UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re:

EARLINE JONES, Debtor.	Case No. 03-41991whb Chapter 13
WILLIE SINCLAIR, Debtor.	Case No. 04-22034whb Chapter 13
BARBARA ANN ANDERSON, Debtor.	Case No. 04-21794whb Chapter 13

MEMORANDUM OPINION ON OBJECTIONS TO CONFIRMATION BY TAX COLLECTION AUTHORITIES

In these and other similarly situated chapter 13 cases assigned to this Judge, objections to confirmation of the debtors' plans were filed by the real property tax collection authorities, the Shelby County Trustee and the City of Memphis. Briefing by counsel for the parties has been completed and oral argument was conducted on December 20, 2004, after which the Court took the issues under advisement. This Memorandum Opinion contains the Court's conclusions of law on stipulated facts. This Opinion shall be adopted in each case assigned to this Judge in which either tax collection authority has filed objections.[1]

STATEMENT OF ISSUES

The parties agreed that the relevant facts are not in dispute, and those facts will be summarized below. The issues before the Court are:

1. Whether these and other similarly situated chapter 13 debtors' plans may be confirmed over the objections of the real property tax collectors;

2. Whether the plans must provide for payment of interest on the delinquent real property taxes, and whether the statutory rate of interest established by the Tennessee legislature is binding or whether another interest rate may be applied;

3. Whether the recent decision of the Supreme Court in *Till v. SCS Credit Corp.,* 541U.S. 465, 124 S.Ct. 1951, 158 L.Ed. 2d 787 (2004), is controlling on the interest rate to be paid, or if not controlling, the extent to which that authority is persuasive; and

4. Whether 11 U.S.C. § 1322(e) applies in these cases.

STIPULATION

The parties filed a stipulation, providing the following facts and conclusions relevant to each case and objection:

1. The debtors owe and have scheduled delinquent *ad valorem* real property taxes, which are due under the provisions of TENN. CODE ANN. § 67-5-101;

2. The relevant taxing authority (city or county or both) has a nonconsensual statutory lien for the delinquent taxes pursuant to TENN. CODE ANN. § 67-5-2101;

3. The statutory lien of the taxing authority is a first lien and in each case the value of the subject realty exceeds the value of the tax claim; and

4. In each case the debtor's plan proposes to pay the tax claim as a priority claim without interest.

In addition, the stipulation acknowledges that TENN. CODE ANN. § 67-5-2010 provides for an accrual of interest on delinquent realty taxes at 12% per annum.

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[1] Objections continue to be filed in new cases, and this Opinion shall be adopted and orders entered in those cases.

DISCUSSION AND CONCLUSIONS OF LAW

The issues of whether chapter 13 debtors must provide in their plans for interest on delinquent real property taxes is an important one. Counsel for the tax collection authorities stated in oral argument that there were 3,507 pending chapter 13 cases in this judicial district in which delinquent real property tax claims existed and that approximately 75 cases with such taxes were filed each month. There was interesting discussion at the argument about the real impact that would occur should the Court require payment of interest, especially should the Court require payment of the 12% statutory rate, with an acknowledgment by debtors' counsel that the impact would be principally on unsecured creditors, whose distributions in confirmed plans would be reduced as the payments to tax creditors increased. There was also interesting discussion about the practical impact of a decision that might say that the parties should negotiate an appropriate rate of interest, with the tax collection authorities' counsel stating that they were prohibited by the Tennessee and federal constitutions from negotiating a rate below the statutory rate, since such a negotiation would arguably be discrimination in favor of one taxpayer for a rate that was not the same as other taxpayers would be required to pay. As a result of this Opinion, negotiation over the rate will not be necessary.

There was extensive discussion of the impact of the *Till* decision and the extent to which it controls the outcome of the issues here. The tax collection authorities' objections are pending before each of the bankruptcy judges in Memphis, with a decision already having been rendered by Chief Judge Kennedy, who required the debtors to amend their plans to recognize the secured position of the tax collection authorities and gave a further opportunity for objection to the rate of interest that the debtors might propose. This Opinion's conclusion is consistent in part with Chief Judge Kennedy's order but it differs in some respects.

First, this Court concludes that the outcome is a rather straightforward one, dependent upon provisions of the Bankruptcy Code:

11 U.S.C. § 101(37) defines a "lien" as a "charge against or interest in property to secure payment of a debt or performance of an obligation."

11 U.S.C. § 101(51) defines a "security interest" as a "lien created by an agreement."

11 U.S.C. § 101(53) defines a "statutory lien" as one "arising solely by force of a statute on specified circumstances or conditions," but such a lien "does not include security interest or judicial

lien...."

11 U.S.C. § 506(a) grants an allowed claim that is secured by a lien on property a secured status to the "extent of the value of the such creditor's interest in the estate's interest in such property...," and § 506(b) permits an oversecured but nonconsensual claim to be paid interest.

11 U.S.C. § 1322(b)(2) provides that a chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence...."

11 U.S.C. § 1325(a)(5)(B)(ii) provides that the value to be distributed through a confirmed plan "is not less than the allowed amount of such claim."

