UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

IN RE:	)	CASE NO. 91-30025-INH
	)	
MARVIN F. OLSON and	)	CHAPTER 13
BEVERLY E. OLSON,	)	
	)	MEMORANDUM OF DECISION RE:
	)	CONFIRMATION OF AMENDED
Debtors.	)	CHAPTER 13 PLAN

The matter before the Court is the confirmation of Debtors' amended Chapter 13 plan and the objections thereto by Farmers Home Administration. This is a core proceeding under 28 U.S.C. § 157(b)(2). This ruling shall constitute Findings and Conclusions as required by F.R.Bankr.P. 7052.

I.

On January 23, 1978, Debtors Marvin F. and Beverly E. Olson (Debtors) executed two promissory notes to Farmers Home Administration for loans made to them. The first loan was for $11,690.00 repayable at three percent interest over twenty years. The last payment is due January 1, 1998. As of January 1, 1991, Debtors were delinquent on this note in the sum of $6,288.00 and $5,218.06 was not yet due. The second loan on January 23, 1978 was for $20,300.00 repayable at eight percent interest over forty years. The last payment is due January 1, 2018. As of January 1, 1991, Debtors were delinquent on this second note in the sum of $13,624.00 and $17,550.95 was not yet due.

Debtors gave FmHA a mortgage on certain real property on January 23, 1978 to secure the two notes executed that day. On June 5, 1979, FmHA filed with the Tripp/Todd County Register of Deeds a UCC-1 form regarding the mortgage.

Debtors obtained another loan from FmHA on June 4, 1979 for $7,000.00. That note was secured by some crops no longer in existence. The note was rescheduled for $3,718.58 on December 30, 1981. Debtors gave FmHA a mortgage in the same quarter of land that secured the January 23, 1978 notes to secure the December 31, 1981 note. The note was rescheduled again on March 29, 1983 for $4,374.78 at ten and a quarter percent interest over seven years. The first payment was due January 1, 1984 and the last payment was due January 1, 1990. Debtors have never made any payments on this note and as of January 1, 1991 they were delinquent in the sum of $7,855.22. FmHA claims this note is secured by the December 30, 1981 real estate mortgage.

FmHA accelerated all three notes by Notice dated August 8, 1990. FmHA has not obtained a judgment of foreclosure under the mortgages.

Debtors Marvin F. and Beverly E. Olson filed a Chapter 13 petition on March 27, 1991. They filed their Chapter 13 Plan on April 5, 1991. Chapter 13 Trustee Rick A. Yarnall (Trustee) and FmHA filed several objections to the plan. On June 7, 1991, Debtors filed an amended plan so the confirmation hearing on the original plan scheduled for June 11, 1991 was rescheduled to July 16, 1991.

Debtors' amended plan states FmHA's total claim is $50,847.73. Debtors value FmHA's secured claim at $36,000.00 and offer to repay $11,683.96 at eight and three-quarters percent interest over six years and $24,316.06 at eight and three-quarters percent interest

over twenty-six years. Debtors' payment to FmHA would be $406.97 for the first six years and $197.81 for the remaining twenty years. Debtors propose to pay FmHA's remaining unsecured claim of $14,847.71 from disposable income.

At the rescheduled confirmation hearing held July 16, 1991, the parties agreed to brief the legal question of how Debtors had to repay the deficiency on their mortgage to FmHA under 11 U.S.C. § 1322. Two exhibits were introduced by FmHA: 1) a statement summarizing the status of Debtors' three notes with FmHA and 2) a copy of the notice of acceleration. The parties agreed that: the fair market value of the property securing FmHA's claim is $36,000.00; that the appropriate interest rate to be paid under the plan on FmHA's secured claim is eight and three-quarters percent; and that FmHA's total claim is $50,846.73. According to the exhibits and FmHA's proof of claim, the payments of principal and interest not yet due on January 1, 1991 [absent the acceleration] total $22,769.01. Principal and interest payments in arrears total $27,767.22.[1]

Briefs from Debtors, FmHA, and Trustee were received in August, 1991. Upon review of the briefs, the Court determined that the factual question of whether FmHA's secured claim was "secured only by a security interest in real property that is [Debtors'] principal residence" as set forth in 11 U.S.C. § 1322(b)(2) needed

[1] The Court attributes the $310.50 difference in the agreed value of FmHA's total claim from those set forth on Exhibit A and FmHA's proof of claim to the difference in the dates the values were computed.

to be resolved first. By Order entered September 12, 1991, an evidentiary hearing was scheduled for October 8, 1991.

