

In Re Parrott #386-03650-H13  
HLH 12/21/88 unpublished  
P88-58(5)

11 USC 1322(b)(2) ..  
ORS 23.240 ✓

The creditor, contending that its loan was secured solely by the debtor's principal residence, claimed that the proposed chapter 13 plan modified the creditor's rights in violation of §1322(b)(2). The debtor contended that other collateral, in addition to the residence, secured the loan because the realty was divided into two tax lots, only one of which was the debtors' residence. The court found that both parcels were part of the debtor's principal residence. In so holding, the court noted that both parcels would be considered as part of the debtor's homestead for the purpose of ORS 23.240.

The court found that the inclusion of a provision in the trust deed granting the creditor an interest in the rents and profits of the realty did not remove the debt from the protection of §1322(b)(2). The court rejected the debtors' argument that the loan was also secured by a vehicle, finding that the vehicle secured an earlier loan. The court also rejected the contention that §1322(b)(2) does not apply to short-term, non-home related finance company loans.



1 July, 1985, reducing the balance to \$23,748. A new loan  
2 agreement and trust deed were executed on October 18, 1985 in  
3 the sum of \$26,000. That loan was secured by the same real  
4 property securing the original loan.<sup>1</sup> The earlier loan  
5 agreement was marked "paid" on the same date. The last payment  
6 date under the new loan agreement was in 1990, whereas under  
7 the original agreement the last payment was due in 1988. The  
8 amount of payments also differed under the new agreement.

9 The debtors claim that the documents executed in 1985  
10 were simply amendments to the documentation of the original  
11 loan. The creditor contends that new funds were loaned to the  
12 debtors for the purpose of paying off the remaining  
13 indebtedness on the original loan. Under the facts outlined  
14 above, the court concludes that the second agreement was not  
15 merely an amendment to the earlier loan agreement, but a  
16 separate loan transaction. Thus, it is the second loan, which  
17 was not secured by a vehicle, which is the basis of the  
18 creditor's claim.

19 The next argument raised by the debtors is that the real  
20 property is actually two separate pieces of land, only one of  
21 which is the debtor's residence. Therefore, argue the debtors,  
22 the debt is not secured solely by the residence.

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24 <sup>1/</sup> After the petition was filed, the residence located on the  
25 real property was destroyed by fire. Neither party has  
26 suggested that the destruction of the collateral in any way  
affects the status of the creditor's claim or the analysis of  
the objections. The court therefore will not address possible  
implications of the destruction of the collateral.

1 The real property consists of two contiguous tax lots, one of  
2 1.33 acres and the other 4.15 acres. Gay Parrott and her  
3 former husband purchased both parcels at the same time from the  
4 same buyer. The debtors' residence was located on the 1.33  
5 acre tract, as is the domestic water well and garage. Access  
6 to both parcels is provided by the same private driveway. An  
7 electrified fence separates the two parcels.

8 The 4.15 acre tract is undeveloped, consisting of pasture  
9 land and trees. It is currently used to pasture one horse. No  
10 evidence was introduced regarding its use on October 15, 1985,  
11 the date the trust deed at issue was executed.<sup>2</sup> The court  
12 assumes that the use at that time is the same as the current  
13 use. The layout of the two parcels is illustrated by Exhibit  
14 "A".

15 The debtors contend that the larger parcel should not be  
16 considered as part of the debtors' principal residence for the  
17 purposes of §1322(b)(2). They argue that in making the  
18 determination, the court should be guided by whether the 4.15  
19 acre parcels would be considered as part of the debtors'  
20 homestead under ORS 23.240.

21 In Smith v. Kay, 153 Or. 80, 54 P. 2d 1160, 1164 (1936),  
22 the Oregon Supreme Court noted that "[i]n determining how much  
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24 <sup>2/</sup> Since the purpose of §1322(b)(2) is to encourage lending  
25 secured by residences, it is the date of the execution of the  
26 trust deed, rather than the date of confirmation, which is the  
relevant time for determining the principal use of the  
property.

1 land is appurtenant to a dwelling house, it is necessary to  
2 consider the use to which the land is put, rather than the  
3 quantity of ground owned by the homestead claimant." The court  
4 noted the general rule that the homestead encompasses both the  
5 residence and those portions of the land used for purposes  
6 immediately connected with the enjoyment of the home. Here the  
7 larger tax lot was used for the purpose of grazing one horse.  
8 That use is consistent with the enjoyment of the home located  
9 on the other parcel. Both parcels are serviced by the same  
10 driveway. The layout of the lots suggests that they are one  
11 functional unit, as the smaller parcel is completely surrounded  
12 on three sides by the larger one. The court therefore  
13 concludes that, for the purposes of 11 U.S.C. §1322(b)(2), both  
14 parcels are part of the debtors' principal residence.

15 The debtors next assert that the trust deed is secured by  
16 property other than the debtors' principal residence because  
17 the instrument also covers rents and profits of the realty.  
18 That argument has been rejected in this District. The right to  
19 rents, issues and profits of property are benefits which are  
20 incident to ownership of the property, and a lien on such rents  
21 or profits cannot be distinguished from the lien of the  
22 property to which they are appurtenant for the purposes of  
23 §1322(b)(2). In Re Hougland, No. 88-1016-PA, slip op. (D. Or.  
24 Dec. 13, 1988).

25 Finally, the debtors argue that §1322(b)(2) does not  
26 apply to short-term, non-home related finance company loans.

4-MEMORANDUM

1 However, the statute, which is clear on its face, makes no such  
2 distinction among lenders. This court cannot make the  
3 distinction urged by the debtors without venturing into the  
4 realm of legislating. That activity is more appropriately left  
5 to Congress.

6 For the reasons set forth above, the court concludes that  
7 the creditor's claim is secured solely by the debtors'  
8 principal residence. The proposed plan impermissibly modifies  
9 the creditor's rights, and cannot be confirmed.

10 Some of the other objections raised by the creditor will  
11 need to be addressed in any modified plan. The debtors have  
12 not specified a listing price for the property, nor is there  
13 any provision for the communication of all offers to the  
14 creditor. Depending upon the amount of equity available to the  
15 creditor, a deadline for the sale may be necessary. All  
16 arrearages must be cured within the life of the plan.

17 The debtors are granted an additional thirty days within  
18 which to file an amended plan. An appropriate order will be  
19 entered.

20 DATED this 21st day of December, 1988.

21   
22 Henry L. Hess, Jr.  
23 Bankruptcy Judge

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25  
26 cc: Steven M. Berne  
Philip F. Schuster

5-MEMORANDUM

