

11 USC §506(a)
11 USC §1322(b)(2)
11 USC §1322(b)(5)
11 USC §1325(a)(5)

In Re Hayes

Bankruptcy Case No. 388-00187-H13
District Court Civ #90-0893-RE

10/16/90

District Court affirming HLH

Judge Redden affirmed Judge Hess's ruling (see summary below for Judge Hess's ruling).

SUMMARY

The creditor's claim was secured solely by the debtor's principal residence. The chapter 13 plan proposed to bifurcate the claim into secured and unsecured portions pursuant to §506 and In Re Hougland, 886 F.2d 1182 (9th Cir. 1989). The issue was how payments should be structured after avoidance of the lien upon the unsecured portion.

Judge Hess ruled that altering the interest rate or installment amount would be an impermissible modification under §1322(b)(2). He further held that §1322(b)(5) mandated curing all defaults rather than allocating them to the unsecured portion of the claim.

Maintaining the interest rate and periodic payment amount will necessarily result in paying off the lien in advance of the original maturity date. All postpetition payments first are applied to interest accrued postpetition on the allowed secured claim, and then to the principal amount of the allowed secured claim.

P90-41(7) Aff'm
P90-12(11)

Certified to be a true and correct copy of original filed in my office.

Dated 12/4/90
Donald M. Cinnamond, Clerk
By *[Signature]* Deputy

[Signature]
U.S. DISTRICT COURT
DISTRICT OF OREGON
FILED

OCT 16 1990

LH USBc 12/19/90

DONALD M. CINNAMOND, CLERK
BY *[Signature]* DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

In Re)

LAWRENCE CHARLES HAYES)
SHARON GLYNN HAYES)

Debtors,)

Civil No. 90-0893-RE
OPINION)

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REDDEN, Judge:

JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. section 158(a) (appeal to the district court from the final

1 - OPINION

cl. d. 10/24/90

102

P90-41 (7)

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1 judgment entered by the United States Bankruptcy Court).

2 STANDARD OF REVIEW

3 The issues raised in this proceeding are issues of law reviewable
4 de novo by this court in the appellate role. United States v.
5 McConney, 728 F.2d 1195, 1201 (9th Cir. 1984).

6 BACKGROUND

7 1. Procedural History

8 This is an action initiated by the debtors in the context
9 of a Plan for Adjustment of Debts of an Individual with Regular
10 Income Pursuant to Chapter 13 of the Bankruptcy code, 11 U.S.C.
11 section 1301. The debtors fourth amended Chapter 13 plan (the
12 Plan) proposes to pay creditor Great Western Savings Bank (Great
13 Western) its secured claim, which is an amount equal to the fair
14 market value of the debtors' personal residence, which secures
15 Great Western's claim. The Plan provides for certain arrearage
16 to be allocated to the unsecured portion of Great Western's claim.

17 Great Western objected to confirmation of the Plan. The
18 Bankruptcy Court entered a final order denying confirmation of the
19 Plan. Debtors appeal this order.

20 2. Statement of Facts

21 Great Western, by assumption agreement, loaned to the
22 debtors the sum of \$99,586.80. To secure payment of the loan,
23 Great Western was given a trust deed on the debtors' personal
24 residence. The present interest rate is 11.5%. The term for
25 repayment of the loan was thirty years. The debtors and Great
26 Western agreed that the fair market value of the debtors' residence

1 on the date the debtors filed this Chapter 13 case was \$72,000.

2 The balance owed is approximately \$96,000.

3 The Plan proposes that Great Western will receive a sum of
4 \$72,000, the full amount of its secured claim. The \$72,000 will
5 be repaid over the 21.5 year term remaining on the trust deed. The
6 Plan also provides that all post-petition defaults (\$9,696.64) will
7 be under the unsecured portion of Great Western's claim.

8 DISCUSSION

9 Title 11 U.S.C. section 1322(b)(2) provides:

10 (b) the plan may -

11 (2) Modify the rights of holders of secured claims,
12 other than a claim secured only by a security interest
13 in real property that is the debtors principal
14 residence, or of holders of unsecured claims, or leave
15 unaffected the rights of holders of any class of
16 claims.

14 A recent Ninth Circuit decision, In re Houghland, 886 F.2d 1182
15 (9th Cir. 1989), held that an undersecured claim secured wholly by
16 the debtors personal residence can be bifurcated into secured and
17 unsecured claims under section 506(a). Under Houghland, Great
18 Western has an allowed secured claim for \$72,000, and an allowed
19 unsecured claim for the difference of approximately \$24,000
20 (totalling the balance owed, \$96,000).

