

In the United States Bankruptcy Court

for the Northern District of Iowa

ARTHUR R. WAGNER and
SHERRY L. WAGNER

Bankruptcy No. X90-00310M

Debtor(s).

Chapter 11

ARTHUR R. WAGNER

Adversary No. X90-0061M

Plaintiff(s)

vs.

FARMERS COOPERATIVE ELEVATOR
COMPANY

Defendant(s)

MEMORANDUM OF DECISION AND ORDER

A debtor, in this chapter 11 case, seeks to recover \$362,500.00 as a preferential payment to Farmers Cooperative Elevator Company (COOP). Trial took place on February 12, 1991 in Mason City, Iowa. This adversary proceeding is a core matter pursuant to 28 U.S.C. § 157(b)(2)(F). Prior to trial, the parties stipulated to a substantial number of facts.**(fn.1)** Based on the stipulation, the court finds the following facts which are adopted from the parties' stipulation with minor, but insubstantial, editing.

(fn.1) A four-page stipulation of facts with numerous attachments was filed with the court on January 15, 1991. Two supplemental stipulations were admitted into evidence at trial as Exhibits 2 and 3.

FINDINGS BASED ON THE STIPULATIONS OF THE PARTIES (Stipulation of January 15, 1991)

On the 30th day of October, 1985, Farmers Cooperative Elevator Company brought suit against Arthur R. Wagner in the District Court of Franklin County, Law No. 1324-1085[,] upon an open account. The Coop claimed that Wagner owed \$261,338.81 plus interest for feed and supplies purchased by Wagner from the Coop. A portion of the account balance claimed against Wagner by the Coop was for "wet corn gluten" cattle feed, which was purchased by Wagner from the Coop and manufactured by ADM Feed Corporation, a subsidiary of Archer-Daniels Midlands Company.

Wagner counterclaimed against the Farmers Coop and brought a third-party action against defendants Archer-Daniels Midlands Company and ADM Feed Corporation claiming that the "wet corn gluten" feed was defective and that the defective nature of the product injured Wagner's cattle.

Farmers Cooperative Elevator Company then filed a cross-claim against Archer-Daniel Midlands Company and ADM Feed Corporation for any damages that may be awarded to Wagner against the Coop as a result of the defective condition of the "wet corn gluten" feed.

In a related proceeding Wagner had been custom feeding livestock for W & G Cattle Company and he had fed the "wet corn gluten" feed to cattle owned by W & G Cattle Company. W & G Cattle Company filed suit against Archer-Daniels Midland Company and ADM Feed Corporation in the Franklin County District Court on June 26, 1986, Law No. C1427-0686. Archer-Daniels Midland Company and ADM Feed Corporation then brought a third party action against Arthur R. Wagner claiming Wagner had improperly fed the livestock. These two cases were subsequently consolidated and tried together in April 1988.

During the trial Arthur R. Wagner, on April [29], **(fn.2)** 1988, filed an Offer to Confess Judgment in favor of the Farmers Cooperative Elevator in the amount of \$350,000. * * *

(fn.2) Although the written stipulation stated that the offer to Confess was filed on April 18, 1998 counsels' oral stipulation at trial was that the offer was executed by Arthur Wagner on April 18 but was filed with the district court on April 29. The findings reflect the latter date.

Thereafter, the Farmers Cooperative Elevator Company filed an Acceptance of the offer . . . and pursuant to the Offer to Confess and the Acceptance thereof, judgment was entered against Arthur R. Wagner in favor of the Farmers Cooperative Elevator Company on April 29 in the amount of \$350,000 plus statutory interest. * * *

On the 6th day of April, 1988, after trial, the jury found for Arthur R. Wagner in his claim against Archer-Daniel Midlands Company and ADM Feed Corporation and awarded actual damages of \$133,170 and punitive damages in the amount of \$850,000. The jury also awarded Wagner damages against the Farmers Cooperative Elevator in the amount of \$15,400. . . . Wagner's judgment against ADM was appealed by ADM to the Iowa Supreme Court.

Pending appeal the case was settled pursuant to the terms of the Mutual Release [executed on November 21, 1989].

