

**In the United States Bankruptcy Court**  
**for the Northern District of Iowa**  
**Western Division**

MERLYN J. FELL and  
BONNIE L. FELL

Bankruptcy No. X88-00772S

*Debtor(s).*

Chapter 12

**ORDER RE: CREDITOR'S MOTION TO DISMISS DEBTORS' MOTION FOR  
TIME IN WHICH TO FILE PLAN MODIFICATION**

State Bank of Everly (BANK) moves to dismiss this chapter 12 case. Debtors resist and ask for time to file a plan modification proposal. The case trustee, Carol Dunbar, and Farm Credit Bank of Omaha, a creditor, ask that the case not be dismissed. Hearing on the motions was held January 7, 1992 in Sioux City, Iowa.

Debtors' (third amended) reorganization plan was filed January 17, 1989 and was confirmed January 26, 1989. The plan was later modified to permit debtors to make a portion of their March, 1990 payment to the trustee in October, 1990. Debtors have now completed all payments to the trustee for distribution to unsecured creditors. Debtors are current in their plan payments to Farm Credit Bank of Omaha. They have failed to make a plan payment to the trustee for distribution to Bank. Bank is the holder of a secured claim treated under the plan. This payment was originally due on March 1, 1991, but the due date was extended to October 1, 1991 by an agreement entered into between debtors and the Bank. The amount due March 1 was \$29,164.41. (Third Amended Plan, p. 1). A like amount will come due March 1, 1992 and would, under the plan, be paid directly to the Bank.

Merlyn Fell (FELL) concedes that he does not presently have sufficient funds to cure the default, nor will he have enough money in March to pay the upcoming installment. He attributes his past and anticipated default to poor weight gain in his cattle, to a 1991 downturn in cattle prices, and to crop losses. Due to wet fields in the spring of 1991, Fell's soybean crop was planted late and therefore was late in maturing. An early frost reduced yields from his normal 50 or so bushels per acre to approximately 27 or 28 bushels per acre. A strong July wind damaged his corn crop reducing his yield per acre to 80 bushels, the worst he has ever had. His county has been declared a disaster area for purposes of applying for federal assistance. Fell feels he meets the requirements for aid and plans to apply when the sign-up period commences on February 3. He has already received an \$8,000.00 crop insurance payment because of the wind storm. He anticipates that if his assistance application is approved, he could receive up to \$20,000.00 in assistance. There was no evidence at trial as to whether this aid would be a loan or a grant.

In November, 1990, Fell purchased 120 head of cattle and was feeding them to market weight. To purchase them, he had borrowed approximately \$60,000.00 from the Farmers Savings Bank of Fostoria. Fell had intended to sell the cattle in June, 1991 to make the March, 1991 payment to the

bank. The cattle did not gain weight as he expected. When he finally sold them in the fall of 1991, each animal weighed about 100 pounds less than had been planned. In addition to the weight gain problem, there was a downturn in the cattle market. Fell estimates that he earned approximately \$20,000.00 less than hoped when he sold the herd.

Bank points out that the poor crop harvest and the low cattle profits both took place in the fall of 1991, and thus could not have been the cause of Fells' failure to make the March, 1991 plan payment for the bank. This is partially accurate. However, the evidence contains an explanation of debtors' default. Under the plan, Fells were required to make a March 1, 1990 payment to the trustee in the amount of \$44,815.12. This figure was to include Bank's payment, the payment to the unsecured creditors, real estate taxes and the trustee's fee. Because Fells were unable to make the entire payment, they sought modification of the plan so they could pay \$14,022.10 in October, 1990. The 1990 crop was used to make this payment as well as to pay ground rent and feed livestock. There was insufficient 1990 crop left over to make the March, 1991 payment to the bank, and there was little explanation for why that may have been so.

Nonetheless, Merlyn Fell borrowed the funds to purchase the cattle and hoped to have sufficient money from their sale to make a late payment to the bank. He first negotiated a May 1, 1991 payment date, but later obtained the bank's agreement for an extension to August 1, 1991. When he sold the cattle in the fall, he netted only \$10,000.00 to \$12,000.00 after paying sales costs and the purchase money note. Fell offered the bank a partial payment, but this offer was not accepted. There was no evidence as to what conditions may have been attached to the offer.

