Appeal History

aff'd C92-3078 (N.D. Iowa, 1994)

In the United States Bankruptcy Court

for the Northern District of Iowa

ARTHUR R. WAGNER and SHERRY L. WAGNER
Debtors.

Bankruptcy No. X90-00310M
Chapter 11

ARTHUR R. WAGNER
Plaintiff

vs.

FARMERS COOPERATIVE ELEVATOR COMPANY
Defendant.

Adversary No. X90-0061M

SUPPLEMENTAL MEMORANDUM OF DECISION AND ORDER

This Memorandum of Decision supplements the memorandum issued September 13, 1991. The latter sets out the court's findings of facts, conclusions of law and rationale for its decision in this adversary proceeding. The court determined that the written agreement (Exhibit A) executed by Arthur Wagner and the Farmers Cooperative Elevator Company (CO-OP) in April, 1988, constituted an assignment of a portion of Wagner's recovery from Archer-Daniels-Midland Company and ADM Feed Corporation. The court further concluded that the execution and delivery of the assignment was the effective date of transfer of Wagner's rights and that because such transfer took place before 90 days in advance of Wagner's filing of his bankruptcy petition, the transfer was not preferential. Judgment entered dismissing Wagner's complaint. On motion of the plaintiff, the judgment and record were reopened for the purpose of taking additional evidence on the issue of whether the agreement amounted to an assignment. The court now supplements its findings and conclusions and re-issues its order.

FINDINGS OF FACT

Wagner and Co-op entered into the settlement agreement (AGREEMENT) during the trial of the consolidated legal actions pending in the Iowa District Court for Franklin County. The Agreement was executed and delivered on or before April 6, 1988, the date when the jury returned its verdict in favor of Wagner and against Archer-Daniels-Midland Company (ARCHER) and ADM Feed Corporation (ADM Feed). See page 117, Jury Verdict Forms attachment to Stipulation.**(fn.1)**

On April 15, 1988, pursuant to the jury's verdict, the court entered judgments against Archer and ADM Feed in favor of Wagner and Co-op. Three days later, in apparent partial fulfillment of his settlement with Co-op, Wagner signed an offer to confess judgment in favor of Co-op. It was filed with the trial court on April 29. On the same day, Co-op filed its acceptance, and the court entered judgment. On April 30, Co-op reduced Wagner's account balance to zero.

Archer and ADM Feed appealed the judgments entered against them. While the appeals were pending, they reached settlements with Wagner which would also satisfy Co-op. The sources of the settlement monies were Archer's and ADM

Feed's insurers or their successors. Three checks were issued to provide payment. The Iowa Insurance Guaranty Fund issued a check to Randy Duncan, Wagner's attorney, in the amount of $350,000.00. Duncan deposited it in his trust account on October 23, 1989. A check on behalf of General Insurance Company of America was issued payable jointly to Wagner and Co-op; it was in the amount of $512,500.00. A check in the amount of $150,000.00 was issued by the Illinois Guaranty Fund; it was payable jointly to Wagner and Co-op. Donald Wine, the attorney for Archer and ADM Feed, drafted a "Mutual Release" for execution by all parties. Wine and his clients learned during the trial that Wagner and Co-op had settled, but there is no evidence that it knew the specific details of the settlement or of the existence of the "Agreement" or its contents.

Wagner settled with Co-op for strategic reasons. Wagner's counsel learned that Co-op was prepared to present evidence in the case that would be damaging to Wagner's case. Wagner and his counsel decided to settle with Co-op in order to prevent the evidence from damaging the case against Archer and ADM Feed. Wagner was successful in this effort.

In his testimony, Wagner said that he viewed the settlement agreement with Co-op as an obligation to pay $350,000.00 but not necessarily out of any particular source. On further examination, he was asked whether, if he recovered from "ADM, the Co-op must be paid out of that recovery." He responded, "Yes." Michael Abildtrup, general manager of Co-op, believed that the settlement required payment to be made from the proceeds of the suit against "ADM." Both Wagner and Abildtrup were of the opinion that if there were no recovery against Archer and ADM Feed, Wagner would still owe Co-op $350,000.00. Once settlement had been reached with Archer and ADM Feed, Co-op asked its attorney to structure the settlement so that funds would not pass through Wagner's hands, as Co-op feared other creditors might try to intercept the funds.

After the settlement agreement was executed, Co-op did not attempt to control, take over or assist in the litigation against Archer or ADM Feed. Settlement negotiations took place between Duncan and Wine. Nonetheless, once settlement was reached, Wine wanted all parties, including co-op, to sign the settlement documents. He took that position because "[t]hey (Co-op] had a judgment against us for one thing and then we had been advised that they participated in the judgment [that Wagner had against Archer and ADM Feed]." (Wine deposition, p. 7, 11. 5-16.)

