Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: July 26, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

WARREN L. CHILDS, **CASE NO. 16-11232-NPO**

DEBTOR. **CHAPTER 12**

ORDER ON INDEPENDENT BANK'S MOTION FOR RELIEF FROM THE AUTOMATIC STAY AND FOR ABANDONMENT OF PROPERTY

This matter came before the Court for hearing on June 30, 2016 (the "Hearing"), on the Motion for Relief from the Automatic Stay and for Abandonment of Property (the "Motion for Relief") (Dkt. 27) filed by Independent Bank (the "Bank"), the Response to Motion for Relief from the Automatic Stay and for Abandonment of Property (the "Response") (Dkt. 32) filed by the debtor, Warren L. Childs (the "Debtor"), and the proposed Agreed Order Resolving Motion for Relief from the Automatic Stay and for Abandonment of Property (the "Proposed Agreed Order") (Dkt. 54) submitted by both parties in the above-referenced bankruptcy case (the "Bankruptcy Case"). At the Hearing, Les Alvis represented the Bank; Glenn H. Williams represented the Debtor; and Todd S. Johns and Justin B. Jones represented Harold J. Barkley, Jr, the chapter 12 standing trustee.

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. §1334(b). This matter is a core proceeding arising under 28 U.S.C. § 157(b)(2)(G). Notice of the Motion for Relief was proper under the circumstances.

Facts

1. On or about February 20, 2013, the Debtor financed the purchase of a 2009 Dodge Ram 150 pickup truck (the "Truck") with a loan from the Bank in the principal amount of $30,282.95 (Dkt. 27, Ex. A). Pursuant to a retail installment contract, the Debtor agreed to repay the loan in forty-eight (48) monthly installments of $734.10 at a fixed annual interest rate of 7.5%. The loan is secured by a lien on the Truck.

2. On April 8, 2016, the Debtor filed a voluntary petition for relief (the "Petition") (Dkt. 1) under chapter 12 of the Bankruptcy Code. In Schedule A/B: Property (Dkt. 6 at 4), the Debtor valued the Truck at $10,000.00. As of the Petition date, the Debtor owed the Bank $11,161.71 (Mot. ¶ 1; Resp. ¶ 1). The Debtor's chapter 12 plan was due initially on July 7, 2016, but the Debtor filed a Motion for Enlargement of Time Within Which to File Chapter 12 Plan (the "Motion to Extend") (Dkt. 66), seeking to extend the time to file his chapter 12 plan until September 8, 2016. The Motion to Extend is currently pending.

3. It is undisputed that the Debtor is in default on the Truck loan. (Mot. ¶ 4; Resp. ¶ 4).

4. On May 26, 2016, the Bank filed the Motion for Relief, asking the Court to order the abandonment of the Truck and the termination of the automatic stay under 11 U.S.C. § 362.[1]

[1] From this point forward, the "Code" refers to the Bankruptcy Code found at title 11 of the U.S. Code, and all code sections refer to the Code unless otherwise noted.

The Debtor opposed the Motion for Relief in the Response, asserting that the Truck is necessary and essential to his reorganization.

5. Before the Hearing, the parties reached an agreement concerning the Motion for Relief and submitted the Proposed Agreed Order to the Court for approval. Under the Proposed Agreed Order, the Debtor conceded that the Bank's claim is fully secured and agreed to pay the Bank adequate protection payments of $11,964.71, at an annual interest rate of 7.5%, in twenty-four (24) monthly installments of $538.42, beginning July 5, 2016 and ending June 5, 2018, when the remaining balance would become due. (Prop. Agreed order at 2-3). Additionally, the "Debtor shall incorporate the terms and provisions of this [Proposed] Agreed Order into his Chapter 12 plan by specific reference hereto and shall not provide for anything in his Chapter 12 plan which is in any way inconsistent with the terms and provisions of this [Proposed] Agreed Order." (Prop. Agreed Order at 4). Thus, the Proposed Agreed Order applies the contract rate of interest of 7.5% to the Bank's secured claim both before and after plan confirmation.

