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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. MT-06-1442-SPK
7 DAN J. FRAZER and SANDRA J.) Bk. No. 06-60704-13
8 FRAZER,)
9 Debtors.)
10 DAN J. FRAZER; SANDRA J.)
11 FRAZER,)
12 Appellants,)
13 v.) **O P I N I O N**
14 ROBERT G. DRUMMOND, Chapter)
15 13 Trustee; CHERYL L. BRITTON,)
16 Appellees.)

Argued and Submitted on July 27, 2007
at Pasadena, California

Filed - September 27, 2007

Appeal from the United States Bankruptcy Court
for the District of Montana

Hon. Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding.

Before: SMITH, PERRIS¹ and KLEIN, Bankruptcy Judges.

¹ Hon. Elizabeth L. Perris, Chief Bankruptcy Judge for the
District of Oregon, sitting by designation.

1 SMITH, Bankruptcy Judge:

2 When debtors filed their chapter 13 case,² they were in
3 default on a contract for deed involving their principal
4 residence. The bankruptcy court held that § 108(b) trumped
5 § 1322 so that the debtors had only 60 days after the petition
6 date in which to cure the default. The court further determined
7 that the seller was entitled to terminate the debtors' equitable
8 interest in the property without offending the automatic stay
9 provisions of § 362. A timely appeal ensued. Concluding that
10 § 108(b) does not trump § 1322(b), we REVERSE and REMAND.

11 **I. FACTS**

12 On July 7, 1995, Dan and Sandra Frazer ("Frazers" or
13 "Debtors") purchased their principal residence (the "Property")
14 on a contract for deed ("Contract") from Levi and Barbara
15 Britton.³ As part of the transaction, both parties deposited
16 documents with an escrow agent.

17 The Contract provided for a total purchase price of \$25,000
18 with a \$4,000 down payment. The \$21,000 balance was to be paid
19 in monthly installments of \$282 commencing on August 7, 1995, and
20 continuing each month thereafter until the principal and accrued
21 interest was paid in full. Based on the principal amount, the
22

23 ² Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
26 enacted and promulgated by The Bankruptcy Abuse Prevention and
Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005,
119 Stat. 23.

27 ³ On February 25, 2005, Levi and Barbara Britton assigned
28 their interest in the contract for deed to Cheryl Britton
("Britton"), who is the party to this appeal.

1 monthly payment, and the interest rate of 10% per annum, the term
2 of repayment was ten years.⁴ Upon proof of the Frazers'
3 compliance with the payment terms of the Contract, the escrow
4 agent would release to the Frazers the warranty deed from
5 Britton.

6 In the event of a default, Britton, at her election, could
7 declare the Contract in default by sending a written notice to
8 the Frazers and the escrow agent describing the default. Should
9 any default remain uncured for more than 30 days, Britton, at her
10 option, by an additional written notice, could accelerate the
11 entire outstanding balance and, upon non-payment of the
12 accelerated balance after 30 days, she could terminate the
13 Contract and cause a forfeiture of it without further notice.
14 Following termination, Britton would be revested with all right,
15 title, and interest to the property and the escrow agent would
16 deliver to Britton a quitclaim deed from the Frazers and other
17 documents deposited at the inception of the transaction.

18 By letter dated June 21, 2006, Britton notified the Frazers
19 and the escrow agent that the Frazers were in default for failing
20 to make the May and June 2006 payments and pay the property
21 taxes. The Frazers did not cure the default.

22 Britton sent another notice to the Frazers on July 25, 2006,
23 notifying them that, in light of the continuing default, she was
24 electing to accelerate the entire outstanding balance in the
25 amount of \$14,147.84 (the "Acceleration Notice"). The

26 ⁴ Although the payment period under the Contract should have
27 expired in 2005, as of the date of the petition, the Frazers
28 still owed over one-half the original balance due. No
explanation has been provided to account for this circumstance.

1 Acceleration Notice also provided that failure to pay the
2 outstanding amount within 30 days, including proof of payment of
3 the outstanding property taxes, would result in Britton
4 terminating the Contract without further notice.

