

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI**

**IN RE:**

**EDDIE O. McCLAIN,**

**CASE NO. 10-13792-NPO**

**DEBTOR.**

**CHAPTER 13**

**ORDER DENYING CONFIRMATION OF DEBTOR'S  
FIRST AMENDED CHAPTER 13 PLAN AND GRANTING  
LEAVE TO AMEND PLAN**

This matter came on for hearing on January 6, 2011 and March 31, 2011 (the "Hearings") before the Court on the Proposed Order Confirming the Debtor's Plan, Awarding a Fee to the Debtor's Attorney and Related Orders ("Proposed Order") (Dkt. No. 40), filed by Eddie O. McClain (the "Debtor"). Having heard the testimony of the Debtor and argument of counsel for the Debtor; having considered the briefs submitted by the Debtor, including the Brief in Support of Confirmation of Plan with Interest Rates as Proposed in the Plan (Dkt. No. 49), the Second Brief in Support of Confirmation of Plan with Interest Rates as Proposed in the Plan (Dkt. No. 56), and the Third Brief in Support of Confirmation of Plan with Interest Rates as Proposed in the Plan (Dkt. No. 57) (collectively, the "Briefs"), and being fully advised in the premises, the Court finds that confirmation of the first amended chapter 13 plan (the "Plan") (Dkt. No. 17) should be denied for the following reasons:

1. On August 5, 2010, the Debtor filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code.
2. The Plan proposes to pay the claims of secured creditors at an interest rate of 5.5% per year.

3. The Court *sua sponte* set the Proposed Order for hearing since the Debtor proposes an interest rate in the Plan that differs from the Court's current presumptive interest rate of 7% per year. The Debtor's choice appears to be unrelated to the parties' original contract rate or to the circumstances of the Debtor's estate. By way of background, the 7% presumptive interest rate applies to chapter 13 cases filed on or after March 1, 2009. *See* Ex. A and Ex. B to this Order.<sup>1</sup> The bankruptcy judges for the Northern and Southern Districts of Mississippi review the presumptive interest rate periodically, using what is known as the Formula Approach as described in Till v. SCS Credit Corp., 541 U.S. 465, 478-79 (2004) and its progeny. The Formula Approach begins with the national prime rate, which is reported daily in the press and reflects the financial market's estimate of the amount of interest a commercial bank should charge a creditworthy borrower. *Id.* at 478-79. That rate is then increased to allow for an appropriate risk adjustment because debtors in bankruptcy cases usually pose a greater risk than solvent borrowers. *Id.* at 479. As a result, the Formula Approach yields an interest rate that bankruptcy courts often refer to as the "Till rate."

4. In their periodic review in December of 2010, the Mississippi bankruptcy judges determined that 7% was still the appropriate interest rate in Mississippi, based on Till and subject to risk adjustment in individual cases.

5. The effect of the presumption is to shift the burden of producing evidence with regard to the presumed interest rate to the party seeking application of a different rate. If the party against whom the presumption operates produces evidence to challenge sufficiently the presumption, the presumption disappears from the case, leaving the issue to be resolved by the trier of fact. *See* Hon.

---

<sup>1</sup> Pursuant to Federal Rule of Evidence 201, the Court may take judicial notice of its own orders and records. *See* State of Florida Bd. of Trustees of the Internal Imp. Trust Fund v. Charley Toppino & Sons, Inc., 514 F.2d 700 (5<sup>th</sup> Cir. 1975).

Barry Russell, Bankruptcy Evidence Manual § 301:4 (2010-2011 ed.) (citing In re Ran, 390 B.R. 257 (Bankr. S.D. Tex. 2008), aff'd, 406 B.R. 277 (S.D. Tex. 2009)).

6. The hearing on the Proposed Order was originally set for December 1, 2010 (Dkt. No. 42), and was re-set for January 6, 2011 (Dkt. No. 47). On January 6, 2011, the Court heard argument from counsel for the Debtor and continued that hearing on the matter to give the Debtor an opportunity to present evidence to rebut the presumptive interest rate applicable to the typical Mississippi debtor.

7. On March 31, 2011, the Court heard argument of counsel for the Debtor and for the first time heard testimony from the Debtor himself. The Debtor testified that he had no knowledge about banking, interest rates, or liquidity. The Debtor called no other witnesses. Accordingly, the Debtor failed to present any evidence to challenge the 7% presumptive interest rate currently set in the Northern District of Mississippi even though the Court had re-set the initial hearing to provide him another opportunity to do so.