The Iowa Insurance Guaranty Fund issued check No. 014786 payable to the Duncan Law Firm Trust Account in the amount of \$350,000 under date of October 19, 1989. This check was deposited into the Law Firm's trust account at Banker's Trust Company on October 23, 1989. A check from Shand, Morahan & Company, Inc. (General Accident Insurance Company of America) in the amount of \$512,500 and the check from the Illinois Guaranty Fund in the amount of \$150,000 were deposited in the trust account of Duncan, Jones, Riley & Finley on November 21, 1989. On November 27, 1989 the Law Firm made the following distributions from its trust account: \$362,500 to the Farmers Cooperative Elevator Company;

\$327,985.44 to Arthur and Sherry Wagner; \$7888 to W & G Cattle Company; and the balance was paid to the Law Firm of Duncan, Jones, Riley & Finley for payment of Wagner's and W & G's attorney fees.

The plaintiff, Arthur R. Wagner, filed for relief under Chapter 11 of the Bankruptcy Code on February 23, 1990.

At all times material hereto, the Law Firm of Duncan, Jones, Riley & Finley was legal counsel for the plaintiff, Arthur R. Wagner.

(Supplemental Stipulation, Exhibit 2)

[T]he Iowa Insurance Guarantee Fund, Shand, Morahn (sic) and Company, Inc. (General Accident Insurance Company of America) and the Illinois Guarantee Fund were at all times material hereto either insurers for Archer Daniels Midland Company and/or ADM Feed Corporation, a subsidiary of Archer Daniels Midland Company, or guaranty funds acting on behalf of an insurer or receivership, and that all moneys paid to the Duncan Law Firm Trust Account, the Farmers Cooperative Elevator Company and/or Arthur Wagner from said insurance companies of funds were paid pursuant to the terms of the Mutual Release. . . . (Exhibit E).

(Supplemental Stipulation, Exhibit 3)

[A]s of the date of the filing of the debtor's petition (2/23/90) the Hampton State Bank owned a secured claim against the debtor secured by first and paramount liens and security interests in the following non-exempt assets of the debtor, which assets have the following indicated fair market values:

Item	Fair Market Value
Farm machinery and equipment (listed on attached Exhibit "1")	\$232,030.00
Livestock (listed on Exhibit "2")	\$383,294.50
Motor vehicles (listed on Exhibit ")	\$ 43,100.00
Total	\$658,424.50

[A]fter payment of the Hampton State Bank in full, the sum of \$22,715.26 would be available to pay priority and unsecured creditors.

[O]n the date of the filing of the debtor's petition (2/23/90) the Commodity Credit Corporation owned a secured claim versus debtor secured by a first and paramount lien and security interest in the following assets of the debtor, which lien has the fair market value of \$102,744.00:

Item	Fair Market Value
Crops	\$137,522.76

[A]fter payment of the claim of the Commodity Credit Corporation in full, the sum of \$34,778.76 would be available to pay priority and unsecured creditors.

[O]n the date of the filing of the debtor's petition (2/23/90), the debtor Arthur R. Wagner owned an undivided interest in real estate (160 acres described as NW1/4, §35-92-20 Frankliin (sic) County, Iowa), said 160 acres was subject to valid and enforceable mortgages to:

- a. Farm Credit in the amount of \$38,735.00
- b. Glee and Thelma Wagner (contract sellers) in the amount of \$37,342.00
- c. Metropolitan Life Insurance Company in the amount of \$147,923.00

[T]he mortgage debt upon the afore-described real estate is in excess of the fair market value of said parcel.

[O]n the date of the filing of the debtor's petition, Steven Recker owned a priority claim against the debtor for wages incurred during the month immediately prior to the date of the debtor's bankruptcy filing in the amount of \$1,282.65. * * * [T]he said claim constitutes a prior claim in accordance with 11 U.S.C. §507(a)(3)(A).