5 On August 25, 2006, before the 30-day cure period under the
6 Acceleration Notice expired, the Frazers filed for chapter 13
7 relief. As of the petition date, the escrow documents, including
8 the quitclaim deed, remained in the escrow agent's possession.

9 Debtors filed their original chapter 13 plan on September
10 11, 2006, which they subsequently amended. The second amended
11 chapter 13 plan provided for full payment of the outstanding debt
12 owed to Britton over a period of 60 months. The confirmation
13 hearing was set for November 7, 2006.⁵

14 Before the November 7 hearing, Britton filed a "Motion to
15 Determine Applicability of Stay" (the "stay motion"), as well as
16 an objection to the second amended plan ("objection"). In both
17 the stay motion and objection, Britton asserted that under
18 § 108(b)(2), Debtors had 60 days after the filing of the
19 bankruptcy in which to pay the accelerated balance on the
20 Contract. Because the 60-day period had expired without payment
21 in full, Britton urged the court to find that Debtors' rights
22 under the Contract were subject to termination. Based on the
23 foregoing, Britton maintained that Debtors could not cure the
24 arrearage through their plan and requested that the court 1)
25 determine that the Contract was not affected by the automatic
26

27 ⁵ The confirmation hearing was initially set for October 4,
28 2006, but was continued to November 7, 2006, due to Debtors'
inability to attend the October 4 hearing.

1 stay, and 2) allow her to terminate the Contract and recover the
2 escrow documents.

3 On November 3, 2006, two days after Britton filed the stay
4 motion and objection, Debtors filed their third amended chapter
5 13 plan. The third amended plan again provided for full payment
6 of the outstanding debt owed to Britton, but reduced the payment
7 term from 60 to 36 months. The chapter 13 trustee objected to
8 this version of the plan on the ground that it was infeasible
9 based upon Debtors' income and expenses.⁶

10 At the November 7 hearing, Debtors conceded that their third
11 amended plan was not confirmable. Accordingly, confirmation was
12 denied. As to the stay motion, the court provided the parties
13 with the opportunity to submit further briefing on the issue of
14 the interplay between §§ 362 and 108(b)(2).

15 In her supplemental brief, Britton continued to argue that,
16 under relevant case law, the curing of a default under a contract
17 for deed could only be accomplished in accordance with § 108(b)
18 and not through a chapter 13 plan. Debtors, on the other hand,
19 maintained that they were entitled to cure the default through a
20 chapter 13 plan pursuant to § 1322(c)(1), because the Contract
21 was for their principal residence.

22 On December 6, 2006, the court issued its memorandum

23 ⁶ The trustee's objection is not part of the excerpts of
24 record, but can be found on the bankruptcy court docket at number
25 41 for case no. 06-60704. As part of the court's docket, we are
26 able to take judicial notice of it. Harris v. U.S. Trustee (In
27 re Harris), 279 B.R. 254, 261 n.4 (9th Cir. BAP 2002) ("A
28 judicially noticed fact must be one not subject to reasonable
dispute in that it is . . . capable of accurate and ready
determination by resort to sources whose accuracy cannot
reasonably be questioned.").

1 decision in which it agreed with Britton that Debtors were not
2 entitled to cure the default through a chapter 13 plan and that
3 Britton was entitled to proceed with terminating the Contract.⁷
4 Specifically, the court found that the time period for curing the
5 default was governed by § 108(b), which regulates the tolling of
6 a debtor's right to redeem a foreclosed property, and not by
7 § 1322 (b) and (c), which relates to chapter 13 plan provisions,
8 including those related to a debtor's principal residence. Under
9 § 108(b), Debtors had 60 days from the petition date to tender
10 the outstanding amount owing. Because they had failed to cure
11 the default within that time, and because the automatic stay
12 provisions of § 362 did not toll the termination of the Contract,
13 the court granted the stay motion and allowed Britton to
14 terminate the Contract.

15 An order reflecting the court's ruling was entered on
16 December 6, 2006. Debtors filed a timely notice of appeal on
17 December 7, 2006.

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
20 and § 157(b) (1) and (b) (2) (G). We have jurisdiction under 28
21 U.S.C. § 158.

