In the United States Bankruptcy Court

for the Northern District of Iowa

CHARLES A. JACKSON and CLAUDIA L. JACKSON Debtors.	Bankruptcy No. 93-40140XM Chapter 12
HYLTON DENNIS JACKSON and DONNLEE JANNETTE JACKSON Debtors.	Bankruptcy No. 93-40139XM Chapter 12

ORDERS RE: PLAN CONFIRMATION

The matters before the court are the plans proposed by the debtors for confirmation under chapter 12. Final hearing on confirmation was held October 28, 1993, in Sioux City.

Each pair of debtors proposed a separate plan. Although the cases have not been consolidated, confirmation issues were tried together. Farm Credit Bank of Omaha (FCBO) and Carol Dunbar, the case trustee, objected to each plan. Competitive Capital Resources, Inc. (CCR), a creditor only of Hylton and Donnlee Jackson, objected to their plan. The trustee did not take part in the confirmation hearing. The other parties agree that for either plan to be confirmed, both need to be confirmed, and if one plan fails after confirmation, both would fail.

The creditors have filed several objections to the respective plans. Their contentions can be summarized as follows: (1) the plans are not feasible; (2) the plans do not provide adequately for the retention and protection of the objecting creditors' liens; and (3) the plans were not proposed in good faith.

I.

Charles and Hylton Jackson are brothers. Both are in their late thirties. Charles is a high school graduate who has been farming since 1972. He is married to Claudia. They have two daughters. Claudia is enrolled at Des Moines Area Community College studying respiratory therapy. She expects to graduate in late 1994. Hylton has an associate degree from Ellsworth Community College in Iowa Falls. He has been farming since 1976. In addition to farming, he is a substitute rural mail carrier and is in charge of the Hardin County roadside vegetation management program. The two jobs together provide substantial off-farm income. He has been married to Donnlee since 1984. They have one child. Donnlee is a receptionist in a dentist's office.

Hylton and Charles farmed with their father Dallas and another brother, Wallen Jackson, until 1986, when they divided their farming operation. This change in operations took place at about the time their lender, a state bank, was closed by the FDIC. Despite the division of the farming operation, the individuals continued to help each other and to share their equipment with each other.

Hylton and Charles provided most of the work on their father's farm after 1982. They did so to aid their father who was in ill health. The crop remained their father's property. Charles has his own 73-acre farm. Hylton is buying some farmground on contract for deed. In 1993, he rented two other farms. In addition to their separate crop farming, the brothers share a joint cattle operation, breeding cows and selling calves.

In 1980, the brothers and their parents borrowed money from FCBO. The loan was secured by a mortgage on 320 acres located in sections 15 and 22 in Hardin County. Of the 320 acres, 120 were owned by Dallas Jackson, and 200 were owned by Dallas and Ila Mae Jackson, as tenants in common. The loan was restructured in 1988. Claudia and Donnlee

signed the restructure agreement. Dallas and Ila Mae gave FCBO an additional mortgage which covered an area somewhat less than 120 acres located in the northeast quarter of section 21.[1] Of the 120 additional acres, Dallas owned approximately 90, and Ila Mae Owned approximately 30. (Dallas owned an additional 10 acres, and Ila Mae owned an additional 30 which appear not to be covered by the mortgage.)

The brothers did not experience financial troubles until 1988. The closing of the bank that financed their operations made it more difficult for them to obtain operating credit. Also, 1988, 1989 and 1991 were disaster years in Hardin County, and debtors' crop yields were detrimentally affected. The 1991 crop year was the first that they were unable to fully pay their farm suppliers. In March of 1992, they were unable, for the first time, to make the annual payment on the restructured loan from FCBO.

Dallas died in 1989 at the age of 82. His last will was admitted to probate in September of that year. Hylton and Charles were appointed as co-executors of their father's estate. Dallas devised one-third of all his real property to his wife. He devised the other two-thirds interest to his three sons--Charles, Hylton and Wallen--subject to life use by Ila Mae.

In August, 1992, FCBO filed suit to foreclose its real estate mortgage. The debtors were named as individual defendants. Charles and Hylton were named also in their capacities as executors. Wallen Jackson and Ila Mae were also named as defendants. The action was listed on the Hardin County lis pendens docket. On January 18, 1993 and January 28, 1993, while FCBO's action was pending, Hylton and Charles received quit claim deeds on the mortgaged property from their mother, their brother and their brother's spouse. The deeds were not recorded.

