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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

UNPUBLISHED OPINION

In re	)	Bankruptcy Case No. 83C-02153
	)	
MARVIN ROBERT TODD	)	
aka Marvin R. Todd and	)	
AFTON J. TODD,	)	
	)	
Debtors.	)	MEMORANDUM OPINION

Appearances: Rulon T. Burton, Burton & Schiess, Salt Lake City, Utah, for the debtors; Bryan Cannon, Poole, Cannon & Smith, Salt Lake City, Utah, for Manufacturers Hanover Mortgage Corporation.

CASE SUMMARY

In this matter the Court is called upon to decide whether or not a Chapter 11 plan of reorganization which provides for 100% payment of unsecured debts over 51 months but proposes to pay the debtors' principal secured creditor over 300 months violates the absolute priority rule. The Court concludes that the plan does not.

FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 1983, Marvin and Afton Todd filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The debtors' financial statement shows that Marvin Todd is employed as a truck driver and his wife is a homemaker. Their schedules indicate that their debts are primarily consumer debts, the largest of which is a note secured by a deed of trust on the debtors' home in the amount of $75,000.00 in favor of Manufacturers Hanover Mortgage Corporation.

On May 15, 1984, the Court approved the debtors' disclosure statement as containing adequate information and authorized its dissemination, together with the plan of reorganization and ballots for acceptance or rejection, among creditors.

The debtors' plan classifies the claims of creditors and provides for payment as follows:

Class	Claimant(s)	Treatment
B-1	The allowed secured claim of Manufacturers Hanover Mortgage Company.	Full payment with 13.5% interest, in deferred cash payments of $827.00 per month for 300 months.
B-2	The allowed secured claim of Garrett Freightlines Employees Credit Union, secured by a lien on a 1977 Cadillac and a 1975 Jeep.	Full payment, with 15% interest, in deferred cash payments of $379.00 per month for 15 months.

B-3	The allowed secured claim of Massey's Jewelry, secured by a lien on a diamond ring.	Full payment, with 15% interest, in deferred cash payments of $145.00 per month for 15 months.
B-4	The allowed secured claim of CSA, secured by a lien on furniture of the debtors.	Full payment in cash on the effective date of the plan.
C-1	Every allowed unsecured claim that is less than $1,090.00.	Full payment with 11% interest, in deferred cash payments, payable pro rata in seven monthly installments of $524.00 commencing in November, 1985.
F-1	The general unsecured claims not otherwise provided for.	Full payment, with 12% interest, in deferred cash payments, payable pro rata in 51 monthly installments of $524.00, commencing in June, 1986.

As the foregoing illustrates, the debtor's plan provides that payments to Manufacturers Hanover Mortgage Company will begin immediately, while those to Class C-1 and Class F-1 commence in November, 1985, and June, 1986, respectively. The absolute priority rule issue centers on the effect of those classes ultimately being paid off prior to payment in full to Manufacturers Hanover Mortgage Company.

Manufacturers Hanover Mortgage Corporation voted to reject the plan and argued against confirmation at a hearing on

August 15, 1984. The Court heard testimony from Marvin Todd, and the debtors' attorney argued that the plan should be confirmed under 11 U.S.C. § 1129(b) over the creditor's dissent.

The Court raised the question of whether the treatment of Manufacturers Hanover Mortgage Corporation violated the absolute priority rule, and, after hearing arguments and specifically finding that all other requirements for confirmation had been met, took the matter under advisement.

DISCUSSION

The question the Court must ultimately decide in this case is whether the debtors' plan of reorganization may be confirmed over the rejecting ballot of their principal secured creditor through the use of the "cramdown" provision of 11 U.S.C. § 1129(b). The answer lies in an analysis and interpretation of the absolute priority rule.

The absolute priority rule was first enunciated in equity receivership cases and later made a part of the judicial gloss which case law placed upon the phrase "fair and equitable" as a prerequisite to the approval of a plan of reorganization under § 77B and Chapter X of the former Bankruptcy Act.[1] The rule is

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[1] For a brief history of the rule, see Caplin v. Marine Midland Grace Trust Co., 406 U.S. 416, 436-37 n. 2, 92 S.Ct. 1678, 32 L.Ed.2d 195 (1972) (Douglas, J., dissenting).

easier to state than to apply in particular cases. "The rule, briefly put, is that no class may participate under a plan unless classes having priority are compensated in full." In re Barrington Oaks General Partnership, 15 B.R. 952, 956, 8 B.C.D. 569, 5 C.B.C.2d 969 (Bky. D. Utah 1981).

The plan confirmation requirements of 11 U.S.C. § 1129 are a partial codification of the rule. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 414 (1977). Section 1129(a)(8) requires that each class either accept the plan or be unimpaired under the plan. However, subsection (b) permits the court to confirm a plan notwithstanding failure to comply with Section 1129(a)(8) if the plan does not discriminate unfairly and is fair and equitable with respect to each class of claims that is impaired under and has not accepted the plan. 11 U.S.C. § 1129(b)(1).

The Prohibition Against Unfair Discrimination

The Bankruptcy Code offers no guidance to aid courts in the determination of whether a plan "does not discriminate unfairly" with respect to a dissenting class. The legislative history indicates that the requirement was included for clarity. 124 Cong. Rec. H11103 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards). One commentator, who was instrumental in drafting the Bankruptcy Code, noted that "[t]he requirement is intended to be complimentary to the fair and equitable test . . . ." Klee, "All

You Ever Wanted to Know About Cram Down Under the New Bankruptcy Code," 53 Am. Bankr. L.J. 133, 141 (1979).

