#### MORTGAGEES' CONCERNS REGARDING CHAPTER 13 PLAN CONFIRMATION

# Lou Jones Breakfast Club November 10, 2009

# Jay Pitner Gray & Associates, LLP

#### I. Claim v. Plan

- a. 11 U.S.C. §502(a): "A claim or interest, proof of which is filed under §501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects".
- b. 11 U.S.C. §1327(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 not such creditor has objected to, has accepted, or has rejected the plan".
- c. <u>In re: Michael D. Smith</u>, Case No. 06-20127, 2007 WL 1544366 (Bankr. ED Wis. 2007).
  - i. Chronology:
    - Proof of claim filed
    - Chapter 13 plan filed and served
    - No objection
    - Plan confirmed
  - ii. Decision limited to its facts? You be the judge: "This Court's ruling applies to the factual scenario in the case before it...".
- d. In re: Daniel and Kimberly Stoltz, Case No. 07-22864
  - i. Plan language:

"Claims Generally. The amounts listed for claims in this plan are based upon Debtor's best estimate and belief. Nothing herein prohibits a creditor from filing a proof of claim in a different amount. Objections to claims may be filed before or after confirmation."

- ii. "It is likely that the Smith decision prompted the creditor's objection..."
- iii. Warning contained in debtors' plan: "Confirmation of this Plan by the Bankruptcy Court may modify your rights by providing for payments of less than the full amount of your claim and/or by setting the interest rate on your claim in the absence of an interest rate stated on a filed claim".

- iv. Debtors' intent good, but not good enough.
- v. Conclusion: "...the Court concludes that in order to provide the creditor with the protection it seeks, the debtors in this case must amend their plan either to insert language indicating clearly that the proof of claim controls, or to put the amount contained in the proof of claim in the plan."
- e. In re: Erma L. Averhart, Case No. 06-23216
  - i. Chronology:
    - Chapter 13 plan filed and served
    - Creditor objected to plan
    - Chapter 13 plan amended (objectionable part of original plan unchanged)
    - No objection
    - Plan confirmed
  - ii. "Wells Fargo is a sophisticated creditor. It either knew or should have known that it had a duty to object to any plan containing terms detrimental to its position. As pointed out in the earlier portion of this decision, a secured creditor cannot ignore proceedings which affect its rights."
  - iii. Indeed. See exhibit A.
  - iv. <u>In re: Escobedo</u> distinguished: The chapter 13 plan must provide for full payment of priority claims, a "mandatory requirement for confirmation".
- f. <u>In re: Escobedo</u>: 28 F3rd 34 (7<sup>th</sup> Cir. 1994)
  - i. Cited in Smith
  - ii. Narrowly interpreted in <u>Averhart</u> limited solely to §1322(a) mandatory requirements
  - iii. Chronology:
    - All creditors received notice of hearing on plan confirmation
    - Plan confirmed
    - Late objection by trustee requested repayment of significant administrative and tax claims
    - Court granted trustee's request
    - Debtor never modified plan to provide for payment of administrative and tax claims
    - Five years after plan's confirmation and two years after debtor's last payment, trustee petitioned court to modify plan's payment schedule or dismiss the plan

iv. "A bankruptcy court lacks the authority to confirm any plan unless it 'complies with the provisions of this chapter and with the other applicable provisions of this title' 11 U.S.C. §1325(a)(1). As all the parties to this suit concede, Debtor's proposed plan did not comply with §1322(a)(2). As a result of this failure, any supposed confirmation was nugatory and properly dismissed".

"We conclude that this Plan was invalid for failing to include the mandatory provisions of §1322(a)(2), and has no *res judicata* effect as to the omitted priority claims".