[A]t the date of the debtor's bankruptcy filing the debtors owned the following additional assets which would constitute property of the estate and which would be available for distribution to priority and unsecured creditors in a Chapter 7 proceeding in addition to the overplus listed in paragraphs 1 and 2 above:

Cash in bank	\$7,000.00
Commodity account balance	\$4,000.00
Total	\$11,000.00

[T]he total funds available for distribution to priority and unsecured creditors would be less than \$69,000.00.

[O]n the date of the filing of the debtor's petition, the debtor Arthur R. Wagner owed valid and enforceable unsecured claims in the total amount of \$519,186.53.

[A]ny claim of the Farmers Cooperative Elevator in a Chapter 7 proceeding would not be entitled to any priority treatment in accordance with 11 U.S.C. §507.

ADDITIONAL FINDINGS

Based upon the evidence, the court issues the following additional findings.

Arthur Wagner's Offer to Confess Judgment to Coop and Coop's acceptance (Exhibits D and E) apparently followed from a settlement "Agreement" entered into by the two parties sometime in early 1988. The agreement bore the caption of the state court consolidated actions and was introduced at the preference trial as Exhibit A. The agreement stated:

1. THAT for valuable and mutual considerations hereby exchanged, Arthur R. Wagner hereby admits a balance owing on his account of \$350,000.00 and authorizes the above Court to enter judgment in this matter against him in favor of the Farmers Cooperative Elevator Co. in such amount.
2. THAT Farmers Cooperative Elevator Co. accepts such admission and upon entry by the above Court of judgment in its favor in such amount against Arthur R. Wagner acknowledges the same to be in full and complete satisfaction of any and all sums owing it by the said Arthur R. Wagner upon those open accounts identified in its Petition as filed herein.
3. THAT it is further agreed by and between Farmers Cooperative Elevator Co. and Arthur R. Wagner that in the event said Arthur R. Wagner prevails in its counterclaim against Archer-Daniels-Midland Company, and/or ADM Feed Corporation, a subsidiary of Archer-Daniels-Midland Company as filed in the above action, that the Farmers Cooperative Elevator Co., will share in such counterclaim in the following manner:
 - a. The first \$500,000.00 of any recovery experienced or had by Arthur R. Wagner against Archer-Daniels-Midland Company and ADM Feed Corporation, a subsidiary of Archers-Daniels-Midland (sic) Company pursuant to its counterclaim as filed herein shall be applied first to any out of pocket costs experienced in the prosecution of its counterclaim by the said Arthur R. Wagner or his counsel of record;
 - b. One-third of such recovery following payment of those amounts identified in sub-paragraph (a) above shall be paid to counsel of record of Arthur R. Wagner as attorney fees pursuant to their compensation agreement;

- c. The balance of such recovery, following payment of those items identified in sub-paragraphs (a) and (b) above, not to exceed \$225,000.00, shall be paid directly to Farmers Cooperative Elevator Co. for application to its judgment and identified above.
 - d. The balance shall be distributed to Arthur R. Wagner.
4. THAT any amounts received or awarded Arthur R. Wagner pursuant to its counterclaim in excess of \$500,000.00 shall be distributed in the following manner:
- a. one-third shall be paid directly to counsel of record for Arthur R. Wagner pursuant to their compensation agreement.
 - b. Following payment of those amounts identified in sub-paragraph (a) Arthur R. Wagner shall receive two-thirds of all other amounts recovered and the Farmers Cooperative Elevator Co. shall receive one-third of all other amounts recovered until such time as the Farmers Cooperative Elevator Co. has received an additional \$125,000.00, giving it a combined recovery of \$350,000.00. At such time as Farmers Cooperative Elevator Co. has recovered \$350,000.00, Arthur R. Wagner shall be entitled to one hundred percent (100%) of all additional proceeds.