At least two of the insurance companies funding the settlement wanted all parties' names on the checks. There was an agreement among the parties that the Duncan firm's trust account would be used for the deposit and disbursement of the settlement monies. (Id., p. 11, 1. 2.) Michael Abildtrup endorsed the checks for Co-op, and they were deposited in Duncan's trust account on November 21, 1988. Co-op refused to deliver its signed mutual release to Duncan until it received its check from Duncan. The exchange was made on November 27, 1988.

The settlement agreement between Co-op and Wagner was negotiated by Duncan and Co-op's attorney, Lynn Wiese; the Agreement was prepared by Wiese. The original document was signed by the parties and their attorneys. When first examined, Duncan said he did not consider the agreement to have conveyed "a present interest in Wagner's claim against ADM or Archer-DanielsMidland to the Co-op." He said the agreement was contingent on the size of the verdict and that Co-op would not be paid anything unless Wagner got a large enough verdict. (Duncan deposition, p. 10, 11. 13-21.) He also testified that he construed the agreement to mean that Co-op would receive its settlement money from Wagner, not from the insurance companies. (Id., p. 21, 11. 817.) on cross examination, Duncan stated that he believed the settlement agreement to be a "viable contract between Arthur Wagner . . . and Co-op." (Id., p. 21, 1. 21 to l. 22, 1. 1). He corrected his earlier testimony that Co-op would only be paid if Wagner got a large enough verdict. He acknowledged that Co-op would be paid out of the first $500,000.00 regardless, and Co-op would be paid before Wagner. (Id. p. 22, 1. 5 to p. 24, 1. 10.)

DISCUSSION

Wagner contends that the Agreement is not an assignment, as it is nothing more than a promise to pay Co-op out of a future fund. Wagner argues also that one cannot assign either tort claims or claims for punitive damages.

"A chose (or thing) in action is a right not reduced into possession or a right under a contract which, in case of nonperformance, can only be reduced to beneficial possession by an action or suit." Arbie Mineral Feed Co., Inc. v. Farm Bureau Mut. Ins. Co., 462 N.W.2d 677, 680 (Iowa 1990). A chose in action is assignable in Iowa. Brenton

Brothers v. Dorr, 213 Iowa 725, 239 N.W. 808, 811 (1931). A cause of action for tort may be assigned. Vimont v. Chicago & N.W. Ry. Co., 64 Iowa 513, 21 N.W. 9, 10 (1884); United States v. Fleming, 69 F.Supp. 252, 259 (N.D. Iowa 1946).

Assignability is not limited to claims or causes in action. one may assign rights to an existing judgment. Broyles v. Iowa Depart. of Social Services, 305 N.W.2d 718, 721 (Iowa 1981) citing Edmonds v. Montgomery & Shaw, 1 Iowa 143, 147 (1855). One may also assign rights to any judgment which may be recovered in a pending action. Broyles, 305 N.W.2d at 721, citing Weire v. City of Davenport, 11 Iowa 49, 52-53 (1860). An assignment of a future judgment may be made without giving the assignee a legal interest in the claim for relief. Allen v. Newberry, 8 Iowa 65, 70-71 (1859).

The issue before the court is whether the Agreement constituted an equitable assignment of a portion of Wagner's right to any judgment or recovery obtained from Archer or ADM Feed. In Iowa, an equitable assignment requires "an assignment, oral or written, of the fund, or some definite proportion thereof --such an agreement as that the assignor parts with all control thereover." In re Donaldson's Estate, 126 Iowa 174, 101 N.W. 870, 871 (1904). "Any words or transaction which show an intention on the one side to assign and the intention on the other to receive, if there is a valuable consideration, will operate as an effective equitable assignment." Fischer v. Klink, 234 Iowa 884, 14 N.W.2d 695, 698 (1944).

However, an agreement to pay out of a particular fund in the future when the fund comes into existence is not sufficient to constitute an equitable assignment. In re Donaldson's Estate, 126 Iowa 174, 101 N.W. 870, 871 (1904); Christmas v. Russell, 81 U.S. (14 Wall.) 69, 84, 20 L.Ed.2d 762 (1871) ; B. Kuppenheimer & Co., Inc. v. Mornin, 78 F.2d 261, 265 (8th Cir. 1935) cert. denied 296 U.S. 615, 56 S. Ct. 135, 80 L. Ed. 163 (1935) ; State Central Sav. Bank v. Hemmy, 77 F.2d 458, 460 (8th Cir. 1935). To create an equitable assignment, there must be an intention by the parties "to appropriate on the one hand and to receive on the other." Id. In determining whether the intent to transfer existed, the court may examine the entire transaction. Id.