As a result of these Code provisions, and with the stipulations in mind, it is obvious that the real property tax collectors are statutory lien holders, by virtue of the Tennessee Code. They are secured creditors to the extent of the value of the property secured by their lien, but they are not, however, beneficiaries of a "security interest," since such an interest requires an "agreement." The lien arises from state law, not from an agreement with the taxpayers. Section 1322(b)(2)'s exception from modification of the rights of secured creditors does not apply but the general provisions of that section do apply; that is, as lien holders, the rights of the tax collection authorities are subject to proposed modification in chapter 13 plans.

The stipulation admits that the value of each debtor's property exceeds the amount of the delinquent tax claims; thus, the tax collection authorities are oversecured and entitled to interest on their secured claims. This is true because of 11 U.S.C. § 1325(a)(5)(B)(ii)'s provision that the value of property distributed in a plan, as of its effective date, must at least equal the "allowed amount of the claim." This "present value" requirement is satisfied by payment of "an appropriate interest rate to guarantee that the present value of payments through the plan will equal or exceed the allowed amount of the secured claim." Keith M. Lundin, CHAPTER 13 BANKRUPTCY 3D ED. §111-1 (2000 & Supp. 2004). As the Supreme Court recognized in *Till,* this is a "cram down" provision for confirmation to be used when the creditor's consent or surrender of the subject property is absent. The *Till* decision analyzed the various methods that courts had used to arrive at an appropriate rate of interest and the plurality opinion adopted what it called the "formula approach," using the nationally published prime rate as might need to be enhanced by "appropriate risk adjustments." *Till,* 124 S.Ct. at 1961.

Is *Till* controlling in the present cases? Not literally, since *Till* dealt with a different type of creditor, but the approach taken in that opinion is clearly persuasive for purposes of these cases. In *Till* the creditor was a lender on a vehicle, a depreciating asset, and there were acknowledged risks that such a creditor incurs in lending to any borrower as well as looking to future payments from a chapter 13 debtor while that debtor was continuing to use the depreciating asset. In the present cases, there is actually no lender; rather the city and county are the beneficiaries of a statutory lien that merely compensates them for any delay by a real property taxpayer in timely payment. It can't be said that the city and county look to interest on delinquent taxes for predictable income, nor can these creditors be compared to a car lender that knows it is incurring risks in a lending transaction. In a very real sense, there is typically no risk to the tax collecting authority since it is given a first lien position by the legislature, a position that primes even a mortgage lender. Since the parties' stipulation is that for these cases the real property values exceed the tax lien claims, these creditors are oversecured. This is effectively an acknowledgment of no present risk of nonpayment. The only effect of these proposed plans on the tax lien is delay in payment. Delay is not a risk when the creditor is clearly oversecured. Delay is compensated by an appropriate interest rate to assure that the present value of the claim is paid.

Should there be a chapter 13 case where the value of the real property does not meet or exceed the delinquent tax claims, the tax collector would no doubt be moving for dismissal of the case or for relief from the automatic stay for cause or for lack of adequate protection, but the tax collector in such a case would also be undersecured, meaning that interest would not accrue in the absence of stay relief or dismissal of the case.

As admittedly oversecured creditors, the tax collection authorities in these cases should be compensated for the delay in receiving payment of their claim. Both the Supreme Court and Sixth Circuit have recognized that an oversecured lien creditor is entitled to interest on its claim. At the same time, those courts have recognized that the Code does not permit such a creditor, in contrast to a creditor in a consensual security agreement, to receive penalty charges, fees or costs. *U. S. v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *Bondholder Committee v. Williamson County, Tennessee (In re Brentwood Outpatient, Ltd.),* 43 F.3d 256 (6th Cir. 1994). In *Brentwood Outpatient*, the Sixth Circuit acknowledged the interest on a real property tax claim to be "compensatory," and it recognized the different treatment given by the Code's

§ 506(b) to nonconsensual creditors from that given to consensual creditors. As a result of these holdings, it is clear that the city and county are only entitled to interest, and in fact, neither seeks statutory penalties on the delinquent taxes.

So, we arrive at the issue of how to determine the amount of interest that is required or appropriate, and here *Till* is persuasive even if not fully controlling. Since the rationale of that decision is based upon a combination of Code sections that also apply in these cases, the question is whether the Supreme Court would find any reason to treat the city or county tax collectors differently from other secured creditors whose secured claims may be modified in chapter 13 plans. This Court can find nothing in *Till* to suggest a difference. In fact, Justice Stevens' plurality opinion warns that the bankruptcy court "need not consider the creditor's individual circumstances...." *Till,* 124 S.Ct. at 1960. As observed already, the city and county tax collectors are first lien holders. The fact that the Tennessee statute gives them a fixed rate of interest is not controlling, however, since the Bankruptcy Code, which takes precedence under the Bankruptcy Clause of the U. S. Constitution,[2] permits chapter 13 plans to modify the rights of such lien holders. The tax collectors do not enjoy the position of home mortgage lenders that may be protected from modification, and there is nothing else in the chapter 13 provisions of the Code that would protect these creditors from modification.