22 **III. ISSUE**

23 Whether the bankruptcy court erred in finding that a
24 debtor's ability to cure a default under an installment land sale

25
26 ⁷ The bankruptcy court's memorandum decision has not been
27 included as part of the record. Nonetheless, we are able to take
28 judicial notice of it and the facts contained therein. See case
cited supra note 6. The memorandum decision can be found on the
bankruptcy court docket for case no. 06-60706 at entry 55.

1 contract⁸ for the purchase of the debtor's residence is governed
2 by § 108(b) rather than by § 1322.

3 IV. STANDARD OF REVIEW

4 This appeal presents an issue of law that we review de novo.
5 Hebbring v. U.S. Trustee, 463 F.3d 902, 905 (9th Cir. 2006).

6 V. DISCUSSION⁹

7 A. Property of the Estate

8 When a bankruptcy petition is filed, an estate is created
9 consisting of "all legal or equitable interests of the debtor in
10 property as of the commencement of the case," 11 U.S.C.
11 § 541(a)(1), as created and defined by nonbankruptcy law, Butner
12 v. United States, 440 U.S. 48, 55 (1979). In other words, the
13 "rights a debtor has in property at the commencement of the case
14 continue in bankruptcy--no more, no less.'" Welborn v.
15 Ruegsegger (In re Welborn), 75 B.R. 243, 244 (Bankr. D. Mont.
16 1987) (quoting Moody v. Amoco Oil Co., 734 F.2d 1200, 1213 (7th
17 Cir. 1984); see also H.R. Rep. No. 95-595, 95th Cong., 1st Sess.
18 367-68 (1977) (§ 541(a)(1) "is not intended to expand the
19 debtor's rights against others more than they existed at the
20 commencement of the case.").

21 ⁸ The term used in Montana is "contract for deed." These
22 contracts are also commonly known as installment land sale
contracts. We use the terms interchangeably.

23 ⁹ Although Debtors did not immediately file another chapter
24 13 plan upon denial of confirmation of the plan that Debtors
25 conceded was not feasible, this was understandable in light of
26 the pendency of the stay motion and the subsequent resolution of
27 that motion that was fatal to any use of chapter 13 to save their
28 residence. At oral argument, it was made clear that Debtors
intend to propose a plan that will pay the entire balance during
the life of the plan. Accordingly, the absence of a pending plan
does not undermine the appeal.

1 Under Montana law, a purchaser of real property under a
2 contract for deed holds equitable title, Hannah v. Martinson, 758
3 P.2d 276, 278 (Mont. 1988), and, upon default, has a right to
4 cure that default by tendering full payment in accordance with
5 Montana Code § 28-1-104.¹⁰ Burgess v. Shiplet, 750 P.2d 460, 462
6 (Mont. 1988).

7 In this case, on the date Debtors' petition was filed, the
8 time to cure under the Contract had not expired and forfeiture of
9 Debtors' rights under the Contract had not been completed.
10 Therefore, Debtors retained an equitable interest in the property
11 that became property of the estate, including the right to cure
12 the default.

13 The bankruptcy court accepted Britton's argument that her
14 acceleration of the balance due under the contract as of the time
15 of filing the case operated to extinguish Debtors' equitable
16 interests in the Property because the time to cure under both
17 Montana law and § 108(b) passed postpetition without cure or
18 confirmation of a chapter 13 plan providing for cure. We
19 disagree.

20 The question is whether Debtors' right to cure is limited by
21 the time provided for cure of defaults under § 108(b), or instead
22 is governed by the provisions of chapter 13. As a matter of
23 Ninth Circuit jurisprudence, this case presents a matter of first
24 impression.

25
26
27 ¹⁰ Montana Code § 28-1-104 states that a defaulting party to
28 a contract for deed can obtain relief from forfeiture "upon
making full compensation to the other party."