6. At the Hearing, the Court questioned the parties about the rate of interest included in the Proposed Agreed Order. By requiring the Debtor to continue paying the same rate of interest under the terms of his chapter 12 plan, the Proposed Agreed Order reflects a "cramdown"[2] interest rate of 7.5%. In this judicial district, however, the presumptive cramdown

[2] Under the "cramdown" option of § 1225(a)(5), a debtor can cram down a plan over the objection of a secured creditor if the secured creditor receives "the value, as of the effective date of the plan of property to be distributed . . . under the plan on account of such claim [that] is not less than the allowed amount of such claim." 11 U.S.C. § 1225(a)(5)(B)(ii).

interest rate in chapter 13 cases is the "*Till* rate" of 5%.[3] Whether the *Till* rate also applies in chapter 12 cases is an issue of first impression before this Court.

Discussion

The filing of a bankruptcy petition generally stops the running of interest. 11 U.S.C. § 502(b)(2). There are two (2) distinct periods, however, during which a secured creditor may be entitled to interest: (1) the post-petition, pre-confirmation period (the "interim period"), as provided under § 506(b); and (2) the post-confirmation period, as provided under the reorganization chapters of the Code. *In re Stringer*, 508 B.R. 668, 671 (Bankr. N.D. Miss. 2014). The Proposed Agreed Order provides for payment of interest at the contract rate of 7.5%, both during the interim period ("pendency interest") and after confirmation under the terms of a reorganization plan ("plan interest" or "cramdown interest"). The Court considers first the pendency interest issue.

A. Pendency Interest

Pendency interest is available to an oversecured creditor only during the interim period between the filing of a petition for relief and plan confirmation. 11 U.S.C. § 506(b). Under § 506(b), interest is allowed on a secured claim to the extent that the value of the collateral exceeds the amount of the secured claim. *See United Savs. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 372-73 (1988) (allowing pendency interest to the extent that a "security cushion" exists); *see also United States v. Ron Pair Enters. Inc.*, 489 U.S. 235, 243

[3] The "*Till* rate" of 5% is the presumptive interest rate applicable to a secured creditor's claim paid under the cramdown option of § 1325(a)(5)(B) in chapter 13 cases filed in this judicial district on or after August 1, 2014. *See* Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate (July 8, 2014). Using the formula approach outlined in *Till*, the interest rate of 5% is based on the then current prime rate of 3.25% per annum and a risk enhancement of 1.75% per annum. *Id.*; *see also In re Washington*, Case No. 14-03588-NPO (Bankr. S.D. Miss. Mar. 18, 2015) (Dkt. 50) (discussing adjustments to the *Till* rate based on specific risk factors).

(1989) (holding that all oversecured creditors, even those holding nonconsensual claims such as a judicial or statutory lien, are entitled to pendency interest under § 506(b)). The Code does not specify the rate of interest that oversecured creditors are entitled to receive during the interim period. *In re Stringer*, 508 B.R. at 671. The Fifth Circuit Court of Appeals considered the pendency interest rate issue in a chapter 11 case, *Bradford v. Crozier (In re Laymon)*, 958 F.2d 72, 75 (5th Cir. 1992), holding that when an oversecured creditor's claim arises from a contract, the contract provides the post-petition, pre-confirmation interest rate pursuant to § 506(b). The Fifth Circuit noted that its holding was consistent with pre-Code practice where a majority of courts applied nonbankruptcy law to determine the rate of interest allowed to an oversecured creditor. *Laymon*, 958 F.2d at 75. The Proposed Agreed Order provides for pendency interest at the contract rate. Thus, if this were a chapter 11 case rather than a chapter 12 case, the pendency interest in the Proposed Agreed Order clearly would be consistent with *Laymon* and would be approved by this Court without further discussion.

There is a paucity of case law on the issue of pendency interest in chapter 12 cases because in a typical chapter 12 case, no more than 135 days will elapse between the filing of the petition and confirmation of a plan.[4] 8 COLLIER ON BANKRUPTCY ¶ 1205.02 (16th ed. 2016). As a result, there is usually no need for a debtor to provide a creditor with adequate protection[5] in a chapter 12 case. This Bankruptcy Case, however, is unusual because the Debtor has not yet filed his chapter 12 plan and has sought an extension of the deadline to do so until September 8, 2016.

[4] The plan must be filed within ninety (90) days after the petition is filed, and a confirmation hearing must be concluded within forty-five (45) days of the filing of the plan. 11 U.S.C. §§ 1221, 1224.