Dallas' probate estate has not yet been closed. There has been no payment of administrative expenses or distribution to claimants. Since Dallas' death, Hylton and Charles have used their father's interests in cattle and machinery in anticipation of an estate distribution and a transfer from their mother.

The brothers applied to the Farmers Home Administration (FmHA) for a loan in 1992. They were determined to be ineligible. They were successful in obtaining a reversal of the decision on appeal. Although as it presently stands, they are eligible for a 1991 disaster loan, there has been no determination that a loan will be granted. FmHA is presently considering the debtors' loan application. The outcome of this confirmation dispute will apparently have a bearing on the FmHA decision, but debtors cannot say that even if their plans are confirmed they will obtain FmHA loan approval. They expect a decision between January and late March, 1994. They intend to use the loan proceeds to put in the 1994 crop. They do not expect a loan greater than $24,000.00. If the loan were large enough, they say they would use some of the proceeds to pay down Hylton's debt to CCR. If the loan is not approved, Hylton expects that it would be difficult, but not impossible, to plant a 1994 crop. There is no likelihood that a backup lender will be found.

II.

To obtain confirmation of the plan, the debtors must show that they will be able to make all payments under the plan. 11 U.S.C. 1225(a)(6). The burden is on the debtors to show that their plans are feasible. They need not show that success is guaranteed. They must show it is reasonably probable that they will be able to perform their plans. "The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." Clarkson v. Cooke Sales & Service Co. (In re Clarkson), 767 F.2d 417, 420 (8th Cir. 1985).

The main dispute as to feasibility centers on the debtors' soybean yields for 1993 and the future. Debtors have planted 599 acres of beans. They estimate 1993 yields ranging from 20 to 24 bushels per acre. Their estimate is based on the harvesting results for approximately 15-20 acres in one of the wettest sections of their farms. They also base their estimate on discussions with neighbors as to the neighbors' yields for similar plantings.

FCBO submitted the deposition testimony of a crop and soil expert, Kay Connelly, to support its contention that the debtors' yields will be much lower. Mr. Connelly, who is well educated and highly experienced, testified by deposition that on 280 bean acres, the debtors will obtain only from 15-18 bushels per acre and that on the remaining 320 bean acres, they will get only 10 bushels per acre. Part of the justification for Connelly's estimate is the high incidence of weeds in the bean fields. Photographs of a very small part of the fields show substantial weed conditions on some of the land. Extensive "weed pressure" has a detrimental effect on yields. Jacksons say they have considered this in their

estimates.

If Connelly is correct, at the high end of his estimates, debtors will harvest 8,240 bushels of beans. If debtors project correctly, they will harvest 12,500 bushels. Using an estimate of $6.02 per bushel, the difference in the two bean income projections for 1993 is significant--a difference of $25,645.00.

The truth, no doubt, lies somewhere in between. Both sides appear to concede that it is difficult to estimate bean yields while the plants are still in the ground. Debtors have the benefit of knowing well their farmground and of having completed the harvest of beans on a portion of the poorer fields. Connelly is well educated and very experienced. He, doubtless, is able to estimate on a more scientific basis.

In this case, the court does not feel compelled to choose one estimate over the other. Recognizing that the actual yield could reasonably be somewhere in between, selection of an estimate yield in the middle of the two estimates seems appropriate. It takes account of Connelly's education and training and of the debtors' experience thus far in the harvest and of their knowledge of the land. The court, therefore, finds that the dollar value of the 1993 bean crop should be estimated for confirmation purposes at $62,428.00 (debtors' total bean income estimate of $75,250.00 less $12,822.00). Even this reduced yield will leave debtors with enough funds to make all payments required by the plan through the end of 1993. The balance of income which may be carried forward to 1994 for both debtors will total $42,769.60.

The next estimate in dispute is debtors' projection for bean yields in 1994 and succeeding plan years. Hylton projects 40 bushels per acre for 117 acres. Charles projects 45 bushels per acre for 216.4 acres. These estimates are not rooted in historic fact. Hylton has never averaged 40 bushels of beans per acre. He came "fairly close" only once, in 1990. Charles testified that he also came close to his estimate--in 1990. Although he has never averaged 45 bushels per acre, he has had some fields do better.

In determining whether the plans are feasible, the court will for years after 1993 reduce the yield projections for beans by 15 per cent--Charles' yields will be projected at 38 bushels; Hylton's at 34. However, the court will also estimate soybean prices at $6.02 per bushel, the current price. The court will also consider that despite lower yields, the input costs will be the same.

