

In the United States Bankruptcy Court

for the Northern District of Iowa

MERLYN J. FELL, and BONNIE L. FELL
Debtors.

Bankruptcy No. X88-00772S
Chapter 12

ORDER RE: DEBTORS' MOTION TO MODIFY PLAN CREDITOR'S MOTION TO DISMISS

Merlyn J. Fell and Bonnie L. Fell (the FELLs or DEBTORS) have proposed to modify their confirmed chapter 12 plan pursuant to 11 U.S.C. 1229. They have filed a Fourth Amended Plan. Creditor Everly State Bank (BANK) objects to the proposed modification and moves to dismiss. Hearing was held March 3, 1992 in Sioux City, Iowa. The court now issues its findings of fact and conclusions of law pursuant to Fed.R.Bankr.P. 7052. This is a core proceeding under 28 U.S.C. 157(b)(2)(L).

FINDINGS OF FACT

Debtors' (Third Amended) Plan of Reorganization was filed January 17, 1989 and was confirmed January 26, 1989. It is a three-year plan. Debtors have completed all payments to the trustee for distribution to unsecured creditors. Debtors have moved to modify their chapter 12 plan because they have defaulted under the plan and missed certain annual payments to secured creditors. Debtors have not made the payment due to Farm Credit Bank of Omaha (FCB) on March 1, 1992. Debtors have also failed to make two payments to Bank. The first payment was originally due March 1, 1991, but the due date was extended to October 1, 1991 by agreement entered into between debtors and Bank. The March 1, 1991 payment was to have been \$29,164.41. (Third Amended Plan, page 1). Debtors became delinquent on their second payment on March 1, 1992. This payment was also for \$29,164.41 and was to be paid directly to Bank.

Merlyn Fell acknowledges that the delinquent payments which he owes to Bank have left him more than \$61,000.00 behind in his payments under the Third Amended Plan. Fell attributes these defaults to farm problems in 1991 including poor weight gain in his cattle, a 1991 downturn in cattle prices, and crop losses. Fell's soybean crop was planted late due to wet fields in the spring of 1991, and an early frost reduced his yields from a normal 42 bushels per acre to approximately 27 bushels per acre. A strong July wind damaged his corn crop and reduced his yield per acre to 76 bushels, his worst return ever. His county has been declared a disaster area for purposes of applying for federal assistance. These problems were discussed in greater detail in the court's January 10, 1992 decision granting debtors time to modify their plan. The Fells attribute their difficulties also to the costly payment of \$38,000.00 to unsecured creditors made on March 1, 1990.

Debtors' plan is as follows: Fells propose to cure the overdue payment to FCB within seven days of the March 3 hearing. Debtors will then continue to make payments to FCB as provided under the Third Amended Plan. Debtors currently owe Everly State Bank \$285,018.33. This includes debtors' default from March 1, 1991 and March 1, 1992. Debtors propose to make a \$30,000.00 payment to Bank within ten days of confirmation of their modified plan. The source of this payment is to be a post-confirmation unsecured loan from an uncle of the debtor, Morris Fell. The loan would be at eight per cent interest. The terms of the loan were not elaborated upon at the hearing. No evidence or testimony was offered as to debtors' repayment obligation under this loan. After the initial payment to the Bank, debtors would make annual installment payments of \$27,504.87, the first such payment being due on or before March 1, 1993. This payment plan is based on the balance of the loan, after deduction of the \$30,000.00 payment, amortized over 20 years at nine per cent interest.

Bank has objected to debtors' proposed plan of reorganization. Bank argues that debtors' plan has not been proposed in good faith and that it is not feasible. Bank disputes debtors' estimates of their income and expenses for 1991. Bank also contends that debtors' proposed plan of reorganization is not valid because it proposes to cut the rate of interest paid to creditor from the 11 per cent previously permitted by the Third Amended Plan of Reorganization to nine per cent, a current Treasury rate of interest plus two per cent. Bank argues also that debtors' estimate of the value of Banks' collateral is not accurate and that Bank has little or no equity cushion in the event of further default. Bank objects to the plan also because it fails to cure immediately the entire \$57,000.00 default. Debtors oppose these objections and contend that the plan is both feasible and offered in good faith. Debtors argue that the rate of interest under their plan may be changed by a plan modification and that the value of the collateral along with the immediate payment of \$30,000.00 adequately protects Bank's interest. Debtors claim that their estimates of expenses and income and the value of the collateral are accurate based on personal knowledge and past experience, and that the default to Bank will eventually be cured by the fourth amended plan.