[5] In chapter 12 cases, § 1205, not § 362, governs adequate protection. *See* 11 U.S.C. § 1205(b) (allowing chapter 12 debtors to provide adequate protection through "periodic cash payments").

The Fifth Circuit's decision in *Laymon* is instructive, and the Court finds no reason to apply a different method for calculating pendency interest in a chapter 12 case than in a chapter 11 case when both involve an application of the same statute, § 506. For this reason, the Court finds that the contract rate of interest of 7.5% reflected in the Proposed Agreed Order should be approved, but only as to the interim period. The Bank's entitlement to post-petition or plan interest at the contract rate requires a separate inquiry because "§ 506(b) . . . has no applicability beyond the plan confirmation date." *In re Stringer*, 508 B.R. at 671-72.

B. Plan Interest

Plan interest is not referenced directly in the Code but is implied from the provisions in the reorganization chapters. In a chapter 12 case, a court may confirm a chapter 12 plan over the objection of a secured creditor if the plan provides that the secured creditor retains the lien securing the claim and "the value, as of the effective date of the plan, of property to be distributed . . . under the plan on account of such claim is not less than the allowed amount of such claim." 11 U.S.C. § 1225(a)(5)(B)(i)-(ii). Thus, when a plan proposes to pay a secured claim in installments (rather than in lump-sum), the court must apply a discount factor to determine the present value of those payments. 8 COLLIER ON BANKRUPTCY ¶ 1225.03[4][c]. The court must then ascribe an interest rate to the allowed amount of the claim. *Id.* This rate of interest is known as plan interest or cramdown interest.

In *Till*, a split decision, the U.S. Supreme Court authorized a "formula approach" in setting the cramdown interest rate in chapter 13 cases. *Till*, 541 U.S. at 465. The plurality interpreted the reference to "value" in § 1325(a)(5)(B)(ii), which also appears in § 1225(a)(5)(B)(ii), as incorporating the principle of the time value of money. *Till*, 541 U.S. at 465. The formula approach begins with the national prime rate, a standard measure of risk-free

lending. *Id.* at 478-79. Then, to compensate a secured creditor for the risk of nonpayment by a debtor in bankruptcy, the formula approach adds an adjustment based on such factors as "the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan." *Id*. at 479. The *Till* plurality did not fix a risk factor for all chapter 13 cases, but generally approved adjustments ranging from 1% to 3% above the prime rate. *Id*. at 480. The evidentiary burden falls "squarely on the creditors" to demonstrate a particularized risk justifying a higher upward departure than the approved range of 1% to 3%. *Id.* at 479.

The Fifth Circuit in *Drive Financial Services, L.P. v. Jordan*, 521 F.3d 343 (5th Cir. 2008), discussed the proper application of *Till* in a chapter 13 case. In *Drive Financial*, the debtors proposed a chapter 13 plan in which they retained possession of their truck and paid the secured creditor the balance of its loan in monthly installments at an interest rate of 6%. *Id*. at 344. The secured creditor objected to the plan, asserting that it was entitled to plan interest at the contract rate of 17.95%. *Id*. In support of its assertion, the secured creditor maintained that *Till* did not constitute binding precedent because five (5) Justices did not join any one opinion. *Id.* at 348-49. After examining the facts in *Till* and finding them indistinguishable, the Fifth Circuit concluded that the plurality in *Till* constituted binding precedent. *Id*. at 350. Later, in *Wells Fargo Bank National Ass'n v. Texas Grand Prairie Hotel Realty, L.L.C. (In re Texas Grand Prairie Hotel Realty, L.L.C.)*, 710 F.3d 324, 337 (5th Cir. 2013), the Fifth Circuit upheld the bankruptcy court's use of *Till*'s formula approach in calculating the cramdown interest rate in a chapter 11 case. The Fifth Circuit has not yet considered whether *Till* applies in chapter 12 cases.