Despite these adjustments in yields, the debtors will be able to make their plan payments in 1994 and 1995. However, the cash carryover from 1994 to 1995 will be reduced from the debtors' total estimates (for Hylton and Charles)--from $11,399.00 to $976.00. For 1995 to 1996, the carryover will be reduced from the debtors' estimates of $17,197.00 to $926.00. These changes put added pressure on the debtors' ability to put in a crop.

There are other aspects of the plan which call into question the feasibility of the plans. Charles projects that Claudia will begin earning money in 1995 from off-farm work as a respiratory therapist. He projects $18,000.00 in take-home pay. The plans are not feasible without this income. This estimate is based wholly on hearsay information from Charles' discussion with the placement office at Claudia's school. Debtors have not chosen the strongest evidence on this point. Yet it is the only evidence, and the court finds it is not unreasonable to consider this income as likely and reasonable in amount. Nonetheless, it is a tenuous element of plan income.

Debtors also depend on the FmHA input loan that has not yet been granted. The evidence is not strong that it will be. This adds one more bit of uncertainty, despite Charles' testimony that it would not be impossible to put in a crop without the loan.

Last, debtors' plans propose a balloon payment to FCBO in December, 1998. At that time, based on the expected amortization of the loan at confirmation, debtors will owe FCBO $644,000.00. Based on the stipulation of the parties, the value of the real estate at confirmation was $589,110.00. Debtors would have to depend on granting a lender security interests in other property to obtain a loan to make the payoff. Debtors have not investigated the likelihood that such a loan would be made. Although they say they would give other mortgage security to make the loan viable, they would not be obligated to do so. They have not addressed the problem of having to sell the cattle herd to make the payment. They believe that the State of Iowa will purchase, by condemnation, part of their farm for the purpose of reconstructing parts of highway 20. Even if such a purchase would enable debtors to pay down the loan, there is no certainty on when this would be done. The evidence presented by the debtors on this point was not persuasive.

With regard to feasibility of chapter 12 plans, courts often give family farmers the benefit of the doubt. The court would do so in this case. Were feasibility the only issue, the court would confirm these plans, although they are only marginally feasible, bearing as they do many uncertainties and risks of failure.

However, feasibility is not the only problem for these proposals. Their treatments of FCBO and CCR do not meet the requirement of 11 U.S.C. 1225(a)(5) which requires the retention of liens by secured creditors and the adequate protection of those liens.

At confirmation, FCBO was owed approximately $625,776.00. Its security is land valued at $589,110.00 with prior tax encumbrances of $10,555.00. The value of FCBO's interest in the land is, therefore, $578,555.00. FCBO also has a first lien in the livestock herd owned by the two debtors. It has an estimated value of $65,600.00. At this point, the court will not consider FCBO's second lien in the 1993 crop. Its two first liens make it fully secured with collateral having a total value of $644,155.00. If debtors make annual payments to FCBO as required by the plan, the balloon payment due in December 1998 will be $640,994.00, including one year's interest. If debtors are unable to find financing for the balloon payment, FCBO will be, at the time of default, considering costs, in an undersecured position. It may be that the value of the real estate will increase. However, livestock prices may also decline. There is no evidence on these probabilities, and there is nothing in the plans to protect FCBO from the latter risk. Even if values stay constant, the collateral position of FCBO will continue to deteriorate. Under the plan, if the debtors cannot refinance the mortgage, FCBO could be in the position of having to foreclose its mortgage after it has seen its equity cushion vanish. As the plans are only marginally feasible, the creditor is entitled to more protection of its equity cushion than is provided in this plan by debtors. See Matter of Underwood, 87 B.R. 594, 597-98 (Bankr. D. Neb. 1988).

As to CCR, it is in a more precarious position than FCBO; the latter at least has land as security. By the end of 1993, Hylton owed CCR $19,912.00. It is secured by a first lien on the 1993 crop which, by debtor's estimates, has a gross value of nearly $47,000.00. This lien was granted as adequate protection for Hylton's use of cash collateral. For 1993 expenses, Hylton used approximately $15,000.00 of 1992 crop proceeds secured to CCR. Hylton expected more than $14,000.00 in government farm program payments in the last quarter of 1993. CCR has a security interest in these payments by virtue of the court's adequate protection order. CCR also has a second lien on livestock, but the court considers this lien essentially valueless as foreclosure by FCBO would leave virtually no livestock proceeds available for CCR. The court also considers CCR's first lien in Hylton's machinery to be valueless for adequate protection purposes, as its lien in $7,300.00 in machinery could be avoided in a chapter 7.