1 B. Right to Cure Defaults

2 Britton concedes that Debtors still had an interest in the
3 property on the date of filing, but she argues that, pursuant to
4 § 108(b), that interest was limited to either curing the default
5 or confirming a chapter 13 plan that provided for cure of the
6 default¹¹ within sixty (60) days after Debtors filed their
7 petition. Debtors argue that their right to cure is governed by
8 § 1322, particularly § 1322(c)(1), which allows them to cure the
9 default until a foreclosure sale is held. Because there has not
10 been a foreclosure sale or its functional equivalent in this
11 case, Debtors argue that they can cure the default through their
12 chapter 13 plan.

13 1. Chapter 13 Plan Provisions

14 The mandatory and optional provisions of a chapter 13 plan
15 are set forth at § 1322. 11 U.S.C. § 1322.¹² Several provisions

16 ¹¹ Section 108(b) is not inconsistent with the § 1322
17 provisions allowing cure because the "Frazers could have provided
18 for payment of the accelerated balance through a Chapter 13 plan
19 as long as confirmation was obtained within 60 days from the
20 commencement of the case, in which case Britton would have been
21 bound to the terms of the Plan." Britton's Brief, p. 16.

22 ¹² As relevant to the issues presented in this case, § 1322
23 provides:

24 (b) Subject to subsections (a) and (c) of this section,
25 the plan may--

26 . . .

27 (2) modify the rights of holders of secured
28 claims, other than a claim secured only by a security
interest in real property that is the debtor's
principal residence, . . .

(continued...)

1 relate to the cure of defaults through a chapter 13 plan.

2 As a general proposition, § 1322(b)(3) permits a chapter 13
3 plan to "provide for the curing or waiving of any default." 11
4 U.S.C. § 1322(b)(3). This provision applies to a default on a
5 debt secured by an interest in a debtor's principal residence.
6 Although the Code forbids modification in chapter 13 of the
7 rights of a creditor whose claim is secured solely by an interest
8 in the debtor's principal residence (i.e. change the length of
9 the contract or amount of the balance), curing a default through
10 a chapter 13 plan does not constitute modification of the
11 creditor's interests. 11 U.S.C. § 1322(b)(2). See, e.g., Litton
12 v. Wachovia Bank (In re Litton), 330 F.3d 636, 644 (4th Cir.
13 2003) (restoring the debtor and creditor to their respective
14 positions under the contract by rectifying the prepetition
15 default on a home mortgage debt pursuant a chapter 13 plan is
16 considered to only cure the default and not modify the creditor's
17 rights); Jim Walter Homes, Inc. v. Spears (In re Thompson), 894
18 F.2d 1227, 1228 (10th Cir. 1990) ("contractual acceleration of
19 mortgage debt upon default does not end the debtor's right to
20

21 ¹²(...continued)

22 (3) provide for the curing or waiving of any
23 default;

24 . . .

25 (5) notwithstanding paragraph (2) of this
26 subsection, provide for the curing of any default
27 within a reasonable time and maintenance of
28 payments while the case is pending on any
unsecured claim or secured claim on which the last
payment is due after the date on which the final
payment under the plan is due[.]

1 cure the mortgage default in bankruptcy"); Clark v. Fed. Land
2 Bank of St. Paul (In re Clark), 738 F.2d 869, 874 (7th Cir. 1984)
3 (power to cure a default allows the debtor to de-accelerate
4 payment under a note secured by residential property).

5 Section 1322(b)(5) allows a debtor to cure a default within
6 a reasonable time and to maintain payments during the case with
7 respect to a claim on which the last payment is due after the due
8 date of the final plan payment. 11 U.S.C. § 1322(b)(5). The
9 reasonable time to cure, however, is limited by § 1322(c)(1),
10 which states:

11 (c) Notwithstanding subsection (b)(2) and applicable
12 nonbankruptcy law-

13 (1) a default with respect to, or that gave rise
14 to, a lien on the debtor's principal residence may be
15 until such residence is sold at a foreclosure sale that
is conducted in accordance with applicable
nonbankruptcy law[.]

16 11 U.S.C. § 1322(c)(1) (emphasis added).

