UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP No. NH 98-046

IN RE: CHRISTOPHER D. HOWE and JENNIFER M. HOWE,
Debtors.

CHRISTOPHER D. HOWE and JENNIFER M. HOWE,
Appellants

v.

FLEET MORTGAGE CORPORATION,
Appellee.

Appeal from the United States Bankruptcy Court
District of New Hampshire
[Hon. Mark W. Vaughn, U.S. Bankruptcy Judge]

Before
Lamoutte, de Jesús and Haines, U.S. Bankruptcy Judges

Grenville Clark III, Esq. and Gray Wendell & Clark on brief for the Appellants.

Linda Aldon, Esq. and Shapiro & Morley, LLP on brief for the Appellee.

March 26, 1999

---

de Jesus, J.

Debtors Christopher and Jennifer Howe challenge the Bankruptcy Court's order overruling their objection to Fleet Mortgage Corporation's secured proof of claim. Fleet had insisted that the Howes' plan provide for payment of interest on all components of their prepetition residential mortgage arrearages, including the portion of the arrearages which itself represents accrued interest on the mortgage principal.

The Howes' appeal turns on the question whether the Bankruptcy Court incorrectly applied Section 1322 determining the underlying mortgage agreement provides that the debtors pay interest on all mortgage arrears, including overdue principal payment and unpaid interest. For the reasons set forth below, we conclude that, although the loan agreement calls for interest to accrue on the outstanding principal, it does not provide that interest accrues on the interest component(s) of unpaid loan installments. Thus, we reverse.

JURISDICTION AND STANDARD OF REVIEW

The bankruptcy court's order denying an objection to a proof of claim under Fed. R. Bankr. P. 3007 and 11 U.S.C. § 1322(b) is a final order. 4 *Collier on Bankruptcy*, § 502.11[3], pp. 502-85 (15th ed. rev.); *In the Matter of Walsh Trucking Co., Inc. v. Insurance Co. of N. Am.*, 838 F.2d 698 (3rd Cir. 1988); *Matter of Colley*, 814 F.2d 1008 (5th Cir. 1987). We have jurisdiction under 28 U.S.C. §

158(b).

Construction of an ambiguous contract, and the application of Bankruptcy Code § 1322(e) and New Hampshire law present legal issues, which we review de novo. McDonald's Corporation v. Lebow Realty Trust, 888 F. 2d 912, 913 (1st Cir. 1989); Boston Edison Co. v. Federal Energy Regulatory Commission, 856 F. 2d 361, 365 (1st Cir. 1988).[1]

FACTS

The facts are brief. Appellants objected to Fleet's proof of claim for a number of reasons. All the disputes were settled except the issue now on appeal.[2] The Bankruptcy Court confirmed the Howes' amended plan, reserving the issue raised by their objection to Fleet's claim for "interest on interest" and set it for a later hearing. Upon that hearing's completion, the Court ruled from the bench stating:

> I think it is only fair to allow the bank to get interest on the arrearages pursuant to Chapter 13. They're being paid over a considerable amount of time, and I'm going to deny your objection on that basis. Appellant's Appendix, p. 18.

---

[1] Neither before this panel nor before the court below did either party assert that the Fleet loan agreement's interest provisions are ambiguous in any material respect.

[2] Fleet's total claim was $7,092.89 which includes approximately $5,450.00 in mortgage arrears. The remainder of the claim is attributable to late charges, costs and attorney fees due to the foreclosure action and the bankruptcy proceeding. The parties do not dispute Fleet's entitlement to interest on these additional charges.

DISCUSSION

The parties agree 11 U.S.C. § 1322(e) controls. It states:

> Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325 (a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

Congress enacted § 1322(e) in the Bankruptcy Act of 1994 with the stated purpose of overruling *Rake v. Wade*.[3] Congress recorded its intent on whether the lender could charge interest upon overdue principal and interest when curing arrears as:

---

[3] See 140 Cong. Rec. H 10,764, (daily ed., October 4, 1994), *Collier on Bankruptcy,* Appendix E, pt. 9(b) at 9-96 (15th ed. rev.):

> This section will have the effect of overruling the decision of the Supreme Court in Rake v. Wade, 113 S. Ct. 2187 (1993). In that case, the Court held that the Bankruptcy Code required that interest be paid on mortgage arrearage paid by debtors curing defaults on their mortgages. Notwithstanding State Law, this case has had the effect of providing a windfall to secured creditors at the expense of unsecured creditors by forcing debtors to pay the bulk of their income to satisfy the secured creditors' claims. This had the effect of giving secured creditors interest on interest payments, and interest on the late charges and other fees, even where applicable law prohibits such interest and even when it was something that was not contemplated by either party in the original transaction. This provision will be applicable prospectively only, i.e., it will be applicable to all future contracts, including transactions that refinance existing contracts. It will limit the secured creditor to the benefit of the initial bargain with no court contrived windfall. It is the Committee's intention that a cure pursuant to a plan should operate to put the debtor in the same position as if the default had never occurred.

> ... [S]ection 305 will prevent mortgage lenders from imposing interest ... when mortgage arrearages are cured, even when the mortgage instrument is silent on the subject. This section will affect all future mortgages unless the mortgage expressly retains the lender's right to impose such interest on interest.

140 Cong. Rec. S 14461 (daily ed. October 6, 1994); *Collier on Bankruptcy*, Appendix E, pt. 9(b) at 9-110 (15th ed. rev.).