8. In contrast to the lack of evidence presented by the Debtor at the Hearings in this case, in the Till case, the creditor presented expert testimony establishing that it uniformly charged 21% interest on “subprime” loans. Till, 541 U.S. at 471. Then, in response, the debtors in Till presented expert testimony from an economics professor. That expert witness opined that the Formula Approach calculation which results in a lower-than-contract interest rate for debtors in bankruptcy was reasonable because chapter 13 plans should be feasible, and the creditor’s exposure is limited by the fact that the debtors are under court supervision. Id. at 471-72. The Supreme Court considered all of evidence and determined that the proper interest rate for the debtors was much lower than the contract rate of interest. Id. at 478-79.

9. While the Debtor's Briefs recite what several other bankruptcy courts have held, these recitations are not evidence before this Court related to the circumstances of the Debtor's estate, but are merely judicial determinations of the appropriate Till rate based on the evidence in each specific case. *See Till*, 541 U.S. at 479. Indeed, the Briefs focus upon the presumptive interest rate rather than on the adjustment of that rate based on the factors set forth in Till, including the "circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." Id.

10. Because the Debtor failed to present any evidence supporting application of an interest rate other than the presumptive interest rate, the Court finds that the Plan should not be confirmed.

IT IS, THEREFORE, ORDERED that confirmation of the Plan hereby is denied.

IT IS FURTHER ORDERED that the Debtor shall amend the Plan consistent with this Order within fourteen (14) days; otherwise, the case shall be dismissed by separate order of the Court.

SO ORDERED.



---

Neil P. Olack  
United States Bankruptcy Judge  
Dated: May 18, 2011

United States Bankruptcy Court  
Southern District of Mississippi  
Post Office Box 2448  
Jackson, Mississippi 39225-2448

Edward Ellington  
U. S. Bankruptcy Judge

100 East Capitol Street  
(601) 965-5303

MEMORANDUM

To: Chapter 13 Trustees, Southern District of Mississippi

Re: Till Rate

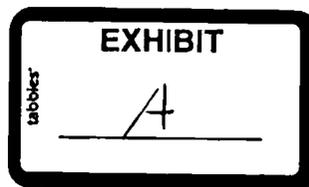
Date: February 13, 2009

Judge Houston, Judge Olack and I have conferred about reducing the presumptive interest rate used in 13 plans because of the significant lower Prime Rate as published each week in the Wall Street Journal. This week it is at 3.25%.

Effective with cases filed on or after March 1, 2009, the presumptive rate will be 7%.

Please convey this to the affected lawyers and any other interested parties.

Attached is a notice that Terre Vardaman sent out last year. All of you might want to confer and draft a form notice that all, or at least some, of you might want to use.



OFFICE OF THE TRUSTEE  
CHAPTER 13 PROCEEDINGS  
109 OFFICE PARK DRIVE  
BRANDON, MISSISSIPPI 39042  
PHONE (601) 825-7663

TRUSTEE  
TERRE M. VARDAMAN

Mailing Address:  
P.O. BOX 1326  
BRANDON, MS 39043-1326

TO: ALL CHAPTER 13 ATTORNEYS  
FROM: TERRE M. VARDAMAN /tmv/  
RE: CHANGE IN TILL RATE FOR CHAPTER 13 CASES  
DATE: February 18, 2009

---

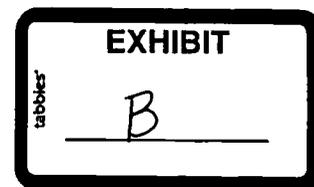
As many of you may already be aware, on February 13, 2009, Judge Houston issued a Memorandum stating that he and Judge Ellington and Judge Olack have conferred about reducing the presumptive interest rate used in Chapter 13 plans, and they have determined that effective with cases *FILED on or after March 1, 2009*, the presumptive rate will be 7%, (which follows the *Till* rule of using the prime rate (currently 3.25%) plus 3.75%.

Please be advised that my office WILL NOT automatically change or reduce the confirmed and/or proposed interest rate on any claims from 9.5% to 7%. It will be the attorney's responsibility to file and properly notice plans, amended plans, or motions to modify to reflect the reduction in interest rate proposed. You should also be sure your objections to secured claims are updated accordingly after March 1, 2009.

In the interest of assisting your offices in calculating the correct amounts, here are the multiplying factors for 7.0% interest on the most frequently used plan periods:

INTEREST FACTORS FOR 7.0%

<u>PLAN PERIOD</u>	<u>MULTIPLY PRINCIPAL BY:</u>
36 MONTHS	1.1116
48 MONTHS	1.1494
55 MONTHS	1.1719
60 MONTHS	1.1881



EXAMPLES:

36 MONTH PLAN      PRINCIPAL \$500.00 X 1.1116 = \$555.79 / 36 MOS = \$15.44/MO  
48 MONTH PLAN      PRINCIPAL \$500.00 X 1.1494 = \$574.71 / 48 MOS = \$11.97/MO  
60 MONTH PLAN      PRINCIPAL \$500.00 X 1.1881 = \$594.04 / 60 MOS = \$9.90/MO