17 According to Debtors, the default under the Contract may be
18 cured through their chapter 13 plan under the authority of
19 § 1322(c)(1). They argue that § 1322(c)(1) was created by
20 Congress to provide a debtor the opportunity to cure defaults
21 involving his principal residence over a period of time through
22 the chapter 13 plan process. Because the Contract specifically
23 involves a secured indebtedness related to their principal
24 residence and there has not been a foreclosure sale, they believe
25 they are entitled to utilize § 1322(c)(1) for the purpose of
26 curing the default through their chapter 13 plan.

27 Although we agree with Debtors that § 1322(c)(1) is intended
28 to enhance a debtor's ability to save his or her home through

1 chapter 13, we are not persuaded that Congress contemplated its
2 use in situations where the security device is not subject to a
3 foreclosure sale.¹³

4 For § 1322(c)(1) to be applicable, there must be, first, a
5 default with respect to a lien on the debtor's principal
6 residence and, second, the possibility of a foreclosure sale,
7 whether strict, judicial, or nonjudicial, pursuant to
8 nonbankruptcy law.

9 Here, Debtors can establish that the Contract exclusively
10 dealt with their principal residence and that Britton held a
11 lien-type interest on the property based on the fact that Montana
12 law treats the contract for deed as a security device. See
13 Horton v. Rehbein (In re Rehbein), 60 B.R. 436, 440 (9th Cir. BAP
14 1986) (a contract for deed is merely a financing arrangement for
15 a sale in which the vendor retains legal title only as security
16 for the price); Kane v. Inhabitants of the Town of Harpswell (In
17 re Kane), 248 B.R. 216, 223 (1st Cir. BAP 2000) ("courts have
18 often treated [installment land sales contracts] as secured
19 debts"); In re McCallen, 49 B.R. 948, 952 (Bankr. D. Or. 1985)

20
21 ¹³ Prior to the enactment of subsection (c), courts were
22 divided on when in the course of a foreclosure proceeding a
23 debtor lost the right to cure under § 1322(b). See generally
24 Oregon v. Hurt (In re Hurt), 158 B.R. 154 (9th Cir. BAP 1993)
25 (discussing the conflicting case law regarding when a debtor's
26 right to cure a default on a home mortgage under § 1322(b)(5)
27 ends). Congress reacted to the split in authority by enacting
28 § 1322(c)(1) as part of the 1994 Code amendments in order to
"safeguard[] a debtor's rights in a chapter 13 case by allowing
the debtor to cure home mortgage defaults at least through
completion of a foreclosure sale." 140 Cong. Rec. H 10769 (Oct.
4, 1994), reprinted in, 1994 U.S.C.C.A.N. 3340, 3361; In re
Crawford, 232 B.R. 92, 95 (Bankr. N.D. Ohio 1999); 8 Collier on
Bankruptcy ¶ 1322.15 (15th ed. rev. 2007).

1 ("under appropriate circumstances land sale contracts should be
2 treated as liens"); In re Carr, 52 B.R. 250, 253 (Bankr. E.D.
3 Mich. 1985) ("Although land contracts are, strictly speaking,
4 agreements which might be called executory until payments are
5 completed and the deed transferred, such conveyances have been
6 treated as security devices, creating a security interest in the
7 vendor[.]"); In re Cox, 28 B.R. 588, 590 (Bankr. D. Idaho 1983)
8 (in a contract for sale situation, a vendor holds only a lien on
9 the property as security for the price); In re Booth, 19 B.R. 53,
10 58 (Bankr. D. Utah 1982) (contract for deed in which the debtor
11 is the buyer creates an interest in the seller equivalent to that
12 of the lien).

13 Debtors' § 1322(c)(1) argument fails, however, because under
14 Montana law, there is no foreclosure sale (or a functional
15 equivalent) where the security device is a contract for a deed.

16 While similarities exist between a mortgage and a contract
17 for deed, Montana law views them as separate legal concepts.
18 Aveco Props., Inc. v. Nicholson, 747 P.2d 1358, 1360-61 (Mont.
19 1987); Glacier Campground v. Wild Rivers, Inc., 597 P.2d 689, 698
20 (Mont. 1978) (a contract for deed and a mortgage are "distinct
21 legal creatures").