Fells' cash flow projections under their Fourth Amended Plan extend from January to December of 1992 only. The Fells plan to raise corn and soybeans in 1992 and to take part in the government program. Debtors currently have several hundred head of hogs which they intend to sell by the end of May, 1992. Debtors' projections include a \$4,000.00 deficiency payment which they expect to receive within the next 10 days. The totals also include \$10,000.00 which Merlyn Fell estimates he will receive in May under the government's disaster relief program for his crop losses experienced in 1991. Debtors list off-farm income from Bonnie Fell's work at a manufacturing plant. The following chart shows debtors' cash flow projections under their fourth amended plan.

SOURCES	TOTALS
Hogs	\$ 26,695.00
Cattle	0
Corn	64,429.00
Beans	49,248.00
Government	17,700.00
Off farm	9,900.00
(Gov't. plan which debtors had forgotten to add to plan)	4,000.00
Total	\$171,972.00

The Fells intend to plant 195 acres of corn. Their cash flow projection assumes the normal ASCS yield of 125 bushels per acre and a sales price of \$2.34/bushel, the February sales price, with the complete crop sale occurring by December, 1992. The Fells also anticipate planting 150 acres of soybeans. At the normal yield of 42 bushels per acre, debtors will receive \$34,398 in November of 1992 based on a current sales price of \$5.64 per bushel. Merlyn Fell testified that he would expect to equal or exceed these projected yields in an average year. The figures listed in the above columns also include income from sales of grain already received in January and February of this year. At the present time, debtors have sold off all of their cattle and do not plan to re-enter the market in 1992, though Merlyn Fell would not completely rule out this possibility at the hearing.

At the hearing, Bank disputed the certainty of \$10,000.00 disaster relief payment which Merlyn Fell expects to receive in May. Robert Goeken (GOEKEN), Bank's Vice-President, testified that the payment was uncertain and that losses may be compensated by the government at a rate of 10-30 per cent.

Debtors' expenses include the following:

EXPENSES	TOTALS
Loan payment	\$26,000.00
Interest	4,510.00
Rent	42,200.00

FLB payment	6,000.00
Feed	6,700.00
Seed	4,300.00
Fertilizer	41000.00
Herbicide	5,100.00
Repairs	5,800.00
Labor	1,950.00
Fuel	4,100.00
Machine hire	1,100.00
Utilities	3,200.00
Taxes	1,200.00
Building repair	3,000.00
Insurance	5,100.00
Living	9,600.00
TOTAL	\$133,860.00

Merlyn Fell testified that most of these expenses come from his 1991 income tax form. Bank has disputed several of these expenses. Goeken testified that the average cost per acre to grow corn would be \$275.00 per acre. Debtors' cost for growing 195 acres of corn, using that figure, would be \$53,625.00. The cost for growing an acre of soybeans is estimated by Goeken at \$225.00 per acre. Debtors' cost for growing 150 acres of soybeans, using that figure, would be \$33,750.00. Thee two estimates total \$87,375.00. Goeken stated that Fells' projections showed a total crop cost of \$62,650.00. Debtors will rent 390 acres of farmland. Merlyn Fell explained at the hearing that the total due for rent included \$9,000.00 paid to his mother, Viola Fell, for farm land rent due from 1991. The current plan will pay Viola Fell in full for 1992 by the end of the year. Part of debtors' estimate for rent also includes the cash value of crop share rent which debtors will pay in 1992. Merlyn Fell explained that the amount projected for seed in 1992 was \$1,500.00 less than normal because debtors had carried over seed from 1991. Fell also stated that the amount projected for fertilizer was half the usual amount because debtors had accumulated manure from cattle and hog production which they planned to use in place of part of their normal fertilizer requirement. Merlyn Fell explained that his feed requirements were low because he planned to sell off his hogs by May and because he still had grain and silage with which he could feed the hogs until they were sold. Fell testified that his family living expenses, which had previously been projected at \$15,000.00 for 1989 and 1990, had been pared back to the bare essentials in the 1992 estimate. No explanation was given why the Fourth Amended Plan did not include expenses for veterinary care, livestock supply, or livestock marketing, all of which had been included in the third amended plan. Deducting debtors' expenses from their projected income, debtors will end the year with a \$38,112.00 surplus. From this, they will have to make their March 1, 1993 payments to the Farm Credit Bank and the Everly State Bank. The Fells will also have to meet their expenses for the first part of 1993.