Accordingly, "...a creditor is not entitled to interest on interest, unless the loan documents and applicable state law so permit"; ... "[t]he rate of interest the debtor is required to pay for the cure should be based on the contract rate and applicable nonbankruptcy law". 2 Robert E. Ginsberg & Robert D. Martin, Ginsberg & Martin on Bankruptcy § 15.04(E), at 15-53, 54 (4th ed. 1997).

The Howes argue that the mortgage note and deed do not give Fleet the right to impose interest on unpaid prepetition interest to be cured under their Chapter 13 Plan.

Fleet contends that the mortgage note's paragraphs two and six A, B and C, as well as a clause in the mortgage deed provide it the right to impose interest on the entirety of all mortgage arrearages.[4] Thus, it contends that imposition and collection of

---

[4] The note's paragraph 2 speaks to interest; 6A concerns late charges; 6B is the acceleration clause in the event of a default; and 6C addresses costs and expenses. Pertinent portions of these paragraphs and the deed's clause read as follows.

> In return for a loan received from Lender, Borrower promises to pay the principal sum of Fifty-Five Thousand Seven Hundred Twenty Six & 00/100 Dollars ($55,726.00) plus interest to the order of Lender. *Interest will be charged on unpaid principal* from the date of disbursement

such interest is a constituent part of the bargain struck between the parties, rather than the "windfall" interest Congress sought to eliminate when it passed § 1322(e) and overruled *Rake*. Fleet further argues New Hampshire law does not prohibit such interest.

> of the loan proceeds by Lender at the rate of eight & 50/100 per cent (8.500%) per year until the full amount of principal has been paid.

Appellants' Appendix, p. 14, paragraph 2 (emphasis added).

> If Lender has not received the full monthly payment required by the Security Instrument, as described in Paragraph 4(C) of this Note by the end of fifteen calendar days after the payment is due, Lender may collect a late charge in the amount of Five & 00/100 per cent (5.000%) of the overdue amount of each payment.

Appellants' Appendix, p. 15, Paragraph 6A.

> If Borrower defaults by failing to pay in full any monthly payments, then Lender may except as limited by regulations or the Secretary in the case of payment defaults, require immediate payment in full of the principal balance remaining due and all accrued interest.

Appellants' Appendix, p. 15, Paragraph 6B.

> If Lender has required immediate payment in full, as described above, Lender may require Borrower to pay costs and expenses including reasonable and customary attorneys' fees for enforcing this Note. Such fees and costs shall bear interest from the date of disbursement at the same rate as the principal of this Note.

Appellants' Appendix, p. 15, Paragraph 6C.

> This security instrument secures to the Lender: (a) repayment of the debt evidenced by the Note, with interest, and all renewals, extensions and modifications; (b) the payment of all other sums, with interest, advanced under paragraph 7 to protect the security of this Security Instrument; and (c) the performance of the Borrower's covenants and agreements under this Security Instrument and the Note.

Appellants' Appendix, p. 7, Deed's clause.

In its view, Fleet seeks nothing more than a Chapter 13 plan consistent (to the degree possible) with the terms of its bargain with the Howes.

We disagree. A review of the contract discloses that the loan documents simply do not do what Fleet says they do. "The Plain Meaning Rule states that if a writing, or the terms in question, appear to be plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence." John D. Calamari & Joseph M. Perillo, The Law of Contracts § 3.10, at 166-167 (3rd ed. 1987). Unless a different intention is shown, language is interpreted in accordance with its generally prevailing meaning. Restatement (Second) of Contracts § 201 cmt. a. (1979).

Here the terms of the loan agreement are expressed in plain and unambiguous language. We need look no further than the language of the mortgage note and deed for the parties' intent and the benefits of the bargain. To begin, we acknowledge that the loan agreement permits Fleet to charge interest on the principal component of the overdue prepetition installments to be cured through the plan. The note's second paragraph shows interest may be charged on "...unpaid principal from the date of disbursement ... until the full amount of the principal has been paid.". Appellant's Appendix, p. 14. Obviously, the Howes' owe Fleet unpaid principal and that unpaid principal is a component of the prepetition arrears. Thus, the Bankruptcy Court correctly allowed the claim's prepetition arrearage for principal and interest

accrued in the loan's overdue monthly installments.

Next, however, we find no provision in the loan agreement that permits Fleet to impose another layer of interest on the entirety of the installment payment arrearages while they await cure under the plan. The Howes were, at bankruptcy in default of their mortgage loan obligations. Under those circumstances, the loan instruments provided Fleet with two options: it could either collect a 5% late charge on each overdue payment, or it could accelerate the loan, requiring full and immediate payment of the entire balance. The underlying note and deed make no provision for the option Fleet urges. Interest accruing upon accumulated prepetition interest was not part of the bargain.

Because we conclude that Fleet's loan documents did not bestow upon it the right to charge "interest on interest", we need not separately inquire whether such a contract term is permitted under New Hampshire law.

CONCLUSION

Pursuant to 11 U.S.C. § 1322(e) and our examination of the mortgage note and deed, we conclude that the parties' loan agreement calls for imposition of interest at the agreed rate on the unpaid mortgage principal for the life of the loan and nothing more. Therefore, we **REVERSE** the Bankruptcy Court's allowance of interest accruing on the interest components of the overdue prepetition installments.