At the October 8, 1991 hearing, FmHA conceded that property other than Debtors' principal residence secured its claim and, consequently, the exception from modification of a secured claim as provided by § 1322(b)(2) did not apply. FmHA continues to argue, however, that 11 U.S.C. §§ 1322(b)(3) and 1322(b)(5) demand that Debtors include the deficiency as part of the secured claim and either cure the default or pay the balance of the mortgage within the term of the plan. Counsel for FmHA cited additional authority on that issue and Debtors were given five days to respond. Debtors' supplemental brief was filed on October 18, 1991 and FmHA's supplemental reply brief was filed October 24, 1991. The Court took under advisement the issue of how FmHA's deficiency had to be treated under §§ 1322(b)(3) and 1322(b)(5). Clarification of the numbers set forth on FmHA's exhibits was obtained from counsel for FmHA with the consent of Debtors' counsel on January 6, 1992. A discrepancy between FmHA's proof of claim and their exhibits was also brought to counsels' attention in early January, 1992. In response, FmHA filed on an affidavit by Elizabeth B. Senter, the FmHA County Supervisor for Tripp County, with attachments, that detailed Debtors' loan history with FmHA.

II.

Under the Bankruptcy Code, a secured claim "is secured only to the extent of the value of the property on which the lien is fixed; the remainder of that claim is considered unsecured." In re

Bellamy, 132 B.R. 810, 812 (D. Conn. 1991)(quoting United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 239 (1989)). If a secured claim holder does not agree to the treatment offered in a Chapter 13 plan or if the secured property is not returned to the secured claim holder, then a Chapter 13 plan may modify the secured claim **if** the secured claim holder retains his lien on the property **and** he receives the present value of his secured claim over the three to five year life of the plan. 11 U.S.C. §§ 1322(b)(2) and 1325(a)(5)[2]; In re Catlin, 81 B.R. 522, 525 (Bankr. D. Minn. 1987). A Chapter 13 plan also may cure a default on a secured claim over the three to five year life of the plan. 11 U.S.C. § 1322(b)(3); Justice v. Valley National Bank, 849 F.2d 1078, 1084 (8th Cir. 1988)[3]. If the last payment on a secured claim will come due after the last payment under the Chapter 13 plan is due, the Chapter 13 plan may cure the arrearage on that long-term secured claim within a reasonable time and continue making regular payments on the remainder of the secured claim as the payments become due. 11 U.S.C. § 1322(b)(5). As long as the mortgage contract has not been dissolved and a foreclose sale has not taken place, a mortgage

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[2] The majority of cases on this issue address the treatment of home mortgage claims and the exception from modification of these claims provided by 11 U.S.C. § 1323(b)(2). That exception is not at issue here.

[3] In Justice v. Valley National Bank, 849 F.2d 1078, 1084 (8th Cir. 1988), the Court analyzed 11 U.S.C. §§ 1222(b)(2), 1222(b)(3), and 1222(b)(5) based on Chapter 13 law because of the similarity between those sections and §§ 1322(b)(2), 1322(b)(3), and 1322(b)(5).

default may be cured under § 1322(b)(5), even after contractual acceleration. Justice, 849 F.2d at 1082-88. If a secured claim is not a long-term debt under § 1322(b)(5) on which payments may be made beyond the plan term, then the secured claim **must** be treated over the life of the plan. 11 U.S.C. § 1322(c); In re Session, 128 B.R. 147, 151 (Bankr. E.D. Tex. 1991); In re Scott, 121 B.R. 605, 608 (Bankr. E.D. Okla. 1990); see also In re Cole, 122 B.R. 943, 949-51 (Bankr. E.D. Pa. 1991).