Merlyn Fell owns a remainder interest in 150 acres of land which he estimates has a per acre value of \$2,500.00 or a total value of \$375,000.00. Fell stated that his estimates were based on five land sales which had taken place since last fall within a five-mile radius of his own farm in Clay County. Bank sharply disputed debtor's testimony of farmland value. Goeken, based on his own education and experience, estimated debtors' land was worth approximately \$1,900.00 per acre for a total value of \$285,000.00. At a previous hearing, Goeken testified that the land had a value of between \$1,800 to \$2,000.00. Goeken testified that Iowa land values have now stabilized and are no longer increasing at the same levels as they were in the late 1980s.

Bank is also secured by an interest in farm machinery which debtor values at \$70,050.00. This includes \$68,050.00 worth of machinery listed in debtors' attached schedule and two vehicles not found on the list valued at \$2,000.00. The

values of the individual pieces of machinery are based on debtors' personal opinion. Bank objects to the estimated value of the machinery and notes that debtors' Third Amended Plan of Reorganization listed only \$49,650.00 worth of machinery. Bank points out that farm machinery, which experiences significant wear and tear from everyday use, does not normally appreciate in value. Debtors' Third Amended Plan of Reorganization did not contain an itemization of the machinery. Merlyn Fell testified that he and his wife have purchased several pieces of machinery since 1989. Merlyn Fell also stated that his earlier estimate of \$49,650.00 might have been conservative. Debtors have made the following additions to their machinery inventory in the past three years:

Machinery	Purchase Price	Value Listed in Fourth Amended Schedule
Allis Chalmers tractor (7050)	\$ 7,500.00	\$ 5,000.00
Dryer-corn	4,000.00	3,000.00
Manure spreader	900.00	900.00
Kocker elevator	1,100.00	800.00
Pickup truck	(unknown)	1,506.00
Scout	(unknown)	500.00

Debtors gave no trade-ins for these new purchasers and apparently have not lost any pieces of machinery that were claimed under the Third Amended Plan. There is no evidence that Bank has a security interest in the vehicles. Taking the value of the machinery listed in the Third Amended Plan of Reorganization and adding the values of the new pieces of machinery (but not the vehicles), debtors have machinery with a combined value of \$59,350.00. As farmers, debtors may each claim the \$10,000.00 exemption on farm machinery provided for by Iowa Code 5 627.6(11). The court, therefore, finds that the collateral value of debtors' farm machinery upon a hypothetical liquidation is \$39,350.00. Debtors have listed \$3,000.00 in vehicles in addition to the Scout and the pickup truck. Merlyn Fell testified that this was the value of his personal car. Debtors also claim \$34,701.00 in grain and livestock available to creditors as non-exempt assets. Most of this grain has now been sold off, however, or will be fed to the remaining hogs, leaving only a supply of silage, for which there is not much of a market. The hogs will be sold by May. The value of the hogs has already been included in debtors' income projection.

DISCUSSION

The modified plan will not be confirmed because the court will not permit the debtors to reduce the interest rate payable to Bank from 11 per cent to nine per cent. Debtors contend that nothing in the Bankruptcy Code prevents the reduction and that the Code provision permitting reduction of the amount of payments implies that it may be done. See 11 U.S.C. 1229(a)(1). But there is nothing in 1229(a) which permits a debtor to modify a secured creditor's claim. It was fixed on the date of the confirmation of the debtors' plan, January 26, 1989, (docketed January 27) and was fully secured. To have obtained confirmation in 1989, the debtors were required to pay Bank the value of its claim "as of the effective date of the plan." 11 U.S.C. 1225(a)(5)(B)(ii). In order to provide the Bank with the present value of its secured claim, the debtors agreed to an 11 per cent interest rate on a 20-year amortization. The present modification cannot change the effective date of the plan. See Hollytex Carpet Mills v. Tedford, 691 F.2d 392, 393 (8th Cir. 1982). Hollytex held that a plan modification did not change the effective date of the plan for purposes of 1325(a)(4). That provision requires debtors to meet the best interest test as of the effective date. Moreover, this court does not interpret 1229(a) and its subsections as broadly as debtors would have it. It does not necessarily follow that because the amount of payments or the time for such payments may be reduced that the interest rate may be altered, despite the fact that a reduction of rate might have the effect of reducing payments. Practically, such changes can be made without altering the rate.

Fairness--equal treatment of both creditor and debtor--requires adherence to the initial plan rate. The debtors were unable to make their payments to the Bank. The failure followed a year of crop and cattle problems. It is coincidental that interest rates have fallen. Debtors, in seeking modification, now want to force a refinancing of their loan at a more favorable rate. But had interest rates increased, the Bank would not be permitted to revise its note with the debtors. I interpret 1229(a) as a device to permit a family farmer to revise his payment schedule to facilitate his reorganization. The debtor can reduce the monthly or yearly payments to the secured creditor. He can extend the time over which

payment will be made. These changes fall within the statutory language. Changing the interest rate or the amount of the claim does not fall within the Code's literal terms.