Section 1322(e) does not benefit these statutory lien creditors. While it provides for determination of the amount needed to cure a prebankruptcy default, from the language of the statute it is clear that this subsection applies only to consensual secured creditors. "Section 1322(e) is worded conjunctively–to be included in the amount necessary to cure default, an entitlement must be supported by both the contract *and* applicable nonbankruptcy law." Lundin, at §135-4 . This is a section of the Code that was added to overrule *Rake v. Wade,* 508 U.S. 464, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993), a decision that permitted an oversecured mortgage creditor to receive both pre- and postconfirmation interest on arrearages that were to be cured in a chapter 13 plan. *Id.,* at § 135-

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[2] U.S. CONST. art. I, § 8, cl. 4. There is no issue here of sovereign immunity, with the tax collectors admitting that it does not apply to cities and counties.

2. Thus, the subsection has no application to the present objections to confirmation.[3]

As a result of the prior discussion and conclusions, these chapter 13 debtors may propose plans that would modify the statutory interest that would be payable on delinquent real property tax claims; however, these debtors have proposed plans that treat these tax collection creditors as priority creditors rather than secured creditors. The Court's conclusion that these creditors are oversecured under the stipulated facts dictates that the objections be sustained; however, the debtors may amend their unconfirmed plans to provide for interest on these claims.

The final question is what rate of interest is appropriate. While the specific rate of interest was not formally submitted at this time, the *Till* Court's roadmap provides the answer. The beginning point is the nationally published prime rate, which of course changes, but it will be that rate at the time of the effective date of the plan. The effective date is the date of the confirmation hearing and its resulting order. 11 U.S.C. § 1327(a). What, if any, adjustment for risk must be applied to that prime rate? This Court has already observed that these creditors are in a priming first position, above all other creditors holding secured claims to the subject realty, and, in view of the stipulated oversecured position, there is no readily recognizable risk of nonpayment. The only obvious factor is one of delay in payment. *Till* does not speak of increasing the interest rate based upon delay in payment; that is the function of the prime rate. *Till's* possible enhanced adjustment is one for risk, and that decision squarely places the burden on the creditor to demonstrate that an upward adjustment is necessary. *Till,* 124 S.Ct. at 1961.

In contrast to the consensual debtor/creditor scenario found in *Till,* where there are obvious risks to the creditor, here the tax collectors are assured of full payment, so long as the property is worth more than their claims, and that assurance continues even if the chapter 13 plan fails and the

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[3] There has been some suggestion that the bankruptcy court should avoid a reduction in the statutory rate in order to not impinge upon the tax assessment and liability arena of the tax authorities. These cases do not, however, present an assessment issue, nor does § 505 of the Code control in these cases. The ultimate issue presented here is limited to the amount of interest that a chapter 13 debtor must pay to cure arrearages on real property taxes, an issue controlled by §§ 1322(b)(2) and 1325(a)(5)(B)(ii).

case is dismissed.[4] At that point, free of the bankruptcy constraints, the tax collectors would revert to their statutory interest of 12%. This risk of plan default is not a risk for the creditor. Any risk of nonpayment through a plan that has reduced the interest rate is a risk the debtor assumes, and if anything, it serves as an incentive for the debtor to complete the plan in order to pay the delinquent taxes at an interest rate that may be lower than the statutory rate.

CONCLUSION

Thus, in these cases and others with like facts in which these creditors have filed objections, the debtors must first recognize the oversecured lien position of these creditors and propose in their plans no less than the nationally published prime rate of interest. The tax collector creditors may then, of course, object to confirmation, but if an objection is based upon the rate of interest proposed, the creditor must bear the burden of proving that an upward adjustment from the prime rate is necessary, a heavy burden indeed in view of this Court's observation that such tax lien creditors typically have no demonstrable risk of nonpayment. Assuming that the plans propose to pay the tax claims in full, the creditors merely seem to have the time delay in payment, with their first lien position preserved throughout the bankruptcy and surviving any dismissal of a particular bankruptcy case, at which point their statutory interest rate and penalties would reappear.

Orders consistent with and adopting this Opinion will be entered in each chapter 13 case pending before this Judge in which a real property tax collecting authority has filed an objection to confirmation.

Service List:
Debtors
Attorneys for each Debtor
Joseph D. Fox, Jimmy E. McElroy and Associates, designated counsel for all debtors on this issue
John L. Ryder and Elijah Noel, Assistant Shelby County Attorneys

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[4] *See Till,* 124 S.Ct. at 1961 n. 18, for its observation that if chapter 13 plan completion could be "certain," the "prime rate would be adequate to compensate any secured creditors forced to accept cram down loans." In the present cases, these oversecured creditors are certain of eventual payment in full, even in the event of plan failure, since their secured prime position will remain intact and, in the event of plan failure and case dismissal, the statutory interest and penalties will be restored. Such certainty of payment in or out of a chapter 13 plan would seem to dictate the use of the prime rate for interest absent compelling proof otherwise.

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Chapter 13 Trustees
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