Based on the jury verdicts, the court entered judgment:

1. that Arthur Wagner recover compensatory damages in the amount of \$133,170.00 plus interest from Archer-Daniels-Midland Co. and ADM Feed Corp. Interest at the rate of ten per cent would begin to accrue as of December 24, 1985;
2. that Wagner recover punitive damages in the amount of \$850,000.00 from the same two defendants. Interest on the recovery would accrue at ten per cent per annum from April 15, 1988;
3. that Wagner recover compensatory damages from Coop in the amount of \$15,400.00 plus interest at ten per cent from December 24, 1985;
4. that Coop was to be indemnified by Archer-Daniels-Midland Co. and ADM Feed Corp. for payment of the \$15,440.00 plus interest;
5. that Coop recover from Archer-Daniels-Midland Co. and ADM Feed Corp. compensatory damages in the amount of \$37,983.00 plus interest at ten per cent from April 5, 1988;
6. that W & G Cattle Co. recover from Archer-Daniels-Midland Co. and ADM Feed Corp. the sum of \$12,000.00 plus interest at ten per cent from June 26, 1986; and
7. that Wagner pay Archer-Daniels-Midland Co. and ADM Feed Corp. as contribution any amount in excess of \$9,240.00 paid by the latter on the \$12,000.00 foregoing judgment. (Exhibit "G").

The monies used to effectuate the settlement among all parties came from three sources. On October 19, 1989, Iowa Insurance Guaranty Fund issued a check payable to the Duncan Law Firm trust account in the amount of \$350,000.00. Shand, Morahan & Company, Inc., on behalf of General Accident Insurance Co. of

America, issued a check for \$512,500.00 payable to Coop and the Wagners. There were perhaps others named on the check. Illinois Guaranty Fund issued a check in the amount of \$150,000.00 payable to Coop and the Wagners and perhaps others.

At a meeting on November 21, 1989, at the Duncan Law Firm's offices, Michael Abildtrup, general manager of Coop, executed the mutual release form (Exhibit E) which had been drafted by the attorney for Archer-Daniels-Midland Co. and ADM Feed Corp. At the meeting and after the

execution of the mutual release, Abildtrup endorsed the two checks which had been made jointly payable to Coop; he then gave them to attorney Duncan. The checks were deposited in Duncan's firm trust account on the same date and were disbursed by attorney Duncan on November 27, 1989.

In the Mutual Release, the Wagners acknowledged payment to them in the sum of \$1,668,000.00, in consideration of which, they released Archer-Daniels-Midland Co., ADM Feed Corp. and numerous others from claims arising out of his purchase of the livestock feed. Coop acknowledged payment to it by Wagners of the sum of \$362,500.00, in consideration of which Coop released Wagners, Archer-Daniels-Midland Co., ADM Feed Corp. and others from the feed claims. Wagners also agreed to "pay all claims demanded by Farmers Cooperative Elevator Company" and agreed to indemnify Archer-Daniels-Midland Co. and ADM Feed Corp. from any claims made against them by Farmers Coop.

RULING ON OBJECTIONS TO INTRODUCTION OF DEFENDANT'S EXHIBITS C AND B

Coop offered two exhibits into evidence which drew objections from the plaintiff. These were exhibits C and B. Exhibit C is a letter dated October 2, 1989 to attorneys Randy Duncan (Wagner's attorney in the state court litigation) and Lynn Wiese (Coop's attorney) from Donald A. Wine, attorney for Archer-Daniels-Midland and ADM Corporation. The letter recited that it confirmed phone conversations wherein the parties had tentatively agreed to settle the case. The letter set out how \$1,012,500.00 would be divided to dispose of the litigation. The letter then stated:

I have agreed that the checks will be made payable to Farmers Cooperative Elevator Company, Arthur Wagner and the Duncan Law Firm as Wagner's counsel. The check to the various parties will be made by the law firm.

The letter also stated that the settlement proposals were contingent upon the necessary inputs from the insurance companies or guaranty funds.

The second letter, dated October 6, 1989, also was from Wine to Wiese and Duncan. Wine wrote that he was sending an original and copies of the Mutual Release to Wiese, and he asked Wiese to forward the signed releases to Duncan. The second paragraph of the letter said:

We have ordered the checks made payable to Arthur Wagner and his attorneys, Duncan, Jones, Riley & Finley and Farmers Cooperative Elevator Company. I will also send the checks to Lynn Wiese for endorsement and he can then forward them to Randy Duncan who will make the disbursements pursuant to my letter of October 2, 1989.