Despite the able arguments of the plaintiff, the court still comes to the conclusion that the parties intended an assignment by Wagner to Co-op of a part of any recovery Wagner might obtain in his suit against Archer and ADM Feed. The parties' failure to use the term "assignment" is not fatal to such a conclusion as no form of words are necessary to constitute an assignment. Petty v. Mut. Benefit Life Ins. Co., 235 Iowa 455, 15 N.W.2d 613, 618 (1944), reh'g denied (1944). The language of the Agreement provides that Co-op "will share" in any recovery. The Agreement set out definite proportions and dictated that Co-op would be paid its share "directly" with remaining funds being "distributed to Arthur R. Wagner." This evinces an intention by Wagner to give up control of the specified proportion of the future fund. Wagner received valuable consideration for the assignment. First, he removed Co-op as his adversary, eliminating the threat of the potentially damaging evidence which Co-op admittedly had to offer. Second, Wagner reduced his debt to Co-op to $350,000.00 from the nearly $450,000.00 claimed on the account. (Exhibit I.) Third, Wagner assured himself of receiving at least some portion of the first $500,000.00 of recovery.

Wagner contends that he never gave up control of the funds. This is not so. The Agreement, as has been said, provided for direct payment to Co-op with distribution to Wagner only after the required payments to Co-op had been made. After Wagner had settled with Archer and ADM Feed, it was orally agreed that the settlement monies would be paid to Duncan, who would deposit them in his trust account and make distribution to himself, Coop and Wagner. It was Co-op's intent that its share would not pass through Wagner's hands. Although it might be argued that Duncan remained Wagner's attorney and under his direction, it cannot be gainsaid that Duncan was fully aware of the Agreement and the required distribution to Co-op. Indeed, he had signed it. (Exhibit E and Duncan deposition, p. 23, 1. 21 to p. 24, 1. 10.) The court cannot conclude that notwithstanding the written agreement between Wagner and Co-op and the oral agreement that Duncan would disburse the settlement funds, Duncan was free to disburse the funds in some other manner at Wagner's direction.

It can also be said, as Co-op has argued, that Duncan took the funds as escrow agent, obliged to disburse them in accordance with the oral agreement reached by Wagner, Co-op and Archer and ADM Feed. In this regard, the Iowa Supreme Court has said: "It sometimes happens that attorneys participate in the settlement of litigation by agreeing to receive and transfer funds in accordance with the settlement. An attorney who agrees to act as an escrow agent can of course be made to perform as one, even where opposing litigants are represented by separate counsel." American State

Bank v. Enabnit, 471 N.W.2d 829, 833 (Iowa 1991). There is no question that Duncan had agreed to hold in trust and then disburse the Co-op's share. Such an agreement may be oral. Id. at 832.

In its previous memorandum and ruling, the court held that the assignment was effective upon its execution and delivery. (Memorandum, September 13, 1991, p. 15.) See Weire, 11 Iowa at 52. This would be when Co-op obtained equitable title to a >portion of the potential recovery. Even, arguably, if Duncan remained under Wagner's control, when the funds were paid to Duncan, Co-op would have obtained legal title to its portion. Kerr v. Kennedy, 119 Iowa 239, 93 N.W. 353, 354-55 (1903). The money was deposited in Duncan's trust account on November 21, 1989. The first day of the preference period was not until November 25, 1989. The court concludes under the foregoing analysis that Co-op acquired an equitable assignment and then legal title to the funds prior to that date, and that thus the transfer to the Co-op was not a preference under 11 U.S.C. 547.

Wagner's other arguments do not detract from this conclusion. Wagner cites the case of Weston v,.Dowty, 414 N.W.2d 165, 163 Mich. App. 238 (1987) as the most closely analogous to our matter. It, however, does not deal with the same issue. In Weston, the Michigan Court of Appeals held that an agreement to assign part of a recovery from a malpractice action was not an agreement to assign the claim or cause of action itself and that thus the agreement did not run afoul of Michigan's prohibition against assignment of legal malpractice actions. Id. at 167. The court did not determine that one could not assign a portion of the recovery.

Wagner argues that a claim for punitive damages cannot be assigned. For this proposition, he cites 25 C.J.S. Damages 7. For one of its authorities, C.J.S. cites Maryland Cas. Co. v. Brown, 321 F.Supp. 309, 311 (N.D. Ga. 1971). In the case, an insurance company, which had indemnified its insured, brought a claim against third parties for the damage done to the insured. The surety sued for actual and punitive damages. The court held that although the tort claim could be assigned, the claim for punitive damages could not be. The cited authority is distinguishable as it involved the assignment of a claim or cause of action, not the assignment of a recovery or judgment.