22 In Montana "[a] contract for deed [is] not [to] be treated
23 as a mortgage for purpose of foreclosure." Aveco Props., Inc.,
24 747 P.2d at 1361. In this respect Montana law differs from the
25 law of states that treat contracts for deed (a.k.a. installment
26 land sale contracts) as mortgages. See In re Brooks, 324 B.R. 56,
27 59 (Bankr. N.D. Ill. 2005) ("under Illinois law . . . a contract
28 [for deed] is treated as a mortgage"); Anderson Contracting Co.

1 v. Daugherty, 417 A.2d 1227 (Pa. Super. Ct. 1979) (Pennsylvania
2 law).

3 This means that a seller under a Montana land sale contract
4 need not invoke a judicial or statutorily created remedy to
5 foreclose the rights of the purchaser as must a mortgagee who
6 wishes to foreclose the mortgagor's equity of redemption. See
7 Aveco Props., Inc., 747 P.2d at 1360. A purchaser on a Montana
8 contract for deed who has defaulted is therefore limited to the
9 remedies available pursuant to the contract's provisions and
10 cannot look to mortgage law for alternative remedies.¹⁴ Burgess,
11 750 P.2d at 462; see also In re Henke, 84 B.R. 693, 696 (Bankr.
12 D. Mont. 1988).

13 Here, the Contract is a contract for deed, and not a
14 mortgage. Thus, under Montana law, no foreclosure sale (or
15 equivalent procedure) is required to terminate Debtors' interest
16 under the Contract. Aveco Props., Inc., 747 P.2d at 1361. If
17 Debtors defaulted on the Contract and failed to cure the default
18 within the allotted time, the Contract would terminate and

19 ¹⁴ While limiting a defaulting buyer to the exclusive
20 remedies associated with a contract for deed may seem unduly
21 rigid, the Montana Supreme Court holds that there is no room for
22 courts to alter this result. Burgess, 750 P.2d at 462. The
23 Montana legislature intends contracts for deeds and mortgages to
24 be treated differently:

25 When a purchaser enters into a contract for deed with a
26 seller, he or she runs the risk of defaulting on the
27 required payments and facing the consequences of losing the
28 property along with forfeiting the amount already paid. If
this produces a harsh or unwanted result, it is for the
legislature to remedy and not the job of [courts] to change
the plain meaning of the contract.

28 Id.

1 Britton could declare Debtors' rights forfeited without any court
2 proceeding, provided proper notice of the forfeiture is given.
3 Because no foreclosure sale is required to be held prior to
4 forfeiture of a contract for deed, we agree with the bankruptcy
5 court that § 1322(c)(1) does not apply. Our analysis, however,
6 does not end here.

7 The fact that § 1322(c)(1) does not apply in this situation
8 does not deprive Debtors of the ability to employ a chapter 13
9 plan to cure the default on the contract for deed. Section
10 1322(c)(1) simply governs the time within which to cure a default
11 that is within its terms. When § 1322(c)(1) does not apply, the
12 debtor nevertheless is left with the other cure provisions of
13 § 1322(b), which provide that a debtor may cure a default and
14 maintain payments on a debt payable beyond the expiration of the
15 plan, so long as that cure is made within a reasonable time. 11
16 U.S.C. § 1322(b)(3) & (b)(5).

17 Curing of a default "commonly means taking care of the
18 triggering event and returning to pre-default conditions." Great
19 W. Bank & Trust v. Entz-White Lumber & Supply, Inc. (In re Entz-
20 White Lumber & Supply, Inc.), 850 F.2d 1338, 1340 (9th Cir. 1988)
21 (chapter 11 case quoting chapter 13 case, Di Pierro v. Taddeo (In
22 re Taddeo), 685 F.2d 24, 26-27 (2d Cir. 1982)). Thus, the plain
23 meaning of "cure," as used in § 1322(b)(3) and (5), provides a
24 debtor with the right to remedy a default and restore matters to
25 the status quo ante. In re Clark, 738 F.2d at 872. In other
26 words, cure will nullify all consequences of default. Casa
27 Blanca Project Lenders, L.P. v. City Commerce Bank (In re Casa
28 Blanca Project Lenders, L.P.), 196 B.R. 140, 143 (9th Cir. BAP

1 1996).

