest. Having considered the evidence, arguments of counsel and consulted applicable authorities, I enter the following order overruling the trustee's objection.

The requirements for a plan and confirmation of a chapter 13 plan are set forth in 11 U.S.C. §§ 1322, 1325. At issue is § 1325(a)(5), the Chapter 13 "cramdown" provision.¹ The trustee contends that debtor's proposal to pay no interest on Commercial Federal's secured arrearage claim does not meet §1325(a)(5)(B)(ii)'s requirement for providing payment of "present value" - the value, of

¹11 U.S.C. § 1325(a)(5) provides:

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

. . .

(5) with respect to each allowed secured claim provided for by the plan-

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder[.]

the effective date of the plan, of the allowed secured claim. This present value provision compensates the secured claim holder for the delay in receiving full payment on its allowed claim during the plan payout period by payment of interest on the allowed claim.

"Present value" or the "time value of money" is not a legal concept, but rather is a term of art in the financial community. It simply means that a dollar received today is worth more than a dollar to be received in the future. To compensate the creditor for not receiving its money today, the debtor is charged an additional amount of money. The charge is based on a rate of interest called a "discount rate." The discount rate is used to calculate how much the creditor should be paid so it will have the same amount of money in the future as it would have had if it did not have to wait to be paid.

In re Fisher, 29 B.R. 542, 543 (Bankr. D. Kan. 1983)

The debtor does not dispute that his plan does not provide for present value of Commercial Federal's claim. However, debtor contends that when a creditor has failed to object to confirmation of a plan providing for that treatment, the creditor has accepted the plan under § 1325(a)(5)(A), and the trustee lacks standing to object to the plan on § 1325(a)(5)(B) grounds. For the following reasons, I agree with debtor's conclusion.²

²I do not reach debtor's alternative contention that an undersecured mortgage holder is not entitled to payment of interest on the arrearage claim under the authority of Rake v. Wade, 113 S.Ct. 2187 (1993). Debtor's schedules value the house at \$52,500.00, an amount less than Commercial Federal's allowed secured principal claim of \$56,184.22. No other evidence of value of debtor's residence has been presented during debtor's chapter 13 case.

In support of his contentions, debtor relies upon the cases of In re Szostek, 886 F.2d 1405 (3d Cir. 1989) and In re Brown, 108 B.R. 738 (Bankr. C.D. Cal. 1989). In Szostek, a debtor's plan which provided for payment of a creditor's allowed secured claim without interest was confirmed without objection by the creditor or the chapter 13 trustee. The Szostek court held that, in the absence of fraud, a creditor could not have the plan modified or revoked because the plan did not provide for present value on his claim when the creditor failed to timely object to the plan. 886 F.2d at 1413.

According to the Szostek court, the creditor's failure to timely object to confirmation constitutes acceptance of the plan. The court found that this was the general rule and that no affirmative act need be taken by a creditor to accept a plan. Id.

[T]o hold otherwise would be to endorse the proposition that a creditor may sit idly by, not participate in any manner in the formulation and adoption of the plan in reorganization and thereafter, subsequent to the adoption of the plan, raise a challenge for the first time. Adoption of (this) approach would effectively place all reorganization plans at risk in terms of reliance and finality.

Id. (quoting In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988) (Chapter 11 plan)). With respect to chapter 13 plan confirmation, the requirement that a creditor act or accept the consequences of a confirmed plan is implicit in the res judicata

effect given to confirmed plans under § 1327(a).³

The binding effect of the confirmation order establishes the rights of the debtor and creditors as those which are provided in the plan. It is therefore incumbent upon creditors with notice of the chapter 13 case to review the plan and object to the plan if they believe it to be improper; they may ignore the confirmation hearing only at their peril.

. . .
It is quite clear that the binding effect of a chapter 13 plan extends to any issue . . . necessarily determined by the confirmation order, including whether the plan complies with sections 1322 and 1325 of the Bankruptcy Code. For example, a creditor may not after confirmation assert that the plan was not filed in good faith, as required by section 1325(a)(3); that the creditor should have been paid interest; that the debtor is ineligible for chapter 13 relief; or that the plan is otherwise inconsistent with the Code in violation of section 1322(b)(10) or section 1325(a)(1).