Because Wagner assigned his potential judgment or recovery and not his claim for relief, it is not significant that Wagner did not give up control of the litigation. Having assigned a portion of the recovery, not the claim, he remained the real party-in-interest.

Finally, the language of the mutual release does not persuade the court that the Agreement was not an assignment. Wagner points out that the release provides for payment to Wagners by the insurers and for payment to Co-op by Wagners. By the document, Co-op acknowledges payment from Wagners. Despite Wagner's argument, the court does not conclude that the language of the release prevents a construction of the Agreement as an assignment. The release was drafted by the attorney for the insurance companies. The purpose of the document was to resolve all claims among all parties. The particulars of the agreement between Wagner and Co-op would not have been of interest to the insurers so long as both Co-op's and Wagner's claims were resolved. Indeed, the drafter also had Sherry Wagner acknowledge payment to her of settlement funds, yet there is no evidence that she was in any way involved in the litigation. Moreover, the release has Co-op acknowledging payment from her despite the fact that her name was not on the account (Exhibits H and I), and co-op had not named her as a defendant in the state court action. The release drafted by the insurers' attorney was to resolve claims. The court does not, however, find it dispositive on the issue of whether Wagner assigned, by the Agreement, part of his recovery to Co-op.

For the foregoing reasons, the court concludes that attorney Duncan's disbursement of $362,500.00 to Farmers Cooperative Elevator on November 27, 1989 was not a preferential transfer of Arthur Wagner's property because Co-op, by virtue of its agreement with Wagner, had already obtained legal title to the funds on November 21, 1989, when the proceeds of the litigation settlement were deposited in Duncan's trust account. This legal title was an enlargement of the equitable title which Co-op obtained by virtue of the settlement agreement executed between Wagner and Co-op in April, 1988. Accordingly,

IT IS ORDERED that judgment shall enter that the complaint of Arthur R. Wagner against Farmers Cooperative Elevator Company is dismissed.

SO ORDERED ON THIS 2nd DAY OF JULY, 1992.

William L. Edmonds
Bankruptcy Judge

(fn.1) The jury foreperson's signature is dated April 11, 1988. The parties to this adversary proceeding have stipulated that the jury returned its verdict on April 6. The latter date is adopted for these findings, as the discrepancy is not material to the outcome of this case.

In the United States District Court

for the Northern District of Iowa

Central Division

ARTHUR R. WAGNER and SHERRY L. WAGNER
Debtors.

Bankruptcy No. X-90-00310M
Adversary No. X90-0061K

ARTHUR R. WAGNER
Plaintiff

vs.

FARMERS COOPERATIVE ELEVATOR COMPANY
Defendant.

ORDER NO. C 92-3078

On August 31, 1994, this court entered an order in this cause finding that Bankruptcy Judge Edmonds' previous finding of an assignment based upon the promise to pay $350,000.00 from an anticipated jury award was not clearly erroneous. That order on page 13 went on to state:

IT IS FURTHER ORDERED that the Defendants' appeal from the Bankruptcy court's ruling is denied.

This sentence contains an error. It should have read that the plaintiff/appellant's appeal was denied.

For good cause shown,

IT IS THEREFORE HEREBY ORDERED that this sentence: "IT IS FURTHER ORDERED that the Defendants' appeal from the Bankruptcy court's ruling is denied." is hereby stricken.

IT IS FURTHER HEREBY ORDERED that the following sentence shall be substituted in lieu thereof:

IT IS FURTHER HEREBY ORDERED that the plaintiff/appellant's appeal from the bankruptcy court's ruling is denied.

IT IS FURTHER HEREBY ORDERED that the Judgment entered in this cause on August 31, 1994 shall be expunged.

IT IS FURTHER HEREBY ORDERED that a new Judgment shall be entered forthwith in accordance with this order.

October 4, 1994.

Donald E. O'Brien, Senior Judge
UNITED STATES DISTRICT COURT

In the United States District Court

for the Northern District of Iowa

Central Division

ARTHUR R. WAGNER and SHERRY L. WAGNER
Debtors.

ARTHUR R. WAGNER
Plaintiff

vs.

FARMERS COOPERATIVE ELEVATOR COMPANY
Defendant.