#### g. <u>In re: Ruth Carr</u>: 318 BR 517 (Bankr. WD Wis. 2004)

## i. Chronology:

- Plan provided for payments to undersecured mortgagee based upon appraised value of residence and treated remainder of mortgagee's claim as unsecured.
- No objection to confirmation
- Plan confirmed
- Creditor filed motion to vacate order confirming plan, arguing that court lacked authority to confirm plan because the plan violated §1322(b)(2) and 1325(a)(5)
- ii. "A plan whose terms violate the Code cannot be allowed to trump a presumptively valid secured claim."
- iii. "Section 1322(b)(2) is mandatory in restricting the right to modify the claim of secured creditor whose solely security is the debtor's principal residence. As in Escobedo, the provisions of the plan in this case do not comply with the mandatory provisions of the Code. Therefore, the result of this case must be the same as the result in Escobedo the debtor's plan confirmation must be deemed nugatory. In Escobedo, the Seventh Circuit appears to have rejected 'you snooze, you loose' doctrine. There would be no justice in applying that doctrine here".

# II. Consumer Law Boot Camp Provisions: "Kool-Aid anyone?"

- a. Payment application provisions.
  - i. Plan language dictating how payments are to be applied to debtor's account.
  - ii. Most mortgages have a paragraph dictating how funds are to be credited to the account.

#### iii. 11 U.S.C. §1322(b)(2)

- iv. <u>In re: Anderson</u>, 382 BR 496 (Bankr. D. Or. 2008): plan confirmation denied where plan required mortgage lender to apply payments in specific manner and provide remedies to debtor in the event the creditor misapplied payments as required by plan.
- v. <u>In re: Aldrich</u>, 2008 Bankr. LEXIS 2278 (Bankr. ND Iowa September 4, 2008): a plan provision attempting to monitor and regulate post-confirmation mortgage charges could not be confirmed.

# b. "Deemed current" provisions

## i. Plan language:

"Holders and/or servicers of mortgage claims shall deem the prepetition arrearages as contractually current upon confirmation of the plan".

# ii. Judge McGarity

"I agree that the mortgage cannot be actually current until any pre-petition default is cured and all postpetition payments that have come due are paid; but like the *Collins* and *Emery* courts, I interpret the word "deem" to mean that the debt is "treated as if" it were current for the purpose of assessing late fees or commencing foreclosure proceedings, not that the debt actually is current. This is not the precise dictation definition of "deem", but it is close enough to allow such an interpretation in this context. The provision in the plans is allowed as interpreted by this court, but future plans might be less likely to draw objection if the provision stated that the mortgage holder upon confirmation would treat the debt as if it were contractually current for the purpose of assessing penalties or remedies, or words to that effect." In re: Patton, 2008 Bankr. LEXIS 3426 (Bankr. E.D. Wis. Nov. 19, 2008).

# iii. Judge Shapiro

Sustained creditor's objection to confirmation. <u>In re: Rheinschmidt</u>, Case No. 08-27049, <u>In re: Johnson</u>, Case No. 08-26796, <u>In re: McFarland</u>, Case No. 08-30947, court minutes of December 16, 2008 hearing.

#### iv. Judge Kelley

"This Court agrees that the language as drafted should be revised. As [two bankruptcy decisions from Colorado] recognize, the mortgage is not "current" until the debtor completes the Plan, and, as Judge McGarity

noted, if the purpose of the provision is to prevent the assessment of late charges or "junk" charges, the Plan could easily say so. After the hearing, Wells Fargo's attorney supplemented his Objection with a letter, stating that the Bank would have no objection to the provision if it were modified in accordance with the Debtors' attorney's explanation at the hearing. Modifying this Plan, and others going forward, should eliminate future disputes over this language". In re: Coria, Case No. 09-30946, decision dated October 7, 2009.

#### v. Judge Pepper

- A. "The Court first found that this language did not modify the mortgage holder's rights under the mortgage contract (which modification would have violated §1322(b)), but only the mortgage holder's *claim* amount. The Court concluded that requiring the creditor to "deem" the prepetition arrearage "current" as of confirmation simply required the creditor to stop assessing default penalties, such as late fees and interest. Accordingly, the Court overruled Aurora Loan Services, LLC's objection to confirmation of the Chapter 13 plan to extent that the basis for the objection was the language requiring the creditor to "deem" the arrearage "current" as of confirmation. In re: Jackson, Case No. 09-30952, court minutes of October 13, 2009 hearing.
- B. "This debtor's plan required holders or services of mortgage debt '... to deem the prepetition arrearages as contractually cured by confirmation...'. The Court opined that requiring a creditor to deem a pre-petition arrearage "cured" as of confirmation was not the same as requiring a creditor to deem a prepetition arrearage "current" as of confirmation. While the Court concluded in the <u>Jackson</u> matter that requiring a creditor to deem prepetition arrears "current" as of confirmation meant only that late fees and other default charges could not continue to accrue, requiring a creditor to deem the prepetition arrears "cured" as of confirmation implied that those arrears had been paid in full as of confirmation, which was not the case. Accordingly, the Court stated that it was sustaining the creditor's objection to confirmation of this plan". <u>In re: Schofield</u>, Case No. 09-30928, court minutes of October 13, 2009 hearing.