III.

In conflict with 11 U.S.C. § 1322(b)(5), Debtors have proposed a plan that repays a secured claim over a period of years which exceeds the term of the plan without curing the arrearage on that long-term debt. Section 1322(b)(5) states regular payments on a long-term debt may be maintained under the original agreement beyond the life of the plan **if** the arrearage is cured during the plan. Debtors' plan neither maintains all the original repayment terms of its long-term debts to FmHA nor cures the arrearage on those long-term debts. Instead, Debtors have modified both the repayment terms and the rate of interest on the notes and have relegated the arrearage on the notes to payment by disposable income. A "long-term cram down" is not an available option. Debtors must either pay the secured claim within the term of the plan as required by § 1325(a)(5)(B) or cure under § 1322(b)(5) by paying the arrearage within the plan term and maintaining payments pursuant to the original terms of the notes. Sessions, 128 B.R. at

152-53 (citations therein).

If Debtors elect to cure under § 1322(b)(5), in essence their original notes with FmHA are reinstated: the arrearage must be cured within the plan (or a reasonable time) and the payments which accrue post-petition must be paid according to the original terms of the loan agreements. Sessions, 128 B.R. at 153 (citing Landmark Financial Services v. Hall, 918 F.2d 1150, 1154 (4th Cir. 1990)).

There is no need for the Court to determine what portion of the arrearage is secured nor consider whether Debtors' failure to treat an arrearage as secured is a per se bad faith plan proposal. Compare Sessions, 128 B.R. at 152. Under § 1322(b)(5), an arrearage must be paid within the term of the plan, regardless of whether the value of the arrearage is secured. Similarly, if a debtor elects to "cram down" under § 1325(a)(5), the full value of the secured claim must be paid over the life of the plan even if a portion of the secured value represents payments that are in arrears.[4]

The Court is still unclear on how Debtors' third note with FmHA dated March 29, 1983 is secured by the December 31, 1981 mortgage. The parties will need to resolve that issue between themselves. If secured, the note does not meet the criteria for

[4] In its first brief, FmHA raised the issue of whether Debtors must pay interest on the arrearage if Debtors elect to cure under § 1322 (b)(2). Debtors did not address this issue in their briefs. The Court, therefore, did not address the issue herein but will leave it for a future confirmation hearing if the parties are unable to settle the matter.

repayment as a long-term secured debt under § 1322(b)(5) because all payments are past due. Therefore, unless FmHA accepts other treatment, the secured value of this note must be paid within the term of the plan pursuant to § 1325(a)(5)(B) or Debtors must surrender the property pursuant to § 1325(a)(5)(C). If the third note is not secured, it may be repaid with Debtors' disposable income.

An order will be entered directing Debtors to file a second amended plan in compliance with this decision within fifteen days of the order and serve and notice it for hearing pursuant to F.R.Bankr.P. 2002(b)(2).

Dated this ____ day of February, 1992.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk

(SEAL)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

IN RE:	)	CASE NO. 91-30025-INH
	)	
MARVIN F. OLSON and	)	CHAPTER 13
BEVERLY E. OLSON,	)	
	)	ORDER DENYING
	)	CONFIRMATION OF AMENDED
Debtors.	)	CHAPTER 13 PLAN

In response to and in compliance with the Memorandum of Decision Re: Confirmation of Amended Chapter 13 Plan entered this day,

IT IS HEREBY ORDERED that confirmation of Debtors' Restated [amended] Chapter 13 plan is DENIED; and

IT IS FURTHER ORDERED that Debtors shall file a second amended plan within fifteen days of this Order in compliance with the Court's Findings and Conclusions set forth in the Memorandum of Decision Re: Confirmation of Amended Chapter 13 Plan and shall timely notice said second amended plan for hearing in compliance with F.R. Bankr. P. 2002(b)(2).

So ordered this ____ day of February, 1992.

BY THE COURT:

_____
Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By _____
Deputy Clerk
(SEAL)