ORDER C92-3078

The Court has before it Plaintiff/Debtor's appeal from the Bankruptcy Court's denial of his unlawful preferential payment claim. A hearing was held in this matter on May 6, 1994 in Fort Dodge, Iowa at which the Court heard both parties' oral arguments. After careful consideration of the facts involved, it is the ruling of this court that the Plaintiff's appeal is denied.

I. FACTS

Plaintiff Wagner is a Chapter 11 Debtor who is seeking to recover $362,500 **(fn.1)** which he paid to the Defendant, Farmers Cooperative Elevator Company (hereinafter, Defendant Co-Op). Plaintiff maintains that he unlawfully gave preferential treatment to the Defendant within 90 days of his filing for bankruptcy, in violation of 11 U.S.C. Section 547(b)(4)(A).

This case arises out of facts generated in a state court civil suit brought in October, 1985 by the now-Defendant Co-Op against the current Plaintiff. In that case, the Defendant Co-op claimed that Plaintiff owed $261,338.81 plus interest on an open account for the purchase of feed for Plaintiff's cattle. A portion of that feed was wet corn gluten, which had been manufactured and sold by Archer Daniels Midland Company (ADM) and ADM Feed Corporation (ADM Feeds). Plaintiff, counterclaimed against the Defendant Co-Op and brought a third party claim against ADM and ADM Feed Corporation, claiming that the wet corn gluten was defective. In that same litigation, the Defendant coop.. cross-claimed against ADM and ADM Feed Corporation.

In April, 1988, the case proceeded to a trial by jury. During the trial, Plaintiff apparently anticipated a favorable jury verdict against ADM and ADM Feeds. It accordingly entered into a Settlement Agreement (Defendant's Exh. A) with the Defendant Co-op whereby the Defendant Co-Op agreed to reduce the Plaintiff's open account debt to $350,000 and the Plaintiff agreed (in anticipation of having available cash from a favorable jury award) to pay that amount **(fn.2)**. By the time the case was received by the jury, the only remaining defendants were ADM and ADM Feeds on a product liability theory. The jury eventually found in Plaintiff's favor against those two companies and awarded damages in

excess of $1 million.

On April 15, 1988, the state court entered judgments in favor of current Plaintiff Wagner and the Defendant Co-Op against ADM and ADM Feeds. Three days later, Plaintiff signed an offer to confess judgment in favor of the Co-Op. That offer to confess, along with Defendants' acceptance of the offer, was filed on April 29, 1988. On April 30, 1988, the Defendant Co-Op reduced Plaintiff's account balance to zero.

ADM and ADM Feeds appealed the district court's judgment to the Iowa Supreme Court. During the pendency of that appeal, ADM and AUK Feeds settled with Plaintiff in a manner which was also satisfactory to the Defendant Co-Op. Three checks totalling $1,012,500 were issued by ADM's and ADM Feeds's insurers (or the insurers, successors). A check for $350,000 was paid to Plaintiff's attorney, Randy Duncan (Duncan) and the other two checks, one for $512,500 and the other for $150,000, were written to the Plaintiff and the Defendant jointly. All three checks were deposited into Attorney Duncan's trust account.

Plaintiff apparently construed the Settlement Agreement as mandating that he pay $350,000 to Defendant, whether or not he recovered from ADM and AUK Feeds. After Plaintiff had settled with ADM and ADM Feeds, Defendant asked its attorney to structure the disbursement of the $350,000 in such a way that it would not pass through Plaintiff's hands, lest other creditors might intercept the money. Included in the Settlement Agreement was a stipulation that all moneys would be deposited in Duncan's trust account. Defendant's attorney endorsed the checks which were joint but refused to sign a release until it received its money. On November 27, 1989, the exchange was made. Plaintiff filed for bankruptcy on February 23, 1990.

Both parties agree--as Bankruptcy Judge Edmonds found--that the tolling of the 90-day proscribed preferential treatment clock began on November 25, 1989. The Defendant maintains that the payments it received from the Plaintiff were neither preferential nor within the proscribed 90-day period. Bankruptcy Court Judge William Edmonds filed two rulings in this case. on September 13, 1991, Judge Edmonds issued his first ruling, which denied Plaintiff's claim on the basis that the payments had been made outside of the 90-day pre-bankruptcy period. Judge Edmonds based his decision not on the date of the actual exchange (November 23, 1989), but on the date when the Settlement Agreement was actually entered into.

Plaintiff resisted that rulings.**(fn.3)** In post-trial motions, Plaintiff argued that by focusing his determination on the timing element, alone, Judge Edmonds did not give the parties a chance to address the issue of whether the Settlement Agreement constituted a preferential transfer of money. In response to the Plaintiff's post-trial motions, Judge Edmonds re-opened the trial and accepted briefs on the issue of the Settlement Agreement. He then issued a second Order, again finding against the Plaintiff, this time on the basis that the Settlement Agreement constituted a lawful assignment for value and that the payment from the Plaintiff to the Defendants was therefore not unlawful.