# c. Provisions allegedly justified by 11 U.S.C. §524

#### i. Plan language:

A. "The debtor(s) specifically invokes and intends for these plan provisions to invoke and to reserve the debtor(s) rights under the provisions of 11 U.S.C. Section 524(i)".

- B. "...and to otherwise comply with 11 U.S.C. Section 524(i)."
- ii. 11 U.S.C. §524(i): "The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in a manner required by the plan cause material injury to the debtor".
- iii. "I am not persuaded that this subjection authorizes the proposed plan language at issue; it merely provides debtors with a post-discharge remedy in the event the creditor willfully fails to credit payments received under a confirmed plan. The statute, with the remedy it provides, refers specifically to a violation of the injunction under 11 U.S.C. §524(a)(2), which would not go into effect until after successful completion of the plan, but it has nothing to do with plan provisions. See In re: Anderson, 382 BR 496, 503 (Bankr. D. Or. 2008); In re: Collins, 2007 WL 2116416, 4 (Bankr. E.D. Tenn. July 19, 2007)". In re: Patton, supra.
- d. Mortgage current upon discharge provisions.
  - i. Plan language:

"Unless the Court orders otherwise, an order granting a discharge in this case shall be a determination that all pre-petition defaults with respect to the debtors' mortgage have been cured, and that the debtors' mortgage account is deemed current and reinstated on the original payment schedule under the note and security agreement as if no default had ever occurred".

ii. "...such a provision impermissibly assumes at that time of discharge that the arrearage has been cured in full and no postpetition charges or regular payments to the secured creditor have been missed. It is possible that in the last few months of a plan, a creditor might not bring a default to the attention of the bankruptcy court with a motion for relief from stay, preferring instead to address the matter with the debtor or in state court later. Or the annual charge notification was less than a year before the discharge, and the creditor had to put forced-placed insurance on the property, or perhaps the debtor incurred late fees. This provision in the proposed plans is not allowed". In re: Patton, supra.

## III. Revesting

- a. 11 U.S.C. §348(f)(1): "Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title
  - i. property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;"
- b. 11 U.S.C. §1327(b): "Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor".
- c. In re: Daniel and Kimberly Stoltz, supra.
  - i. Plan language:

"Property of the Estate. Property of the estate shall revest in the Debtor upon discharge, conversion, dismissal or other order of the court"

- ii. "...what is a creditor to make of a plan that provides for revesting at three alternative points—discharge (which is an option a debtor could elect, but is by no means automatic), conversion (which is an incorrect statement of law), or dismissal (which is a given under the code)—and that makes no mention of whether the debtor elects to have the property revest in confirmation?"
- iii. "...the Court cannot ...find that the language regarding revesting makes it clear when the estate property will revest in the debtor".

NONE- (B).	Claims Sac	ured by Real Proper	ty Which Debtor In	tends to Retai	'n	
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(C). Surrender of Collateral. This Plan shall serve as notice to creditor(s) of Debtor's intent to surrender the following collateral. Any secured claim filed by a secured lien holder whose collateral is surrendered at or before confirmation will have their secured claim treated as satisfied in full by the surrender of the collateral.

(a) Creditor	(b) Collateral to be surrendered
-NONE-	

### 7. Unsecured Claims.

- (A). Debtor estimates that the total of general unsecured debt not separately classified in paragraph (b) below is \$ 17.521.00 . After all other classes have been paid, Trustee will pay to the creditors with allowed general unsecured claims a pro rata share of \$ 3,679.67 or 21 %, whichever is greater.
- (B). Special classes of unsecured claims: None

Total Unsecured Claims to Be Paid Through the Plan: \$3679.67