UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re
Earl N. Luckett and
Barbara J. Luckett,
Debtors.

Case No. 07-24706-svk

(Chapter 13)

ORDER DENYING CONFIRMATION OF PLAN

The Debtors filed a First Amended Chapter 13 Plan dated August 9, 2007 (the "Plan"). Argent Mortgage Company, LLC ("AMC") holds a mortgage on the Debtors' duplex located on 39th Street in Milwaukee. The Plan proposes (1) to reduce and fix AMC's interest on its claim at 8% per annum;[1] (2) to provide AMC with adequate protection payments for the life of the Plan in the amount of $685.83 per month, consisting of interest, real estate tax escrow and hazard insurance; and (3) a balloon payment to pay the secured claim of AMC in full from the sale or refinance of the duplex between the 35th and 39th months after confirmation of the Plan. The Chapter 13 Trustee and AMC filed objections to confirmation of the plan, and a hearing was held at which the Debtor and a mortgage broker testified. At the conclusion of the hearing the Court denied confirmation of the Plan. This Order memorializes the Court's decision and constitutes findings of fact and conclusions of law as required by Bankruptcy Rule 7052, incorporated in this contested matter by Bankruptcy Rule 9014.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) completely rewrote 11 U.S.C. § 1325(a)(5)(B). That section now provides that if the holder of a secured claim does not accept the plan or the debtor does not surrender the property securing the claim to the holder, then the holder of the claim must retain its lien until payment in full or discharge. Under Subsection (B)(ii), the value, as of the effective date of the plan, of property to be distributed on a secured claim may not be less than the allowed amount of the claim, and subsection (B)(iii)(I), at issue in this case, states: "if property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts."

The Debtors argue that making adequate protection payments of $685 per month followed by one balloon payment at the end of the plan does not constitute "periodic payments." They assert that the adequate protection payments serve as both compensation to AMC for the Debtors' use of the collateral and protection of AMC's interest in the collateral until AMC is paid in full in the 36th month of the Plan.

[1] The Debtors' attorney indicated that the AMC mortgage is an adjustable rate mortgage, which had a higher rate than 8% and was expected to continue to increase. The Debtor's attorney and AMC's attorney had agreed that if a fixed rate was approved by the Court, the amount would be 9.25%, instead of 8%.

This is a novel use of the adequate protection provisions of 11 U.S.C. § 361. Adequate protection is designed to protect creditors from the delays caused by the automatic stay and the dangers inherent in the debtor's use of depreciating collateral. As aptly explained by the Bankruptcy Court for the Southern District of Texas: "The very heart of the concept of adequate protection is to assure the secured creditor that as the bankruptcy procedures unfold he will not be faced with a decrease in the value of his collateral." *In re Born*, 10 B.R. 43, 48 (Bankr. S.D. Tex. 1981). Although the provision of adequate protection is appropriate in Chapter 13 and is even required for claims secured by personal property,[2] a plan that proposes adequate protection payments to a creditor secured by non-depreciating collateral for a 35 month period and then a lump sum to pay off the balance of the claim in the 36th month violates the equal monthly payment requirement of § 1325(a)(5)(B)(iii)(I).

The courts that have considered the "equal monthly payment" requirement have all agreed that balloon payments are not allowed over the objection of the secured creditor. *See, e.g., In re Schultz*, 363 B.R. 902 (Bankr. E.D. Wis. 2007); *In re Lemieux*, 347 B.R. 460 (Bankr. D. Mass. 2006); *In re Wagner*, 342 B.R. 766 (Bankr. E.D. Tenn. 2006). The Bankruptcy Court for the Central District of Illinois recently summarized the rationale for these decisions:

> The results of these cases are readily explainable when the remedial purpose of the equal payment provision is considered. Prior to BAPCPA, it was not uncommon for some Chapter 13 plans to provide for backloaded payments, such as balloon payments. Another form of backloading involved graduated or step-up payment plans, where the payments started out smaller and increased over time. Secured creditors, particularly those secured by a vehicle, viewed this as unfair, exposing them to undue risk in light of the constant depreciation of their collateral.
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> Other plans, filed by debtors whose employment is seasonal, provided for reduced payments or no payments at all during certain months of the year, or called for payments to be made quarterly or semi-annually, rather than monthly, based upon the peculiarities of the debtor's income stream. Secured creditors had similar complaints with those plans.
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> In response to those creditor concerns, Congress enacted the equal payment provision and a companion provision extending the concept of adequate

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[2] 11 U.S.C. § 1325(a)(5)(B)(iii)(II) requires that if the holder of the claim is secured by personal property, the amount of the periodic payments must be sufficient to provide adequate protection during the term of plan. This suggests that post-confirmation adequate protection is meant to ensure that a creditor secured by depreciating collateral is paid in installments large enough to cover the diminution in value over the life of the plan. Nothing in this provision nor in any case located by the Court sanctions a plan providing for 36 adequate protection payments followed by one balloon payment that pays the claim in full.

> protection, formerly a preconfirmation requirement, to postconfirmation plan payments. 11 U.S.C. § 1325(a)(5)(B)(iii)(II). The equal payment provision prevents debtors from backloading payments to secured creditors or paying them other than on a monthly basis.

In re Erwin, 2007 Bankr. LEXIS 3331, 7-8 (Bankr. C.D. Ill. October 1, 2007).

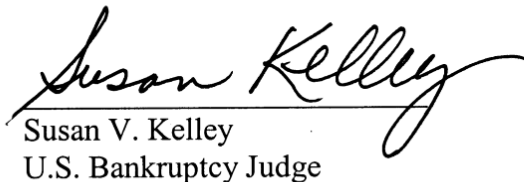
The Debtors have focused on the word "if" in § 1325(a)(5)(B)(iii), suggesting that by stating that *if* the property is distributed in periodic payments, the payments must be equal, Congress is suggesting that there are alternatives to paying a secured claim in full other than with periodic payments. That may be true, but rather than Congress envisioning a proposal for 36 months of adequate protection and a balloon payment at the end of the plan, the Court interprets this provision to allow treatment in the form of one lump sum payment in the full amount of the claim on the effective date of the plan.

The Plan in this case proposes to pay the value, as of the effective date of the plan, of AMC's allowed secured claim. Part of that payment is the interest component of the Debtors' monthly adequate protection payment.[3] Accordingly, the Plan distributes property (the interest payments) to AMC pursuant to § 1325(a)(5)(B), and that property is in the form of periodic payments. Calling the property distributed on the claim "adequate protection payments" does not change the fact that this is property distributed on the claim. If made over time, the distributions of the property on the claim must be in equal monthly amounts, and, unless AMC consents, the balloon payment at the end of the Plan will not satisfy this requirement.

For the foregoing reasons, it is therefore Ordered: that confirmation of the Plan is denied.

Dated: October 24, 2007

By the Court:



Susan V. Kelley
U.S. Bankruptcy Judge

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[3] The Debtors must propose to pay interest on the claim, or the Plan would violate § 1325(a)(5)(B)(ii), requiring the property distributed to be of a value to pay the claim in full "as of the effective date of the plan." The interest component allows a creditor who is paid over time to receive the present value of its claim on the effective date of the plan. *See Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).