II. DISCUSSION

Bankruptcy Rule 8013 speaks to the disposition of appeals and the weight to be given a Bankruptcy Judge's factual findings.

Rule 8013 provides:

> On an appeal, the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard should be given to the opportunity of the bankruptcy court to judge the credibility of witnesses.

A district court must affirm the fact findings of the bankruptcy court unless the bankruptcy court's findings are "clearly erroneous." Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50, 55-56, n. 5 (1981). A finding is "clearly erroneous" if, on the entire record, the district court is left with a definite and firm conviction that a mistake has been made. In re Perimeter Park Inv, Assoc., 616 F.2d 150, 151 (5th Cir. 1980) (a bankruptcy case relying on United

States v.

United States Gypsum Co., 333 U.S. 364 (1948)). Of course, conclusions of law are subject to de novo review. In re Comer, 723 F.2d 737, 739 (9th Cir. 1984).

1. Whether the Agreement was an Assignment

The question in this appeal is whether the Settlement Agreement between Plaintiff and Defendant was an equitable assignment of some portion of Plaintiff's right to any judgment or recovery obtained from ADM and ADM Feeds (and therefore not a violation of the unlawful preference rule). Plaintiff argued to Judge Edmonds that one cannot assign either tort claims or claims for punitive damages. Judge Edmonds ruled that individuals can always assign rights to an existing judgment Broyles v. Iowa Dep't of Soc. Serv., 305 N.W.2d 718, 721 (Iowa 1981) or to any judgment which may be recovered in a pending action. Id.

Judge Edmonds noted that in Iowa, the inclusion of the term "assignment" in an agreement is not necessary to demonstrate that an assignment was intended. To the contrary, "(A)ny words or transaction which show an intention on one side to assign and an intention on the other to receive, if there is valuable consideration, will operate as an effective equitable assignment." Fischer v Klink, 14 N.W.2d 695, 698 (Iowa 1944). However, an agreement to pay out of a non-existent future fund is not sufficient to constitute an equitable assignment. In re Donaldson's Estate, 101 N.W. 870, 871 (Iowa 1904); State Central Sav., Bank v. Hemmy, 77 F.2d 458, 460 (8th Cir. 1935).

Judge Edmonds concluded that an assignment was intended between Plaintiff and Defendant for any recovery Plaintiff might receive from ADM and ADM Feeds. His conclusion was based on the language of the Agreement, which stated that the Defendant "will share" in the recovery. In Judge Edmonds' view, the definitive allocation of payments set out in the Settlement Agreement, along with the requirement that the Defendant Co-Op be paid "directly" from the Plaintiff's award clearly set forth an assignment because it showed Plaintiff's intention to give up control of the award to the Defendant. As to whether or not there was valuable consideration, Judge Edmonds found that there was after looking at the history behind the Settlement Agreement.

At the initial trial between the Defendant Co-Op and the Plaintiff, the Defendant Co-Op was going to present evidence which would have hurt Plaintiff's case against ADM and ADM Feeds. In Judge Edmonds's estimation, by agreeing to settle the matter before introducing that evidence, the Defendant Co-Op provided valuable consideration to Plaintiff. Judge Edmonds also noted that the terms of the Settlement Agreement allowed Plaintiff to reduce the amount of his debt to Defendant from nearly $450,000 to $350,000 which also demonstrated valuable consideration.

Plaintiff appeals the Bankruptcy Court's decision on a variety of theories. First, Plaintiff claims that the Settlement Agreement was not an assignment because his attorney received the money and therefore Plaintiff at all times retained -- through his attorney -- control of those funds. Judge Edmonds, however, noted that the Settlement Agreement provided that the money deposited into Attorney Duncan's Account would not go to the Plaintiff until the Defendant Co-Op had collected its share. Therefore, in Judge Edmonds view, the Plaintiff did not have control of the funds.

Judge Edmonds noted that in the release document between the Plaintiff and ADM and ADM Feeds, a financial settlement was to be paid both to the Plaintiff and his wife. He noted that this document was prepared by insurance companies for ADM and ADM Feeds and he determined that the allocations of money were not dispositive as to the issue of whether an assignment was created by the Settlement Agreement between the Plaintiff and the Defendant Co-Op in light of the fact that the insurance companies, motivation was merely to release their clients from liability. Judge Edmonds concluded that the insurance companies were not certain about who the payments were to go to, nor how the payments were to be dispersed. For example, he noted that Sherry Wagner was not even a party to the original countersuit, but that the insurance company attorneys who drafted the ADM and ADM Feeds release document did not know this. Therefore, Judge Edmonds determined that the release document drafted by ADM and ADM Feeds's attorneys was not dispositive on the issue of whether the Settlement Agreement between the Plaintiff and Defendant Coop. was an assignment.