The court finds that each of these letters is relevant to the terms of the parties' settlement and to the issues of whether Duncan or Duncan's firm had agreed to act as escrow agent for the disbursement of the funds or whether a trust in the funds was created at the time of the deposits in Duncan's trust account. Wagner has objected to the admission of the letters on three grounds: (1) that they are not the best evidence of the agreement between the parties; (2) that they constitute inadmissible hearsay; and (3) that they violate the parole evidence rule in that they attempt to vary or explain the Mutual Release which is alleged by Wagner to be the written agreement among the parties.

The court now overrules the objections to the extent they are based on violations of the best evidence and parole evidence rules, but sustains the objections on the ground of hearsay. As to the parole evidence objection, the court does not consider the Mutual Release to be the integrated or entire agreement among the parties. It is merely a document which in part carries out the parties' settlement agreement. As to the best evidence objection, the court concludes that it is meritless because as to the

issue of whether either an escrow agreement or a trust was established, the Mutual Release is not the best evidence as the Mutual Release does not speak to those issues.

The hearsay objection is sustained. The letters of October 2 and 6 are out-of-court written statements offered to prove the terms of the settlement agreement among Wagner, Coop, Archer-Daniels-Midland Co., ADM Corp. and W & G Cattle Co. The effect of the letters is to describe the prior oral agreements of the parties. While those oral agreements might not be hearsay because of their independent legal significance in the formation of a contract, the later description of the oral agreements is hearsay. The court, therefore, concludes that because Coop is offering the exhibits to prove the elements and obligations of the settlement agreement, the defendant's Exhibits B and C are excluded from evidence under Fed.R.Evid. 802.

DISCUSSION

A trustee or debtor-in-possession may avoid preferential pre-petition transfers of property interests of the debtor. Among the elements of a preference is that the transfer of the property interest was made on or within 90 days before the date of the filing of the bankruptcy petition. 11 U.S.C. § 547(b)(4)(A). There is no question in this proceeding that a transfer was made by Wagner to Coop. The critical questions are, "What was the transfer?" and "When was it made?"

The dispute between the parties thus centers upon the legal effects of various steps in the parties' settlement of their state court dispute. Wagner contends that the preferential transfer took place on November 27, 1989 when Wagner's attorney, Randy Duncan, delivered a settlement check to Coop. If Wagner is correct, the transfer would have taken place within the preference period which began on November 25, 1989 and which ended upon the filing of the case on February 23, 1990.

Coop asserts that any transfer to Coop took place no later than November 21, 1989 when Coop endorsed insurance company and guaranty fund checks and delivered them to Duncan in accordance with the parties' agreement. Coop argues that the deposit of the money in Duncan's trust account, pursuant to the agreement, created either an escrow obligation in Duncan, or a resulting trust, an express trust or a constructive trust any of which irrevocably placed the money out of Wagner's control and thus constituted a transfer for purposes of preference law.

Despite counsels' arguments, I conclude that a transfer was perfected under 11 U.S.C. § 547 when Wagner executed and delivered the "Agreement" which assigned to Coop a share of any recovery which might be obtained from Archer-Daniels-Midland Co. and ADM Feed Corporation (defendant's Exhibit A).

To accomplish a valid assignment in Iowa, "there must be a perfected transaction between the parties, intended to vest in the assignee a present right in the thing assigned." Carey v. Chase, 187 Iowa 1239, 175 N.W. 60, 62 (1919). The evidence must show the intent of the parties to effect an assignment. No particular form of assignment is necessary. Moore v. Lowrey, 25 Iowa 336, 339 (1868). "No specific form of words is necessary to effect an assignment. . . . Any language, however informal, if it shows the intention of the owner of the chose in action to transfer it will be sufficient to vest the property in the assignee." Petty v. Mutual Benefit Life Ins. Co., 235 Iowa 455, 15 N.W.2d 613, 618 (1944) reh'g. denied (1944).

The owner of a claim, even after the initiation of suit on the claim, may transfer his rights to any judgment he may recover. Allen v. Newberry, 8 Iowa 65, 70, 8 Coles 69 (1859). See also, Conover v. Earl, 26 Iowa 167 (1868). Furthermore, Iowa law recognizes partial assignments of claims for relief.