5 Collier on Bankruptcy ¶ 1327.01 at 1327-2 to -4 (L. King, 15th ed. 1994).

Commercial Federal was duly served by the clerk's office of this court with the Notice of Meeting of Creditors containing the provisions of debtor's plan, the date of the confirmation hearing, and the requirement that an written objection to the plan be filed

³11 U.S.C. § 1327(a) provides:

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or has rejected the plan.

five days prior to confirmation. Once a creditor has received notice of a debtor's intention towards its claim, the creditor "bears the burden of taking affirmative steps to evaluate, advance, and protect its rights." In re Walker, 128 B.R. 465, 468 (Bankr. D. Idaho 1991). I find that Commercial Federal's failure to object to the debtor's proposed treatment of its claim prior to confirmation constituted acceptance of that plan under § 1325(a)(5)(A).

The issue remaining is what effect that acceptance has on the trustee's standing to object to the debtor's failure to provide for payment of interest on Commercial Federal's secured arrearage claim. The key to resolution of this matter lies in a proper determination of when a plan meets the confirmation requirement of § 1325(a)(5) and the role of the trustee in regard to that determination.

When a Bankruptcy Code section is structured as § 1325(a)(5) so that the word "or" is placed between the last two divisions of that section, courts have consistently held that the provision is disjunctive and the requirement of that section is satisfied by any of the alternative grounds provided therein. See In re Easton, 59 B.R. 714 (Bankr. C.D. Ill. 1986) (§507(a)(7)(A)(i)-(iii)); In re Etheridge, 91 B.R. 842 (Bankr. C.D. Ill. 1988), aff'd sub nom, Etheridge v. State of Illinois, 127 B.R. 421 (C.D. Ill. 1989) (§507(a)(7)(A)-(G)).⁴ Accordingly, under § 1325(a)(5), a

⁴These cases are based in part on the rule of construction found in 11 U.S.C. § 102(5) that provides in title 11 the word "or"

plan's treatment of an allowed secured claim may be confirmed if any one of three alternative conditions set forth in subparagraphs (i)-(iii) of that section are met: (1) the secured claim holder has accepted the plan; or (2) the plan surrenders to the claim holder the collateral securing the claim; or (3) the plan provides that the claim holder retain the lien securing the claim and provides for payment of "present value." 5 Norton Bankruptcy Law & Practice 2d § 122:8 at 122-52 (W. Norton ed. 1994).

The effect of this construction of § 1325(a)(5) and of a creditor's failure to object to debtor's plan (i.e. Commercial Federal) is made explicit in Szostek:

Where acceptance [of the plan] under that subsection [(A)] exists, the requirement for present value need not be satisfied, since only one of the three requirements of § 1325(a)(5) need be met.

886 F.2d at 1412-13 (citation omitted). Accordingly, a chapter 13 trustee's standing to object to the failure of a debtor's plan to pay present value on a secured creditor's claim is rendered moot by such acceptance.

If holders of allowed secured claims have accepted the plan, § 1325(a)[(5)] has been satisfied. Whether the provisions of § 1325(a)(5)(B) have also been complied with then becomes irrelevant.

. . . [t]here is no indication that Congress intended that the Trustee be empowered to thwart the effect of acceptance. If a holder

is not exclusive.

of a secured claim objects, then the plan may be confirmed over that creditor's objection if the plan fulfills the requirements of § 1325(a)(5)(B) or (C) [assuming the plan meets all other requirements].

In re: Brown 108 B.R. at 740.⁵

This ruling does not affect the right of the trustee to object to confirmation on any other grounds. Bankruptcy Code § 1324 provides that any party in interest may object to confirmation of a

⁵The court in Brown based its analysis on alternative grounds: that § 1325(a)(5) provides for independent alternative bases for confirmation as outlined supra and that the language of § 1325(b) precludes a trustee from objecting on § 1325(a)(5) grounds. This second conclusion is adequately refuted by the court in In re Andrews, 155 B.R. 769 (Bankr. 9th Cir. 1993), as evidenced by the following exchange.

"A comparison of the language of subsections § 1325(a)(5) and § 1325(b) reveals that Congress did not intend to allow the Trustee to object to confirmation on the grounds asserted here. Section 1325(b)(1) states that the Trustee of holders of allowed unsecured claims may object to confirmation of the plan if certain criteria pertaining to unsecured claims are not satisfied. Contrariwise, § 1325(a)(5) dealing with secured claims, makes no provision for objections to plan confirmation by the Trustee on any grounds." Brown, at 739 (emphasis in original).