21 Section 506(a) states:

22 An allowed claim of a creditor secured by a lien on
23 property in which the estate has an interest, or that
24 is subject to setoff under section 553 of the Title, is a
25 secured claim to the extent of the value of such creditor's
26 interests in the estate's interest in such property, or to the
extent of the amount subject to setoff, as the case
may be, and is an unsecured claim to the extent that the
value of such creditor's interest, or the amount so
subject to setoff is less than the amount of such allowed
claim. Such value shall be determined in the light of the

1 purpose of the evaluation and of the proposed disposition
2 or use of such property, and in conjunction with any hearing
3 or such disposition or use or on a plan affecting such
4 creditor's interest.

5 The question left unanswered by Houghland and which the bankruptcy
6 judge was forced to decide, is whether section 1322(b)(2) prohibits
7 a recalculation of the monthly installment payment on the
8 creditor's secured claim. Houghland stated,

9 Congress quite plainly has provided for the separation of
10 undersecured claims into two components, - a secured
11 component and an unsecured component. It has then
12 provided for their treatment in chapter 13 proceedings.
13 The secured portion has special protection when residential
14 real estate lending is involved. The unsecured portion
15 does not.

16 Id. at 1185.

17 Great Western objected to the debtor's Plan because it proposed
18 to reduce the monthly payment to a sum less than that presently
19 called for by the terms of the Promissory Note and Deed of Trust,
20 and because the Plan made no provision for curing postpetition
21 defaults. The debtors propose to allocate the missed payments to
22 the unsecured portion of the claim. Alternatively, the debtors
23 propose to reduce the amount of monthly payments to reflect the
24 lower balance which must be repaid.

25 The debtors argue that Houghland permits the bankruptcy court
26 to recalculate the monthly installment payment due on an
undersecured debt secured solely by a debtors' principal residence,
after having bifurcated the debt into an allowed secured claim and
an allowed unsecured claim. I disagree. Houghland permits only
the division of an undersecured home mortgage debt into a secured
component and an unsecured component under section 506(a).

1 Houghland does not attempt to explain how payment of the debt is
2 to be structured after its "bifurcation" is effected. The
3 bankruptcy court correctly held that section 1322(b)(2) prohibits
4 reduction of the monthly installments due on the Great Western
5 mortgage loan.

6 I agree with the bankruptcy court, that as a method of
7 restructuring a loan under Houghland, adjustment of the term to
8 reflect the reduced loan balance is the option which is most in
9 harmony with section 1322. The bankruptcy court said,
10 "accelerating the maturity date is the change which is least likely
11 to adversely affect a creditor." Great Western cites a number of
12 decisions where the courts hold that mortgage loan terms may not
13 be modified. See In re Wilkinson, 33 B.R. 933, 935 (Bkrtcy SD NY
14 1983) ("the test [for permissibility of a modification] is whether
15 the payments called for by the mortgage have been reduced"); In re
16 Harlan, 783 F.2d 839 (9th Cir. 1986) (plan's delay of balloon
17 payment was an impermissible modification); In re Seidel, 752 F.2d
18 1382 (9th Cir. 1985) (plan's proposal to spread a currently due
19 balloon payment over the life of the plan in installments was
20 impermissible). I find these cases instructive because, like
21 interest rates, the monthly payment amount is a basic and important
22 term of the mortgage contract upon which the lender must rely in
23 extending credit.

24 I agree with the bankruptcy court. Under Houghland, some factor
25 affecting payment of a bifurcated home mortgage debt must be
26 modified. It is most consonant with the protective purposes of

1 section 1322(b)(2) to require modification of the term of the loan,
2 rather than its interest rate or monthly installment amount. As
3 the bankruptcy court noted, accelerating the maturity date is the
4 change which is least likely to adversely affect a creditor. This
5 acceleration results not from the actions of the creditor but from
6 the debtors' request that the claim be divided under section 506.

7 The second matter at issue is the bankruptcy court's decision
8 that section 1322(b)(2) prohibits the debtor from allocating post-
9 petition defaults to the unsecured portion of the creditor's claim.

10 The debtors acknowledge that Houghland does not discuss into
11 which claim, secured or unsecured, missed installment payments
12 should be applied, whether pre or post petition. Debtors argue
13 that the dividing line is the fair market value of the collateral.
14 So that the amount of the debt up to that point is secured, and the
15 remainder is unsecured.


16 The bankruptcy court held that section 1322(b)(5) provides the
17 only payment option available to a debtor who wishes to retain a
18 residence which is the sole collateral for a claim. The court
19 stated, "that section contemplates the maintenance of regular
20 payments and the curing of defaults. This court interprets that
21 section as mandating the curing of any defaults." Bankruptcy Court
22 Opinion, filed March 13, 1990, p. 8 (emphasis in original). The
23 court found that permitting the debtor merely to make the contract
24 payments but not cure defaults as required by section 1322(b)(5)
25 would not provide the "special protection" referred to in
26 Houghland. I agree.

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CONCLUSION

The bankruptcy court's disapproval of debtors' fourth amended plan is affirmed.

Dated this 16 day of October, 1990.



James A. Redden
United States District Judge