

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
EASTERN DIVISION**

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**IN RE**

**Cynthia Miller**

**CASE NUMBER 98-13716**

**Chapter 13**

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**MEMORANDUM OPINION AND ORDER RE  
OBJECTION TO CONFIRMATION FILED BY UNION PLANTERS BANK**

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The Court conducted a hearing on the Objection to Confirmation filed by Union Planters Bank on January 14, 1999. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

**I. FINDINGS OF FACT**

The facts in this case are relatively undisputed. On August 29, 1996, the debtor, Cynthia Miller, (“Miller”), executed and delivered to Union Planters National Bank, (“Bank”), a promissory note in the amount of \$48,000, which was secured by a mortgage on the debtor’s residence. Between the date of execution of the note and November 30, 1998, debtor made only fourteen (14) of the twenty-six (26) scheduled payments.

After experiencing financial difficulty throughout 1997 and 1998, Miller filed a chapter 7 bankruptcy petition on January 12, 1998. Miller received her chapter 7 discharge on May 4, 1998. During the pendency of her chapter 7 case, the Bank attempted to work out a payment arrangement with the debtor on the note and the arrears, but Miller did not comply. A reaffirmation agreement was never executed. As a result, Miller’s discharge under chapter 7 discharged the debtor’s personal obligations under the deed of trust and deed of trust note, but did not affect the Bank’s lien on the property.

During the summer of 1998, Bank proceeded to foreclose on the debtor’s residence, setting the actual sale of the property for October 1, 1998. In an attempt to stop the foreclosure, Miller filed a chapter 13 bankruptcy petition on September 29, 1998. According to the plan of repayment filed contemporaneously with her chapter 13 petition, Miller proposed to make the regular ongoing monthly payment of \$504.00 to the Bank through her chapter 13 case, as well as making a monthly payment of \$34.00 towards the \$2,000 arrearage on the note. Miller’s chapter 13 case is a one-creditor case.

In response to the proposed treatment of its lien, Bank filed an Objection to Confirmation on November 10, 1998, alleging, in part, that Miller’s proposed plan lacked the good faith and feasibility required by the Bankruptcy Code. Bank also alleged that, because Union Planters does not accept the debtor’s proposed chapter 13 plan, the debtor must either surrender the property or provide Union Planters with an amount equal in value to its claim.

## **II. CONCLUSIONS OF LAW**<sup>1</sup>

A mortgage lien securing an obligation for which a debtor’s personal liability has been discharged in a previous chapter 7 liquidation is a “claim” within the meaning of 11 U.S.C. § 101(5) and is subject to inclusion in an approved Chapter 13 reorganization plan. *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150, 2154, 115 L.Ed.2d 66 (1991). A plan proposed in this kind of serial filing, however, must still pass the tests of good faith under § 1325(a)(3) and feasibility under § 1325(a)(6). *Id.*

The Bankruptcy Code does not define the meaning of “good faith.” As a result, the Bankruptcy Courts around the nation have had the task of setting the boundaries of such term. In so doing, the Sixth Circuit has delineated a test for determining whether or not good faith is present in the proposal of a debtor’s plan. Such test requires an investigation into the totality of the circumstances, *Society Nat’l. Bank v. Barrett (In re Barrett)*, 964 F.2d 588 (6<sup>th</sup> Cir. 1992). When a debtor files for chapter 13 reorganization soon after receiving a discharge under chapter 7 (a procedure commonly known as “chapter 20”), this remains the appropriate test, and a court must sufficiently consider the debtor’s prior conduct. *Id.* The critical issue is whether there is a “sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources.” *Id.* at 592.

The Sixth Circuit has set out twelve relevant factors a bankruptcy court should consider in making a good faith determination:

- (1) the debtor’s income;
- (2) the debtor’s living expenses;
- (3) the debtor’s attorney fees;
- (4) the expected duration of the Chapter 13 plan;
- (5) the sincerity with which the debtor has petitioned for relief under Chapter 13;
- (6) the debtor’s potential for future earning;
- (7) any special circumstances the debtor may be subject to, such as unusually high medical expenses;
- (8) the frequency with which the debtor has sought relief before in

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<sup>1</sup> Although Union Planters has objected to confirmation of the debtor’s proposed chapter 13 plan on two grounds, the Court is deciding the confirmation issue based solely on the Bank’s allegation of bad faith.

bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by debtor as indicative of the debtor’s sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy the bankruptcy provisions be construed liberally in favor of the debtor.

*In re Okareeh-Baah*, 836 F.2d 1030 (6<sup>th</sup> Cir. 1988). The bankruptcy court is not required to find in favor of the debtor on each factor. Instead, as already stated, the court must find by a totality of the circumstances that the debtor acted in good faith in submitting the current Chapter 13 plan. *In re Caldwell*, 895 F.2d 1123, 1126 (6th Cir. 1990).

A determination of good faith must rest ultimately with the bankruptcy court’s common sense and judgment, remembering the purpose of Chapter 13 is sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources. *Okareeh-Baah*, 836 F.2d at 1033. The inquiry by a bankruptcy Court is highly fact-specific and implementation of the Sixth Circuit’s twelve-factor test will most definitely vary on a case-by-case basis. When addressing an objection to confirmation, it is the debtor seeking the protection and benefits of Chapter 13 who has the burden of proving that their plan was submitted in good faith. *In re Girdaukus*, 92 B.R. 373, 376 (Bankr. E.D. Wis. 1988).

In the case at bar, the debtor executed the promissory note in August of 1996. By May of the next year, Miller became delinquent on the loan. In August of 1997, Union Planters attempted to work out a payment schedule for Miller so that she could make up the missed payments and avoid a foreclosure. When this concessionary agreement failed to provide Miller with the extra help she needed to remain current on the note, she filed for chapter 7 bankruptcy relief.

During the pendency of her first bankruptcy case, Miller failed to cooperate with the Bank in reaffirming the debt. Instead, she allowed the chapter 7 discharge to erase her personal liability on the debt in May of 1998. After the Bank had initiated foreclosure proceedings and set the date for the foreclosure sale, Miller returned to bankruptcy court and filed the current chapter 13 case two days before the scheduled sale. As stated in the Finding of Facts portion of this opinion, Miller’s current chapter 13 is a one-creditor case. Additionally, Miller has proposed to pay the arrearage on the Union Planters note over the entire life of the plan.

Based on a totality of the circumstances, the Court simply cannot find there to be the requisite good faith in Miller’s instant chapter 13 filing. Since executing this note in August of 1996, Miller has made what can be termed at best a half-hearted attempt to repay this debt—all the while, continuing to remain in possession of the property. Had she reaffirmed the note in her previous chapter 7 petition and

thereby sustained her personal obligation for the debt, the Court would be more persuaded that good faith was present in the filing of the instant case. However, considering the present circumstances, the Court has no choice but to sustain Union Planters’ Objection to Confirmation and to grant them their reasonable attorney’s fees.

### **III. ORDER**

It is therefore **ORDERED** that the Objection to Confirmation filed by Union Planters Bank is **SUSTAINED**. Debtor shall have fifteen (15) days from entry of this order to submit an amended plan or her case will be dismissed.

It is **FURTHER ORDERED** that the debtor, Cynthia Miller, shall pay to Union Planters Bank the reasonable attorneys’ fees the Bank incurred in litigating this objection.

**It is so ordered.**

**By the Court,**

**G. Harvey Boswell  
United States Bankruptcy Judge**

**Date: March 22 ,1999**