Welch v. Taylor, 218 Iowa 209, 254 N.W. 299, 301 (1934); Archibald v. Midwest Paper Stock Co., 158 N.W.2d 739, 742-743 (1968).

Having examined the Agreement (defendant's Exhibit A), I conclude that it is not merely an agreement to assign something in the future but was a present assignment of a partial interest in Wagner's recovery from the feed companies. The agreement states that Coop "will share", and although paragraph 3 states that it will do so "in the event" Wagner prevails in the counterclaim, the latter phrase does not lead me to conclude that the Agreement was one to assign in the future depending on the outcome of the litigation. Paragraphs 3(c) and 4(b) require direct payments to Coop out of any recovery. Of the first \$500,000.00 of any recovery, Wagner would receive his share only after a distribution to Coop. Paragraph 3(d). Of any recovery in excess of \$500,000.00, Wagner would only be "entitled" to proceeds after payment to Coop. Paragraph 4(b).

In determining when the transfer was made, the court must consider when it was perfected. 11 U.S.C. § 547(e)(2)(A)-(C). Transfers of personal property interest are perfected under § 547 of the Bankruptcy Code, "When a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee." As an absolute assignment, the transfer would be perfected as against other creditors at the time of the agreement to assign. Weire v. City of Davenport, 11 Iowa 49, 52 (1860).

The payment to Coop of \$350,000.00 in November, 1989 was in recognition of its property rights in the judgment against the feed companies. But what of the fact that the Coop received \$362,500.00 from the final distribution? Was the additional \$12,500.00 a preference? The settlement Agreement (defendant's Exhibit A) did place a \$350,000.00 cap on the assignment. The amount of the judgment obtained against the feed companies, if fully affirmed on appeal, would have permitted Coop to recover to the full extent of that cap. By the settlement with the feed companies and despite the cap, Coop received \$362,500.00 out of the insurance and guaranty fund proceeds. There is no evidence exactly how the latter figure was arrived at. Certainly Coop's judgment against Wagner had been drawing interest at the legal rate (10 per cent per annum pursuant to Iowa Code § 535.3) since April 29, 1988. Settlement with the feed companies, which would provide some payment of the judgment, was reached in the fall of 1989, clearly more than a year after the entry of Coop's judgment against Wagner. More than \$35,000.00 in interest had accrued. Also, Coop was entitled to recover from Archer-Daniels-Midland and ADM Feed Corp. damages in the amount of \$37,983.00. Pursuant to Coop's participation in the settlement of all claims, Coop had agreed to satisfy not only its claims against the feed companies but its judgment against Wagner for less than the amount Coop was entitled to from Wagner. But it was receiving out of insurance company payments \$12,500.00 more than it was entitled to under the assignment from Wagner. There is insufficient evidence to determine whether this \$11,500.00 came to Coop from Wagner to completely satisfy his obligation to Coop, or from the feed companies to satisfy Coop's claim against them. This insufficiency of evidence prevents the court from determining that transfer of those funds were preferential. The debtor has failed to satisfy his burden of proof in this regard. 11 U.S.C. § 547(g).

Because the court has concluded that in 1988 there was an absolute transfer by Wagner to Coop of an interest in Wagner's recovery against the feed companies, the court must also conclude that the debtor cannot establish a preference. Compare United General Ins. Co. v. Roy Young, Inc. (In re Roy Young, Inc.), 66 B.R. 16, 19 (Bankr. W.D. La. 1986). The court need not reach the many issues related to the creation of an escrow obligation in Duncan or the establishment of a trust.

CONCLUSIONS OF LAW

Wagner, in 1988, assigned to Coop an interest in any recovery or judgment which might be obtained against Archer-Daniels-Midland Co. and ADM Feed Corp. This transfer was not a preference under 11 U.S.C. § 547(b).

ORDER

Judgment shall enter that the complaint of Arthur Wagner against Farmers Cooperative Elevator Co. is dismissed.

SO ORDERED ON THIS 13th DAY OF SEPTEMBER, 1991.

William L. Edmonds
Chief Bankruptcy Judge