The 1991 crop also did not produce sufficient profit to permit payment of the delinquent amount. Fells obtained the crop insurance payment of \$8,000.00 but they no longer have all of those funds. At present, they have \$1,000.00 in cash, \$8,000.00 in equity in hogs, and \$18,435.00 in equity in crop inventory.

Fell says the farmland which secures the bank's debt is worth \$2,500.00 per acre (150 acres) or \$375,000.00. Bank also has as collateral for its loan farm machinery and equipment valued by Fell at \$70,000.00. Bank considers that the land is worth \$270,000.00 to \$300,000.00 and that the machinery is worth \$30,000.00. The present balance of the Fells' plan indebtedness to Bank is \$281,079.42 consisting of principal in the amount of \$233,392.97 and interest in the amount of \$47,686.45. I estimate that the interest accruing per day on the entire amount is approximately \$85.00 based on 11 per cent per year.

Section 1229(a) of Title 11, United States Code, permits a debtor to seek modification of his or her plan "[a]t any time after confirmation of the plan but before the completion of payments under such plan ...." There is nothing in the language of this section which leads me to believe that the payments referred to do not include payments to creditors with allowed secured claims. Even if the section were interpreted to mean that modifications must be obtained prior to the conclusion of payments to the trustee, modification would still be timely in this case, as the March, 1991 payment to Bank would, by the plan, be made through the trustee. I conclude that modification of the debtors' plan would still be timely in this case and that debtors' motion for more time to file should be considered.

Bank wants the case dismissed without such an opportunity. It relies on 11 U.S.C. § 1208(c) (6) which gives the court the discretion to dismiss for cause, including a "material default by the debtor with respect to a term of a confirmed plan." There has been a material default by the debtors in failing to make the March, 1991 payment to the bank. It is expected the debtors will default on the next

payment when it comes due in March, 1992, although there are nearly sufficient assets on hand to make that payment.

Bank has received some payments under the plan. It says the March, 1991 payment is not paid. Thus far the bank must have received payments of \$82,431.18 if all other payments described by the plan have been made. (See Third Amended Plan, Exhibit B, p. 1). All payments for unsecured creditors have been made to the trustee, and another major secured creditor--Farm Credit Bank of Omaha--is current with its loan. This is not a case where the debtors have wholly failed to pay anything under their plan. Also, it is acknowledged that Bank is as yet oversecured. Finally, for the purposes of these motions, I find credible Merlyn Fell's explanation of why Fells are delinquent in their payment to Bank or why they failed to cure the delinquency. Considering these facts, I believe that the debtors should have an opportunity to move to modify.

However, they seek far too much time to do so. Perhaps there is an explanation as to why debtors have waited this long to pursue modification. Merlyn Fell knew at least as early as the fall of 1991 that events were such that they could not pay the 1991 payment and there would be problems in paying the March, 1992 payment. The potential availability of the disaster aid, but uncertainty as to its amount, is not a satisfactory explanation. The potential aid, in the estimated amount of \$20,000.00, cannot entirely solve the debtors' problem. Debtors cannot rely solely on it and should be considering other possibilities. I will not, as asked, establish a deadline of May, 1992 for filing a proposed modification. While debtors seek modification, Bank's equity erodes through the accrual of interest. The parties are approaching another crop year, so time may be of the essence. Moreover, Congress mandated that initial plans be proposed within 90 days of filing. I see no valid reason in this case to give debtors more merely because of the uncertainty of their federal aid application.

### **ORDER**

IT IS ORDERED that Bank's motion to dismiss is denied at this time. Debtors shall have to and including February 10, 1992 to file a plan modification. Notice to creditors shall provide that creditors and parties-in-interest shall have to and including February 21, 1992 to file objections. Hearing on timely filed objections will come before the court at 1:30 P.M. on March 3, 1992 in the Bankruptcy Courtroom, Sioux City, Iowa. At that time, the court will again consider Bank's motion to dismiss without the necessity for refiling.

SO ORDERED ON THIS 10<sup>th</sup> DAY OF JANUARY, 1992

William L. Edmonds  
Bankruptcy Judge