In this Court, the Plaintiff began his analysis of the situation by maintaining that when determining whether an assignment of rights has occurred, a Court must look to the intention of the parties. Broyles, 305 N.W.2d at 721, citing

6A C.J.S. Assignments, Section 43. "(T)hat intention is derived not only from the instruments executed by them, if any, but from the surrounding circumstances." Id. Plaintiff claims that neither party intended an assignment when the Settlement Agreement was entered into. At the hearing in this Court, the Plaintiff noted, for example, that the Settlement Agreement does not contain the word "assignment."

The Defendant Co-Op, in resistance to the Plaintiff's appeal, argues that the parties clearly intended an assignment, and that the facts in this case clearly demonstrate that intention. Defendant pointed to the language of the Settlement Agreement which provided that if and when an award of money was tendered by ADM and ADM Feeds, the Plaintiff would not have access to any of the money until the Defendant had collected what was due it, and further that the Defendant Co-op was to receive his share from the first $500,000 of that award.

The Court notes -- as did Judge Edmonds in his decision -that the absence of the term "assignment" in the Settlement Agreement really has no bearing on whether an assignment was intended. See, Fischer, supra. See, also, Petty v. Mut. Benefit Life Ins. Co., 15 N.W.2d 613, 618 (Iowa 1944), reh'g denied, (Iowa 1944). Instead, the facts and circumstances surrounding the agreement are the relevant consideration factors. Id.

It is difficult -- if not impossible -- to envision the advantage of a Settlement Agreement to the Plaintiff if the Defendant Co-Op had not agreed to withhold damaging evidence from introduction at trial and to cut the size of its bill. It is quite conceivable that both the Plaintiff and the Defendant Co-op recognized that the Plaintiff might win a large financial award from ADM and ADM Feeds without the damaging evidence from the Coop coming in. Since the Defendant did so-withhold (by a settlement) the damaging evidence and since the Plaintiffs agreed to have the Co-op share in the award which was likely to be won from ADM and ADM Feeds without that damaging evidence, the Court is persuaded that there was an intention on the part of the Plaintiff to assign a portion of the proceeds from that litigation to the Defendant Co-Op. This is evidenced by the structure of the Settlement Agreement. Plaintiff's attorney was to receive the money and place it in a trust account. The Plaintiff was to have no access to that money until the Defendant received the $350,000 plus interest. Only then could the Plaintiff touch the award money. Further, even if an award had not been received, the Plaintiff had agreed to pay the Defendants $350,000 plus interest. Therefore, the Court is persuaded that the Bankruptcy Court's finding of an assignment was not clearly erroneous.

Plaintiff further argues that an important consideration in deciding whether an assignment exists is evaluating whether the assignor retained control over the thing assigned. If so, then there is no assignment. Jackson Nat'l Bank v. Christensen, 178 N.W. 494 (Minn. 1920). Plaintiff maintains that he controlled the course of the litigation regarding ADM and ADM Feeds after the Settlement Agreement was completed and that his attorney controlled the money, so there was no assignment. Judge Edmonds did not speak to the issue of who controlled the litigation, and appropriately so. After all, the thing assigned was not the litigation, itself, but the anticipated award from the litigation. Regarding the control of that award, Judge Edmonds ruled that although it was kept in Plaintiff's attorney's trust account, it was also made payable jointly to the Plaintiff and the Defendant Co-Op per the Settlement Agreement and was to be dispersed, initially, to the Defendant Co-Op. Accordingly, Judge Edmonds found no control by the Plaintiff and, hence an assignment.

b. Whether the Settlement Agreement was an assignment or a promise to pay money in the future out of anticipated revenues?