There is a relative dearth of case law that addresses the question of plan interest in a chapter 12 case.[6] Of those courts that have considered the issue, however, almost all agree that the holding in *Till* reaches chapter 12. *See, e.g., In re Prescott*, No. 11-10789, 2011 WL 7268057, at *2 (Bankr. S.D. Ga. Dec. 21, 2011) (observing that "[t]he courts and commentators have generally treated the question of how the cramdown interest rate should be determined as a question that is answered the same in Chapter 11, 12, and 13 cases") (citation omitted); *In re Standley*, No. 11-62373-12, 2013 WL 1191261, at *5 (Bankr. D. Mont. Mar. 22, 2013) (holding in a chapter 12 case, "The United States Supreme Court in . . . *Till* . . . adopted the formula approach over other approaches to establish a cramdown rate. Together with *Till* and . . . *Fowler*, [903 F.2d 694, 697-98 (9th Cir. 1990)], this Court considers its long-standing formula approach still good law [for chapter 12 cases]."); *In re Hudson*, No. 208-09480, 2011 WL 1004630, at *6 (Bankr. M.D. Tenn. Mar. 16, 2011) (applying the "formula" or "risk plus" analysis in *Till* in a chapter 12 case); *In re Pratt Vineyards, LLC*, No. 10-35071-A-12, 2011 WL 10657053 (Bankr. E.D. Cal. June 7, 2011) (applying *Till* in a chapter 12 case); *First Nat'l Bank v. Woods (In re Woods)*, 465 B.R. 196, 207 (B.A.P. 10th Cir. 2012), *judgment vacated on other grounds by* 743 F.3d 689 (10th Cir. 2014) ("[T]he *Till* rate should be applied in Chapter 12 cases."); *In re Torelli*, 338 B.R. 390, 396 (Bankr. E.D. Ark. 2006) (suggesting that *Till* applies within Chapters 11, 12, and 13); *In re Wise*, No. 12-07535, 2013 WL 2421984, at *5 (Bankr. D.S.C. May 31, 2013) ("The Supreme Court's decision in *Till* . . . while involving a security interest in a vehicle in the context of a chapter 13 case, supplies the appropriate methodology for determining the interest rate component of present value" in a chapter 12 case).

[6] As of July 5, 2016, a limited search of the Westlaw's electronic database produced only forty-seven (47) cases that discussed *Till* in the context of a chapter 12 case.

Although the Supreme Court did not expressly hold that *Till* applies in chapter 12 cases, the plurality seemed to suggest as much when it remarked: "We think it likely that Congress intended bankruptcy judges and trustees to follow essentially the same approach when choosing an appropriate interest rate under any of these provisions." *Till*, 541 U.S. at 474. Three (3) of the provisions cited by the Supreme Court are found in chapter 12: 11 U.S.C. §§ 1225(a)(4), 1225(a)(5)(B)(ii), 1228(b)(2). *Id.* at n.10. Significantly, the confirmation standards at issue in *Till* are nearly identical to those in chapter 12. *Compare* 11 U.S.C. § 1325(a)(5)(B)(ii) *with* 11 U.S.C. § 1225(a)(5)(B)(ii). Moreover, the Fifth Circuit in *Texas Grand Prairie Hotel Realty* sanctioned the application of *Till*'s formula approach in chapter 11 cases. 710 F.3d at 337. It seems likely that its application in chapter 12 cases would also be appropriate. Accordingly, this Court finds, as a matter of first impression, that the *Till* rate is the cramdown or plan interest rate that should be applied in all chapter 12 cases.

Here, the Proposed Agreed Order contemplates plan interest at the contract rate of 7.5% for the Truck. For cramdown purposes, however, the presumptive *Till* rate is only 5%. Therefore, the Court finds that the Proposed Agreed Order should not be approved, and the Motion for Relief and the Response should be reset for hearing. The parties may agree either to remove the plan interest rate provision altogether or reduce the plan interest rate from 7.5% to 5% so that the contract rate of 7.5% applies only until plan confirmation. Alternatively, the Bank may present evidence at the hearing specific to the Bankruptcy Case that supports a risk adjustment to the current prime rate greater than the percentage reflected in the *Till* rate of 5%. Such evidence, however, must relate to: (1) the circumstances of the Debtor's estate; (2) the nature of the collateral; (3) the feasibility of the Debtor's plan; or (4) the duration of the Debtor's plan. *Till*, 541 U.S. at 479; *In re Washington*, No. 14-03588-NPO, slip op. at 12-17.

Conclusion

For the reasons set forth above, the Court will reset the Motion for Relief and the Response for an evidentiary hearing consistent with this Order.

IT IS, THEREFORE, ORDERED that the Motion for Relief and the Response shall be reset for an evidentiary hearing consistent with this Order.

##END OF ORDER##