2 Acceleration of a debt is a common consequence of a default
3 in payments in a contract for deed situation. Most contracts for
4 deed are like the one Debtors executed here and provide that the
5 seller can accelerate the payments upon default. Because to cure
6 means to restore matters to the way they were prior to default,
7 "the power to cure [under § 1322(b)] must comprehend the power to
8 'de-accelerate'" the payments on the Contract. In re Taddeo, 685
9 F.2d at 26; see also Downey Savs. & Loan Ass'n v. Metz (In re
10 Metz), 820 F.2d 1495, 1497 (9th Cir. 1987) ("Chapter 13 allows a
11 mortgagor debtor to cure a prepetition acceleration of home
12 mortgage debt triggered by default.").

13 Unless some other provision of the Code trumps these chapter
14 13 plan cure provisions, Debtors are entitled to cure the default
15 within a reasonable time and reinstate the debt, despite the
16 nonapplicability of § 1322(c)(1).

17 2. Section 108(b)

18 Britton does not argue that Debtors do not propose to cure
19 within a reasonable time; instead, she relies on the time limit
20 of § 108(b) to argue that Debtors' right to cure was cut off by
21 the passage of time. Section 108(b) provides that, where an
22 agreement fixes a period within which the debtor may cure a
23 default, "the [debtor] may only . . . cure . . . before the later
24 of" the date specified or 60 days after the order for relief. 11
25 U.S.C. § 108(b).¹⁵ Generally speaking, § 108(b) provides for the

26 ¹⁵ Section 108(b) states,

27 Except as provided in subsection (a) of this section,
28 (continued...)

1 extension of statutory and contractual time periods for the
2 purpose of preserving assets for the benefit of the bankruptcy
3 estate.¹⁶

4 In this case, on the date of filing, Debtors were parties to
5 an agreement that provided for a specific period within which to
6 cure the default or forfeit their rights under the contract.
7 Applying § 108(b) would have given Debtors until October 24, 2006
8 (60 days following the petition date) to cure the default.
9 Because Debtors did not confirm a plan by that date, Britton
10 argues, and the bankruptcy court agreed, that Debtors' right to
11 cure the default through their plan had been cut off. Thus, the
12 question is whether Debtors' right to cure the default on the
13 contract for deed is governed by § 108(b) or by the cure

14 _____
15 ¹⁵(...continued)

16 if applicable nonbankruptcy law, an order entered in a
17 nonbankruptcy proceeding, or an agreement fixes a
18 period within which the debtor or an individual
19 protected under section 1201 or 1301 of this title may
20 file any pleading, demand, notice, or proof of claim or
21 loss, cure a default, or perform any other similar act,
22 and such period has not expired before the date of the
23 filing of the petition, the trustee may only file,
24 cure, or perform, as the case may be, before the later
25 of--

26 (1) the end of such period, including any
27 suspension of such period occurring on or after
28 the commencement of the case; or

(2) 60 days after the order for relief.

24 ¹⁶ Section 108(b) is intended to provide the trustee with an
25 extension of time to take action necessary to protect the
26 debtor's pre-petition rights. See S. Rep. No. 95-989, 95th
27 Cong., 2d Sess. 30, reprinted in, 1978 U.S.C.C.A.N. 5787, 5816.
28 In a chapter 13 case, the debtor enjoys certain rights of a
trustee. See 11 U.S.C. §§ 1303 (authorizes the debtor to use
property of the estate) and 1306(b) (permits the debtor to remain
in possession of all property of the bankruptcy estate).

1 provisions of § 1322.

2 3. Chapter 13 Plan Cure Provisions Trump the General Cure
3 Provision of § 108(b)

4 The legislative history behind chapter 13 relief supports
5 and promotes debtor rehabilitation. Tinley Park Bank v. Phelps
6 (In re Kokkinis), 22 B.R. 353, 354-55 (Bankr. N.D. Ill. 1982)
7 (“debtor rehabilitation is the pervasive theme” of chapter 13);
8 see H.R. Rep. No. 95-595, 95th Cong. (1977), reprinted in 1978
9 U.S.C.C.A.N 5963; S. Rep. No. 95-989, 95th Cong. (1978),
10 reprinted in (1978) U.S.C.C.A.N 5787; Report of the Commission on
11 the Bankruptcy Laws of the United States, H.R. Doc. No. 93-137,
12 93d Cong., Pt. 1 (1973), reprinted in App. 2 Collier on
13 Bankruptcy (15th ed. 1980).