Despite Bank's objection to the modification, the court would permit debtors to make a lump sum payment of \$30,000.00 and reamortize the balance over 20 years. This modification does not prevent confirmation.

Debtors' failure to provide for the treatment of the secured creditor's legal fees and costs, to the extent allowable under state law and 506(b) of the Code, prevents confirmation of the modified plan. Such fees, as may be allowed, must be paid upon confirmation or capitalized and reamortized. The plan fails to provide any treatment whatsoever.

Debtors have paid substantial sums under their third amended plan. They contemplate quickly curing their default to Farm Credit Bank of Omaha. They also propose a \$30,000.00 payment to Bank. Bank argues that debtors' plan is not feasible. The court does find that the debtors have only a borderline ability to meet the payments proposed, especially when an 11 percent interest rate is required, and when debtors must provide for payment of Bank's allowable legal costs. The court estimates the March, 1993 payment (without legal costs but at the 11 per cent rate) to be approximately \$32,000.00. However, the debtors should have one last opportunity to amend the plan to correct the foregoing deficiencies. Since such an opportunity will be provided, some words about feasibility are in order. Three areas of debtors' proof were wholly unsatisfactory. First, Merlyn Fell could only guess at the remaining disaster payment. At trial, debtor's and Bank's estimates of the final payment varied by \$7,000.00. As dicey as debtors' plan is, they should provide better evidence of the payment--even if that means subpoenaing a knowledgeable witness. Moreover, there was no evidence as to whether such payment was a grant or a loan. Second, there was no evidence as to Fells' necessary cost of doing business in January and February of 1993. Even to make the required payment to Bank on March 1, 1993, debtors have to operate in January and February. Debtors' 12-month cash flow was, therefore, inadequate. Third, debtors' evidence as to Morris Fell's enabling loan was weak, amounting to testimony by Merlyn Fell that his uncle would lend him the money at eight per cent interest. The requirements, including the timing, for repayment could prevent the plan from being feasible. Also, there was no evidence on the uncle's ability to lend \$30,000.00. Finally, this court would not permit repayment to Morris Fell to interfere with the bank's scheduled payment in March, 1993.

Substantial payments have been made by debtors under their plan. They defaulted on the payment to the Bank, which is fully secured. If a \$30,000.00 payment is made shortly, the Bank should still be fully secured in March, 1993. Assuming that debtors are able to obtain the \$30,000.00 loan and to make the initial payment to Bank, debtors will owe \$255,018.33. Should debtors default in their plan payments on March 1, 1993, debtors will owe Bank approximately \$286,976.61. The court finds that debtors' land is worth \$2,000.00 per acre or \$300,000.00 total. This is based on Robert Goeken's testimony that debtors' land was worth between \$1,800.00 and \$2,000.00 per acre and upon Fell's estimate. Debtors' farm machinery has a collateral value to Bank of approximately \$39,000.00. The gross value of bank's collateral is thus \$339,000.00. By March 1, 1993, debtors will owe Farm Credit Bank between \$32,000 and \$34,000. It is presumed that the Farm Credit Bank of Omaha has a first mortgage on debtors' property, as required by law. If debtors' plan were to fail, Farm Credit Bank would be able to foreclose on its mortgage. This would leave debtors with an equity of approximately \$305,000.00. This provides creditor with an equity cushion of approximately \$18,000.00. Even assuming the further need for foreclosure costs, which can roughly be estimated at \$2,000.00, and payment of creditor's attorney's fees, calculated at about \$3,000.00, Bank will still have an equity cushion of \$13,000.00. This will protect Bank against a decline in land prices of up to four per cent in one year. The court finds that Bank is adequately protected. Debtors will be given a short amount of time to amend. If they fail to amend, the case will be dismissed. If they fail to gain confirmation of any amendment, the case will be dismissed.

ORDER

IT IS ORDERED that confirmation of the plan as amended is denied. Debtors shall have until March 31, 1992 to file further amendment. Failure to file such an amendment by the close of the clerk's office on March 31 will result in dismissal of the case without further notice or hearing. Debtors shall serve the amendment and notice of the amendment on all creditors and parties-in-interest by March 31, 1992. The notice shall provide for a bar date for objections of April 16, 1992. Final hearing on confirmation shall come before the court at 9:00 A.M. on April 21, 1992. Further hearing on Bank's motion to dismiss is continued to that date. If debtors fail to obtain confirmation, the case will be dismissed.

SO ORDERED ON THIS 18th DAY OF MARCH, 1992.

William L. Edmonds
Bankruptcy Judge