"However, § 1325(b) can also be read to mean that Congress intended merely to limit the objections under § 1325(b)(1) to a restricted class, including only the Chapter 13 trustee and unsecured creditors, where other sections, such as § 1325(a)(5) are not so restricted. We believe this to be the better reading." Andrews, at 771.

chapter 13 plan. 11 U.S.C. § 1324. Although party in interest is not defined in § 1324 or in § 101, a trustee is a party in interest with standing to raise an objection to confirmation. In re Andrews, 155 B.R. 769, 770 (Bankr. 9th Cir. 1993); In re Stein, 91 B.R. 796 (Bankr. S.D. Ohio 1988); In re Colandrea, 17 B.R. 568, 582 (Bankr. D. Md. 1982); In re Erwin, 10 B.R. 138 (Bankr. D. Colo. 1981). Any other view would render meaningless the statutory mandate provided in 11 U.S.C. § 1302(b)(2) that the chapter 13 trustee "appear and be heard" at any confirmation hearing. Thus, the chapter 13 trustee is free to and has a duty to object to a plan treatment of any allowed secured claim if that treatment does not otherwise comply with all applicable Code provisions under § 1325(a)(1) or with any other provision of § 1322 and § 1325, apart from § 1325(a)(5)(B) where as here the holder of the secured claim accepts the plan. See Andrews, at 771-72.

Likewise, this ruling does not alter the trustee's duties under Bankruptcy Local Rule 8 of this district.⁶ Under that rule,

⁶Local Rule 8 requires a secured creditor's claims to be filed for the net principal balance only as of the date of debtor's filing and was instituted to prevent filing of claims including unmatured interest. To effectuate the rule and provide for a common interest rate to be applied to secured claims, the rule provides, in pertinent part:

Unless otherwise ordered by the Bankruptcy Judge, the Chapter 13 Trustee is directed to pay interest at a rate of 12% per annum on all allowed secured claims and is further directed to file objections to or to notify debtor's counsel with respect to any claim which is not filed in accordance with the

the trustee is directed to pay interest at 12% per annum on all allowed secured claims "unless otherwise ordered by the Bankruptcy Judge." As explained in In re Washington, Chapter 13 Case No. 89-11840, slip op. at 4 (Bankr. S.D. Ga. April 2, 1990) (Dalis, B.J.), if a debtor through the plan or a secured creditor by motion proposes an interest rate to be paid on the creditor's allowed secured claim, the proper rate will be determined at the confirmation hearing and established by order of confirmation. In such cases, the trustee need not seek to have the claim paid at 12% interest as the order of confirmation will meet the "unless ordered by the Bankruptcy Judge" requirement. Id. "Bankruptcy Local Rule 8 only applies in the situation where the chapter 13 trustee lacks guidance from any party in interest as to the rate of interest to be applied." Id.

Finally, I note that nothing in the recent Supreme Court decision of Rake, supra, mandates a different result in this case. In Rake the Court held that an oversecured creditor was entitled to preconfirmation interest on mortgage arrearage claims pursuant to 11 U.S.C. § 506(b) and postconfirmation interest on those claims under § 1325(a)(5)(B). 113 S.Ct. at 2193. However, in that case the creditor objected to the plan's proposal not to pay interest on its allowed secured claims. Consequently, the Court did not consider the procedural issue addressed in this case: whether a creditor is

terms of this order.

entitled to postconfirmation interest on an allowed secured claim when only a chapter 13 trustee objects to a plan proposing to pay no interest on that claim. The Court does state, however, that . . . "unless the creditor accepts the plan or the debtor surrenders the collateral to the creditor, § 1325(a)(5)(B)(ii) guarantees that property distributed under the plan on account of a claim, . . . including deferred cash payments in satisfaction of the claim, must equal the present dollar value of such claim as of the confirmation date." Rake, at 2191. This statement supports the interpretation advanced in this order that § 1325(a)(5) provides alternative grounds for satisfaction of the confirmation requirement of that section.

It is therefore ORDERED that the chapter 13 trustee's objection to confirmation of debtor's plan is overruled. Confirmation is approved.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this _____ day of June, 1994.