CCR's best security is the 1993 crop and the government payments which are sufficient to pay its claim. If Hylton's plan is confirmed, he would pay CCR interest to December 31, 1993, in the approximate amount of $263.00 and principal in the amount of $2,203.00. This would reduce the balance due to $17,477.00 as of December 31, 1993. CCR's next payment would be due December 31, 1994. CCR would retain its lien in livestock and machinery, and would be given a replacement lien in the 1994 crop to replace its lien in 1993 crops and government program payments; but its other presently existing collateral would be used by Jacksons to pay other creditors under the plan. While it awaited its next payment, it would be virtually unsecured. Essentially, CCR would, each year, see its collateral used to pay other creditors, while it risked non-payment if for any reason the plan failed before the crop came into existence or matured to a value sufficient to pay the CCR claim in full. This treatment is unacceptable under the Code. Abbott Bank-Thedford v. Hanna (In re Hanna), 912 F.2d 945, 949-952 (8th Cir. 1990). Implicit in 1225(a) is the requirement that a debtor adequately protect a secured creditor over the term of the plan. Id. at 951. The court must consider whether any changes in the lien retained by the creditor put it at greater risk for nonpayment in the event the debtor defaults on plan payments. Id. at 951-52. Hylton's plan deprives CCR of collateral which in value exceeds its claim in exchange for a payment of $2,466.00 and a lien in property not yet in existence--the 1994 crop. Such treatment fails to provide for the retention and adequate protection of CCR's lien.

Last, Hylton's plan fails to protect CCR's interest in a government program payment which Hylton assigned also to his attorney prior to the filing of bankruptcy. CCR had a pre-bankruptcy security interest in Hylton's "deficiency payments." Its financing statement describes "general intangibles." Although it filed no transfer documents or forms with the United States or its agencies, it did file its financing statement with the Iowa Secretary of State. As part of his agreement to represent Hylton in the bankruptcy case, attorney Michael Cross claims a security interest in an $8,000.00 deficiency

payment made by the United States to Hylton. To perfect, Cross apparently filed assignment documents mandated by the United States Department of Agriculture or a related entity. Cross claims he is perfected in the payment and that CCR, because of its failure to file U. S. forms, is not. The payment, although contracted for pre-petition, was paid to Cross on Jackson's behalf after the case was filed.

Hylton apparently intends that all or part of Cross' remaining fees in the case be paid by this deficiency payment. Cross claims that he has an interest in the payment prior to any claim by CCR. Even putting aside Cross' precarious position in attempting to be a secured creditor of the debtor and the debtor's attorney, neither Cross nor Hylton can ignore the claim of CCR as to this asset of the estate. Hylton's or CCR's failure to sign or obtain government assignment forms does not invalidate CCR's state law security interest. Nor does it place Cross in a better position than CCR. The purpose of such assignment documents has been held to be the protection of the government, not the preemption of state law as to secured transactions. See In re Sunberg, 729 F.2d 561, 563 (8th Cir. 1984). The plan is defective because it fails to recognize CCR's interest in the payment or to protect that interest.

Because the plans are only marginally feasible, and because their treatment places FCBO and CCR in increasingly risky positions as to their secured claims, the court concludes that the plans do not meet the requirements of 11 U.S.C. 1225(a)(5)(B). They cannot be confirmed. The court need not determine whether as alleged the plans are not proposed in good faith because of the debtors' use of probate property.

The debtors have each proposed three plans in cases pending since February, 1993. No further time to obtain confirmation will be granted. The cases will be dismissed.

ORDER

IT IS ORDERED that confirmation of the reorganization plan proposed by Hylton and Donnlee Jackson is DENIED, and their chapter 12 case is DISMISSED.

IT IS ORDERED that confirmation of the reorganization plan proposed by Charles and Claudia Jackson is DENIED, and their chapter 12 case is DISMISSED.

Judgment in each case shall enter accordingly.

SO ORDERED ON THIS 12th DAY OF JANUARY, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and judgments by U. S. mail to: Michael J. Cross, Carol Dunbar, Richard Hansen, U. S. Attorney, 2002 List and U. S. Trustee.

1. [1] Section 21, Township 88 North, Range 20 West of the 5th P.M., Hardin County, Iowa.