The word "discriminate" may be defined as treating one differently from another. Before a plan will be said to "discriminate unfairly," the Court must find that there is actual discrimination. For a plan to discriminate unfairly, the discrimination must be unjust, inequitable, and prejudicial to the affected creditors. The requirement is imposed for the protection of dissenting classes of creditors and should be considered from their standpoint. Each case will, of course, depend on its particular facts.

In this case, the debtors propose a fairly simple plan of reorganization which is compatible with their simple debt structure. The plan resembles those commonly confirmed under Chapter 13. All plan payments must be funded from Marvin Todd's future income. Each secured creditor will retain its lien on the collateral securing the debt. The Court holds that the debtors' plan does not discriminate unfairly against Manufacturers Hanover Mortgage Company by providing for concurrent payments to unsecured creditors.

The Fair and Equitable Rule

Section 1129(b)(2)(A) provides that in order for a plan to be fair and equitable with respect to a dissenting class of

secured claims, the plan must, at a minimum, satisfy one of three separate requirements. First, the plan may provide for the secured creditor to retain the lien that secures the claim to the extent of the allowed amount of the claim. 11 U.S.C. § 1129(b)(2)(A)(i)(I). Additionally, the plan must provide for the class to receive deferred cash payments totaling at least the allowed amount of the claim, and the payments must have a present value as of the effective date of the plan equal to the value of the holder's interest in the collateral. 11 U.S.C. § 1129(b)(2)(A)(i)(II). Second, the plan may propose to sell the secured creditor's collateral free and clear of liens, with liens to attach to the proceeds of the sale. 11 U.S.C. § 1129(b)(2)(A)(ii).[2] Third, the plan may provide that the dissenting secured creditor receive the "indubitable equivalent" of its claim. 11 U.S.C. § 1129(b)(2)(A)(iii).[3] Under Section

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2 A secured creditor must be preferred to an unsecured creditor in the distibution of the property or proceeds of the property on which it has a lien. This is a property right which may not be disturbed even in bankruptcy. In re Utilities Power & Light Corporation, 29 F.Supp. 763, 769-70 (N.D. Ill. 1939). See In re Clawson, No. 83C-02021 (transcript of proceedings, Sept. 25, 1984, at pp. 11-13).

3 The legislative history notes that the standard of "indubitable equivalence" is taken from In re Murel Holding Corp., 75 F.2d 941 (2d Cir. 1935) (Learned Hand, J.). 124 Cong. Rec. H11104 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards). See generally, In re Alyucan Interstate Corp., 12 B.R. 803, 805-09, 7 B.C.D. 1123, 4 C.B.C.2d 1066 (Bky. D. Utah 1981).

1129(b)(2)(A)(iii), the "indubitable equivalent" concept requires only that a senior secured creditor's interest be adequately protected. It does not necessarily require that payments to inferior creditors be denied until the senior creditor's claim is paid in full. Cf. Matter of Hobson Pike Associates Limited, 3 B.C.D. 1205 (Bky. N.D. Ga. 1977). The debtors' plan provides that Manufacturers Hanover Mortgage Company will retain its lien on the debtors' home and receive substantial monthly cash payments. Implicit in this provision is that should the debtors default on their payment obligations under the plan, Manufacturers Hanover Mortgage Company could seek and obtain an order of this Court authorizing it to exercise its remedies against the property. Moreover, the plan is fully compensatory because it provides for deferred payments with a present value as of the effective date equal to the value of the collateral. This Court holds that the debtors' plan complies with the fair and equitable requirements of 11 U.S.C. Section 1129(b). This is so because the interest of the senior creditor, Manufacturers Hanover Mortgage Company, in the collateral is adquately protected. Under the facts of this case, Section 1129(b) does not require that payments be denied to junior creditors until senior creditors are paid in full. Such a requirement would very possibly damage these junior creditors by delaying payment to them, while neither providing further protection nor reducing the risks to the

senior creditor in this case. The requirements of 11 U.S.C. 1129(b) are aimed not at denying payments to junior creditors, but to insure that senior creditors receive the security for which they bargain. If such a creditor is adequately protected then, as far as that creditor is concerned, the plan is fair and equitable under Section 1129(b). The Court need not deny confirmation of the plan simply because it provides for deferred payments to junior classes of creditors at such a rate that they will receive payment in full before the senior creditor does. Of course, this analysis will not apply to cases where the senior creditor is not adequately protected with the "indubitable equivalent" of his claim or where the plan would otherwise fail the "fair and equitable" requirements of Section 1129(b).

CONCLUSION

These individual Chapter 11 debtors propose to fund their plan through the future earnings of Marvin Todd, whose uncontroverted testimony satisfied the court that the plan is feasible. The absolute priority rule, as made a part of Section 1129, requires that senior creditors receive the full benefit of their bargain before the treatment of junior claims. This does not necessarily require payment in full to secured creditors before unsecured creditors are allowed to participate. What is required, at a minimum, is that the secured creditor retain its

lien and receive sufficient deferred cash payments to provide it with the indubitable equivalent of its claim. Under this plan, Manufacturers Hanover Mortgage Company is not required to accept a greater risk. Its interest in the debtors' home is adequately protected and the benefit of its bargain is preserved.

Accordingly, the Court finds that the confirmation standards of 11 U.S.C. § 1129 have been met. Counsel for the debtor shall prepare and submit an order of confirmation within 10 days.

DATED this 16 day of January, 1985.

BY THE COURT:

Glen E. Clark

GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE