

11 U.S.C. §1325(a)(5)(B)(iii)(I)
FRBP 9023
Balloon Payments
Equal Monthly Payments
Statutory Construction

In Re Bollinger
9/2/11

Case #10-62344-fra13
Alley

Debtor owns a “four-plex” in Salem, Oregon which he holds for income/investment purposes, and in which creditor Deutsche Bank holds a note and trust deed. Debtor’s second amended *Chapter 13 Plan* proposed to “cram down” Bank’s secured claim to \$225,000, to be paid at \$1,208 per month at 5% interest, with the claim being paid in full with a balloon payment via sale or refinance by April 30, 2013.

Bank objected to confirmation of the Plan, arguing that the 2013 date was too remote, and that the balloon payment violated 11 U.S.C. §1325(a)(5)(B)(iii)(I)’s requirement of “equal monthly payments.” The Court ultimately confirmed the Plan, and the *Order Confirming Plan* amended the *Plan* by interlineation to provide that (1) the sale or refinance of the property must occur by March 31, 2012, (2) the Bank would be granted relief from stay to foreclose if the deadline was not met, and (3) the Bank would be granted immediate relief from stay to take all necessary actions in furtherance of conducting a foreclosure sale, provided that the sale could not occur before April 2, 2012. The issue of “equal monthly payments” was not addressed by the Court. The Bank thereafter filed a *Motion to Amend or Alter Order Confirming Debtor’s Chapter 13 Plan of Reorganization* to pursue its argument regarding “equal monthly payments.”

The Court started its analysis by noting that the applicable statute (11 U.S.C. §1325(a)(5)(B)(iii)(I)) provides that if a debtor proposes to pay a secured claim “in the form of periodic payments, such payments shall be in equal amounts,” but that the Bankruptcy Code does not define the term “periodic payments.” It also noted that other judges in the District of Oregon have confirmed plans, in oral rulings, containing balloon payments, finding the statute ambiguous.

The Court next reviewed published case law on the issue which examined the purpose behind the statute – to protect creditors from undue risk in light of potential depreciation of the collateral and to curb abuses resulting from confirmed plans involving balloon payments. It finally noted that “every published decision to consider balloon payments in the context at bar has held that §1325(a)(5)(B)(iii)(I) forbids them.”

In light of the authority cited by the Court, it held that the *Order Confirming Plan* was manifest error. The Court therefore entered an order vacating the confirmation order, denying confirmation of the *Plan*, and granting Debtor 30 days to file a further *Amended Plan*.

E11-18(7)

1 The second modified plan drew multiple objections, one of which was by Deutsche Bank The Bank
2 argued the 2013 date for sale or refinance was too remote and that the balloon payment provision violated 11
3 U.S.C. § 1325(a)(5)(B)(iii)(I)'s² requirement that "periodic payments" be in "equal monthly amounts."

4 A hearing on confirmation was convened on March 8, 2011. The Court heard argument by counsel
5 on the § 1325(a)(5)(B)(iii)(I) issue. At the conclusion of the hearing the Court announced its ruling that
6 confirmation of the plan as presented would be denied because the 2013 sale/refinance deadline was too
7 generous. The Court went on to state it would confirm a plan with certain amendments referenced below.
8 The ruling did not specifically comment on the "periodic payments" issue.

9 On May 23, 2011, the order confirming the second modified plan was entered. Exhibit 1 thereto sets
10 out the material amendments, amongst which was a March 31, 2012, deadline to sell or refinance the
11 property and pay the cram-down value with the proceeds. If the deadline was not met, Deutsche Bank would
12 be given relief from stay to foreclose. The amendments also allowed Deutsche Bank immediate relief from
13 stay for the limited purpose of taking all actions necessary in furtherance of conducting a non-judicial
14 foreclosure sale on the property such that any sale could occur as quickly as April 2, 2012, but no earlier.
15 The practical effect of these amendments was to move the balloon payment up approximately 13 months
16 from the original deadline.

17 Deutsche Bank then timely filed the instant motion to alter or amend, to which Debtor has responded.
18 After oral argument the matter was taken under advisement.

19 The instant motion is one under FRCP 59 (made applicable by FRBP 9023).³ FRCP 59(e) allows the
20 court to "alter or amend a judgment," if amongst other grounds, it committed a "manifest error of law."
21 Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011) (internal citations omitted). Deutsche Bank
22 argues the Court's manifest error was confirming a plan with the balloon payment. Having reviewed the
23 matter, it appears Deutsche Bank is correct.

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25 ² Unless otherwise noted, all future statutory references are to Title 11 of the United States Code.

26 ³ Deutsche Bank also based its motion on § 105. For the reasons discussed below, the Court need not address whether that statute gives it the power to set aside the confirmation order.

1 Section 1325(a)(5)(B) is the so-called “cram down” provision in Chapter 13 which allows a debtor to
 2 modify the treatment of secured claims over objection if certain criteria are met. The subsection at issue, §
 3 1325(a)(5)(B)(iii)(I) provides that if a debtor proposes to pay a secured claim “in the form of periodic
 4 payments, such payments shall be in equal monthly amounts.”⁴ Deutsche Bank argues Debtor’s payments on
 5 its secured claim are “periodic” and thus, in the event of objection to the proposed treatment,⁵ must be “in
 6 equal monthly amounts.” Debtor argues the balloon payment can stand alone as somehow detached from the
 7 monthly payments proposed, and is not a “periodic” payment. Debtor cites several oral rulings by other
 8 judges in this District to that effect.⁶

9 In resolving a dispute over the meaning of a statute, courts must begin with its plain language, United
 10 States v. Ron Pair Enters., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989), which
 11 must be read in light of the design of the statute as a whole and its object and policy. Crandon v. U.S., 494
 12 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 997 (1990). Where the language is plain, “the sole function
 13 of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its
 14 terms.” Lamie v. United States Tr., 540 U.S. 526, 534, 124 S.Ct. 1023, 1030, 157 L.Ed.2d 1024 (2004)
 15 (internal quotation omitted).⁷

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20 ⁴ Section 1325(a)(5)(B) also requires that the value, as of the plan’s effective date, of Debtor’s payments over
 21 the plan’s course, equal the allowed amount of the secured claim. This means Debtor must pay a discount factor,
 which is translated into an interest rate. § 1325(a)(5)(B)(ii).

22 ⁵ Section 1325(a)(5)(A) allows for payment by any means or schedule if the secured creditor accepts the plan.
 23 Further, § 1325(a)(5)(C) allows for treatment of secured claims by surrender of the collateral. Neither of these
 subsections apply to the case at bar.

24 ⁶ See, In re Meredith, Case # 11-30227-rld13 (Bankr. D. Or. May 5, 2011) (Dunn, J.) (oral ruling, finding the
 25 statute ambiguous and allowing a balloon payment); In re Davis, Case # 10-39945-elpl3 (Bankr. D. Or. May 26,
 2011) (Perris, J.) (oral ruling, following Meredith).

26 ⁷ Neither Deutsche Bank nor Debtor argues application of the statute under the facts at bar would be “absurd.”

1 The Bankruptcy Code does not define the term “periodic payments.” When a term in a statute is
 2 undefined the court is to give it its ordinary meaning. Hamilton v. Lanning, ___ U.S. ___, 130 S.Ct. 2464,
 3 2471, 177 L.Ed.2d 23 (2010).

4 Authoritative dictionaries . . . universally agree that the word “periodic” simply
 5 refers to an event that occurs repeatedly or regularly. *See Webster's Third New*
 6 *International Dictionary* 1680 (1981) (“occurring at regular intervals”);
 7 *Merriam-Webster Online Dictionary* (“occurring or recurring at regular
 8 intervals; occurring repeatedly from time to time”); *Black's Law Dictionary*
 1165 (8th ed.2004) (defining “periodic payment” as “[o]ne of a series of
 payments made over time instead of a one-time payment for the full amount”);
see also 5 Lundin § 448.1 (noting that most chapter 13 plans provide for
 monthly payments).

9 Hamilton v. Wells Fargo (In re Hamilton), 401 B.R. 539, 544 (1st Cir. BAP 2009).⁸ Under Hamilton, a
 10 “periodic payment” must be equal to the payment that preceded it. *Id.* at 543. *See, also, In re Wagner*, 342
 11 B.R. 766, 772 (Bankr. E. D. Tenn. 2006) (§ 1325(a)(5)(B)(iii)(I) requires that payments be equal once they
 12 begin, and to continue to be equal until they end). Both Wagner and Hamilton hold the statute does not
 13 differentiate between balloon payments and prior monthly payments, and that all are encompassed in the
 14 term “periodic payments.” This is correct, and consistent with the language of the statute, and its object and
 15 policy. Crandon, 494 U.S. at 158.

16 Section 1325(a)(5)(B)(iii)(I) is a product of the Bankruptcy Abuse Prevention and Consumer
 17 Protection Act of 2005 (BAPCPA).⁹ In In re Sanchez, 384 B.R. 574 (Bankr. D. Or. 2008), this court quoted
 18 with approval the following from In re Erwin, 376 B.R. 897, 901 (Bankr. C.D. Ill. 2007):

19 Prior to BAPCPA, it was not uncommon for some Chapter 13 plans to provide
 20 for backloaded payments, such as balloon payments. Another form of
 21 backloading involved graduated or stepup payment plans, where the payments
 22 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.

24 ⁸ Similarly, in In re Sanchez, 384 B.R. 574 (Bankr. D. Or. 2008), this court in *dicta* cited with approval Royals
 25 v. Massey (In re Denton), 370 B.R. 441, 445 (Bankr. S.D. Ga. 2007), which held the term “periodic” means “payments
 that recur at regular intervals.” Sanchez, 384 B.R. at 579 (denying confirmation of a “stepped payment” plan).

26 ⁹ Pub.L. 109–8, April 20, 2005, 119 Stat. 23.

1 Other plans, filed by debtors whose employment is seasonal, provided for
 2 reduced payments or no payments at all during certain months of the year, or
 3 called for payments to be made quarterly or semi-annually, rather than
 4 monthly, based upon the peculiarities of the debtor's income stream. Secured
 5 creditors had similar complaints with those plans.

6 In response to those creditor concerns, Congress enacted the equal payment
 7 provision and a companion provision extending the concept of adequate
 8 protection, formerly a preconfirmation requirement, to postconfirmation plan
 9 payments. 11 U.S.C. § 1325(a)(5)(B)(iii)(II). The equal payment provision
 10 prevents debtors from backloading payments to secured creditors or paying
 11 them other than on a monthly basis.

12 Sanchez, 384 B.R. at 576-77.¹⁰ Similarly, the court in In re Acosta, 2009 WL 2849096 (Bankr. N.D. Cal.
 13 May 7, 2009) noted that “undoubtedly one of the reasons Congress enacted
 14 § 1325(a)(5)(B)(iii)(I)” was to curb the abuses resulting from confirmed plans with balloon payments,
 15 whereby the debtors dismissed the case if unable to timely sell or refinance, and worse, sometimes re-filed
 16 and then “asked for another four or five illusory years.” Id. at *3.

17 From the Court’s research, it appears every published decision to consider balloon payments in the
 18 context at bar has held § 1325(a)(5)(B)(iii)(I) forbids them, with many of them specifically agreeing with
 19 Erwin and Acosta as to the statute’s object and policy. See e.g., Hamilton, 401 B.R at 543 (statute enacted in
 20 response to creditors’ concerns about balloon and quarterly payments so as to prevent backloading); In re
 21 Luckett, 2007 WL 3125278, *2 (Bankr. E.D. Wis. October 24, 2007) (quoting Erwin for policy); In re
 22 Wallace, 2007 WL 3531551, *1 (Bankr. M. D. N. C. Nov. 12, 2007); In re Newberry, 2007 WL 2029312, *3
 23 (Bankr. D. Vt. July 10, 2007); In re Lemieux, 347 B.R. 460, 463-64 (Bankr. D. Mass. 2006); Wagner, 342
 24 B.R. at 772; In re Gray, 2008 WL 5068849, *4 (Bankr. D. Puerto Rico Nov. 25, 2008) (adopting anti-
 25 backloading policy behind statute).¹¹ Despite my respected colleagues’ oral rulings, see, f.n. 6, infra, for the

26 ¹⁰ Despite agreeing on the statute’s purpose, Sanchez nevertheless disagreed with Erwin for various reasons as
 to whether § 1325(a)(5)(B)(iii)(I), in conjunction with other Code provisions, permitted stepped payments to secured
 creditors to allow room for debtors’ attorney’s fees to be paid. Sanchez, 384 B.R. at 578-79.

¹¹ One case, In re Davis, 343 B.R. 326, 328 (Bankr. M.D. Fla. 2006) could by extension be construed to allow
 balloon payments in limited circumstances. There, the debtor proposed under § 1322(b)(5) to cure an arrearage on
 (continued...)

1 reasons stated above, this judge finds that the majority rule is correct. To hold the balloon payment at bar
2 should be construed as outside of a “periodic payment” is not consistent with the statute’s object and policy.

3 It must be said that Erwin and Acosta do not provide any sources for their holdings regarding the
4 purpose of the statute. There is scant, if any, formal legislative history revealing Congress’ purposes. The
5 most likely conclusion is that the language requiring equal periodic payments is a straightforward prohibition
6 of repayment schemes that allocate the bulk of the payments to some point in the future. Balloon payments
7 are a common feature in consumer and commercial finance: if Congress had intended to permit the use of the
8 technique in chapter 13 plans it could have easily done so by adding such authority to the plain language of
9 the statute.

10 In short: the plain language of 11 U.S.C. § 1325(a)(5)(B)(iii)(I) requires repayment plans to secured
11 creditors to provide for equal periodic payments, which necessarily excludes balloon payments. The
12 prohibition is consistent with the overall policies of Chapter 13 and the Bankruptcy Code, and cannot be seen
13 as absurd or anomalous.¹²

14 The order confirming Debtor’s second modified plan was manifest error. It will be vacated and an
15 order denying confirmation entered. That order will give Debtor 30 days to file and notice an amended plan.

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22 ¹¹(...continued)

23 long-term secured debt in unequal payments. The court held § 1322(e) which refers the parties back to the underlying
24 agreement and non-bankruptcy law as to the amount necessary for cure, rendered § 1325(a)(5)(B)(iii)(I) inapplicable.
25 Davis has been criticized. See, Hamilton, 401 B.R. 545-46. In any event, its rationale rests on §§ 1322(b)(5) and
26 1322(e), which here are inapplicable.

¹² 11 U.S.C. § 1325(a)(5)(B)(iii)(I) does not, of course, prohibit a single payment in full at any time during
the course of the plan, assuming all other elements of §§1325 and 1322 have been complied with. Where the collateral
is real property adequate protection payments appropriate under §361 maybe addressed in a plan or separately.

1 The above constitute my findings of fact and conclusions of law under FRBP 7052. They shall not be
2 separately stated.

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6 FRANK R. ALLEY, III
7 Chief Bankruptcy Judge
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