In this Court's view, the most pressing issue in this litigation is whether Plaintiff promised to pay money out of a non-existent future fund (which would nullify an assignment, see In re Donaldson's Estate and State Central Sav. Bank v. Hemmy, supra) or whether Plaintiff promised to pay the Defendant Co-Op out of a future judgment in a pending action (which, under Broyles, supra, would be evidence of an assignment). Plaintiff notes, as did Judge Edmonds in his Order, that a promise to pay money in the future out of proceeds anticipated to be received does not constitute an assignment. Restatement (Second) of Contracts, Section 330. Paragraph 3 of Exhibit 1 reads: ". . . the Farmers Cooperative Elevator Company will share in such counterclaim. . . " (emphasis added by plaintiff). Plaintiff asserts that this sentence clearly demonstrates an intention to an indefinite, therefore non-existent future fund. Judge Edmonds disagreed, maintaining that given the circumstances surrounding this case -- the fact that without the Defendant Co-Op's damaging evidence, a favorable judgment was highly likely -- this language demonstrated that the promise was for a future judgment in a pending action and therefore COULD be assigned under Broyles, 305 N.W.2d, at 721 (citing, Weire v. City of

Davenport, 11 Iowa 49, 52-53 (1860).

The Court is persuaded that this issue -- the characterization of the anticipated jury award -- is dispositive in this case. The question for consideration is whether a jury award which is anticipated, but not certain to occur, is a future judgment or a non-existent one. The Court devoted a considerable amount of time to this question at the hearing. The Court asked the Defendant Co-op to elaborate on this issue. The Defendant's counsel responded as follows:

> It certainly shows he had, he seized an opportunity to limit his damages to the Co-Op that he would ultimately owe, and I believe it shows that the Co-op recognized this lawsuit against ADM to be its best chance at ever collecting from Art Wagner.

The Plaintiff acknowledged that he expected or hoped he would receive an award from ADM. At the hearing, his counsel characterized the Plaintiff's intentions as follows:

> He, I think that you're getting into that hairline distinction that if he transferred or promised to pay something that he expected or hoped he would get in the future, and again, he was hoping he would hit the jackpot, which he did. And, he was saying to the Co-Op, "If I do hit the jackpot, you know, I promise to pay you," which is not a transfer of anything, but a promise to pay.

As stated previously in this Order, the Court is bound by the Bankruptcy Court's determination unless it can be shown that the Bankruptcy Court's decision was clearly erroneous. It is clear to the Court that Plaintiff entered into the Settlement Agreement and promised to pay $350,000 to the Defendant Co-Op. It is also clear to the Court that the Plaintiff would probably have not been able to pay that amount if he did not win a favorable jury verdict. Hence, the promise to pay the Defendant Co-Op was premised upon an anticipated jury award he hoped would meet, if not exceed the $350,000 settlement amount. The Bankruptcy Court concluded that these facts amounted to an assignment. Based on the evidence in the record and the comments of counsel at the hearing in this matter, this Court cannot rule, as a matter of law, that the Bankruptcy Court was mistaken. Therefore, the Court is persuaded that Judge Edmonds's finding of an assignment based upon the promise to pay $350,000 from an anticipated jury award was not clearly erroneous.

IT IS THEREFORE ORDERED that the Bankruptcy Court's finding of an assignment on the Plaintiff's part was not clearly erroneous.

IT IS FURTHER ORDERED that the defendants' appeal from the Bankruptcy court's ruling is denied.

August 31, 1994.

Donald E. O'Brien, Senior Judge
United States District Court

(fn.1) The amount was for $350,000 plus interest. Therefore, throughout this order the amount will be referred to as $350,000, though the actual amount paid was $12,500 more than that.

(fn.2) By agreement of the parties, that Settlement Agreement was never filed with the state district court.

(fn.3) Although the Plaintiff resisted that ruling in post-trial motions to the Bankruptcy Court, he did not raise the issue of the 90-day limitation period in his Appeal to this Court. Instead, in a pleading entitled "Statement of the Issues Presented for Review and Designation of the Record," (attached as part of Clerk's Memorandum of Papers #1), he made the following statement:

> COKES NOW, Plaintiff, Arthur R. Wagner, by and through his Attorney, G.A. Cady III, and pursuant to Bankruptcy Rule 8006 hereby states the following issue to be presented for review: THAT THE BANKRUPTCY COURT ERRED IN CONCLUDING THAT DEFENDANT'S EXHIBIT "A" CONSTITUTED AN EQUITABLE ASSIGNMENT. The issue of whether the bankruptcy court correctly ruled that the transfer of funds occurred within 90 days of Plaintiff's bankruptcy filing is not before the

Court and therefore the Court will not rule on that issue.

In the United States District Court

for the Northern District of Iowa

Central Division

ARTHUR R. WAGNER and SHERRY L. WAGNER
Debtors.

ARTHUR R. WAGNER
Plaintiff

vs.

FARMERS COOPERATIVE ELEVATOR COMPANY
Defendant.

File No. C92-3078

NOTICE OF APPEAL

Notice is hereby given that Arthur R. Wagner, Plaintiff, in the above-named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Final Judgment and Order entered in this action on the 31st day of August, 1994.

By: G. A. Cady III

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