14 Chapter 13 is designed to facilitate debtor rehabilitation
15 by providing a debtor with the ability to adjust his or her debts
16 through a flexible repayment plan. See H.R. Rep. No. 95-595,
17 95th Cong. 118 (1977) reprinted in 1978 U.S.C.C.A.N 5963, 6079.
18 Thus, in chapter 13, we look to the specific provisions of § 1322
19 to govern what a debtor may include in a chapter 13 plan to meet
20 his or her needs.

21 Section 108(b), on the other hand, is a provision of general
22 applicability in the Bankruptcy Code. It is not directed
23 specifically at chapter 13 default cures, as is § 1322. We
24 conclude that the more specific cure provisions of § 1322, which
25 govern chapter 13 plans, apply rather than the more general
26 provision of § 108(b), which applies in general to bankruptcy
27 cases. See, e.g., D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S.
28 204, 208 (1932) (“Specific terms prevail over the general in the

1 same or another statute which otherwise might be controlling.");
2 Coleman Oil Co. v. Circle K Corp. (In re Circle K Corp.), 127
3 F.3d 904, 909 n.4 (9th Cir. 1997) ("The curing of defaults in an
4 executory contract or unexpired lease is governed by section 365,
5 not by the . . . provisions of section 108(b)."); Moody, 734 F.2d
6 at 1215-16 (same); 2 Collier on Bankruptcy ¶ 108.03[3] (15th ed.
7 rev. 2007).

8 The Supreme Court's decision in United States v. Whiting
9 Pools, Inc., 462 U.S. 198 (1983), cannot be ignored. In Whiting
10 Pools, the debtor had an interest in property, as of the date of
11 filing bankruptcy, that a secured creditor seized prepetition.
12 The Supreme Court concluded that the property was property of the
13 estate that could be used on the condition that adequate
14 protection be provided. Id. at 204. The creditor must look to
15 the Bankruptcy Code's adequate protection provision, rather than
16 to its nonbankruptcy remedies. Id. The Supreme Court pointed
17 out that the Bankruptcy Code "modifies the procedural rights
18 available to creditors to protect and satisfy their liens" and
19 that the protections it provides "replace the protection afforded
20 by" nonbankruptcy law. Id. at 206-07. These fundamental
21 propositions inform the analysis regarding the implications of
22 the Bankruptcy Code authority under § 1322 to cure defaults. The
23 Supreme Court's Whiting Pools analysis is not consistent with
24 postpetition insistence on strict compliance with a short-fused
25 state law redemption procedure when a debtor is proposing to cure
26 a default through a plan. Hence, it supports our conclusion that
27 § 108 does not trump § 1322.

28 In sum, the cure provisions of § 1322 afford Debtors a

1 reasonable time to cure the default on the Contract. There is no
2 argument that the time in which Debtors propose to cure under a
3 chapter 13 plan is unreasonable. Therefore, Debtors are entitled
4 to cure the default through their plan and reinstate the debt.¹⁷

5 **VI. CONCLUSION**

6 When Debtors filed for chapter 13 relief, their equitable
7 interest in the Property had not been terminated. This interest
8 gave them the right to de-accelerate the Contract and cure any
9 defaults related to it under § 1322(b)(3) and maintain any
10 payments pursuant to it under § 1322(b)(5) through their chapter
11 13 plan. We therefore REVERSE the bankruptcy court's order
12 denying confirmation and REMAND.

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¹⁷ Although we hold that Debtors can cure the Contract
27 through their chapter 13 plan, whether they will be able to
28 confirm a plan is unknown at this time. As of the filing date of
this opinion, there is no indication on the bankruptcy court's
docket that Debtors have been successful in confirming a plan.