In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

CARL L. JANSMA and JUDY L. JANSMA
Debtors.

Bankruptcy No. 93-51290XS
Chapter 11

DECISION

Debtors, Carl and Judy Jansma, ask that their Second Amended Plan of Reorganization be confirmed. The plan was filed February 2, 1994, and was modified October 7. Objections to the plan have been filed by Sioux County State Bank, the Agricultural Stabilization and Conservation Service, and the United States of America on behalf of the Internal Revenue Service.

Trial on confirmation was held on October 26, 1994. The court now issues its decision, including findings and conclusions, and does so orally as permitted by Fed.R.Civ.P. 52.

Section 1129 of the Bankruptcy Code contains the requirements for plan confirmation. Among them are that, "If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including acceptance of the plan by an insider." 11 U.S.C. § 1129(a)(10). This section requires affirmative acceptance.

In debtors' plan, they say that four classes of claims or interests are impaired--classes C, D, E and F. The latter class contains the interests of the debtors themselves. As insiders, their acceptance may not be counted in determining whether one impaired class has accepted. According to debtors' ballot report, classes C and E have rejected the plan.

Debtors contend that class D is their accepting class. The objecting creditors dispute this contention.

Class D is an administrative convenience class of unsecured creditors. It contains unsecured claims which are less than $500.00 in amount and those claims of greater than $500.00 which elect to reduce their claims to $500.00. Unsecured creditors with claims greater than $500.00 who do not elect class D treatment are covered in class E.

Under the plan, class D creditors will be paid 20 per cent of their allowed unsecured claims on the effective date of the plan, plus three months. The effective date is the date an order of confirmation becomes final and no longer appealable, plus 90 days. Also, Classes D and E unsecured creditors are to share pro rata in the profit of the reorganized debtor Judy Jansma. Such profit is to be determined after deduction of all necessary yearly farming and yearly living expenses, plan payments, and amounts necessary for the next year's crop inputs. See plan, page 7. Such profits would be divided for 10 years or until full payment of the claims, whichever comes first.

In the ballot report, debtors show that of those creditors in class D, seven creditors holding claims totalling $2,820.00 have accepted the plan, and none has rejected it.

The court must first determine whether all those voting were entitled to vote. The debtors have scheduled every creditor in the case as holding an unliquidated claim. This is true for secured creditors, unsecured creditors holding priority claims, and unsecured creditors. Notwithstanding such listing, the debtors have listed an amount for each such claim. It may be that the debtors were unsure of the amounts and wanted to force creditors to file claims, but this is not necessarily the reason as a conservative listing of amounts would also do much to solve a problem of uncertainty.

By listing each claim as unliquidated, the debtors have, by law, required each creditor to file a proof of claim in order to vote in the confirmation process or to participate in plan distribution.

Holders of allowed claims may accept or reject a plan. 11 U.S.C. § 1126(a). A filed proof of claim is deemed allowed. 11 U.S.C. § 502(a). Fed.R.Bankr.P. 3003(c)(2) provides that any creditor whose claim is listed as unliquidated, disputed or contingent must file a proof of claim. Such a creditor who fails to do so "shall not be treated as a creditor with respect to such claim for the purposes of voting and distribution."

Because all of Jansmas' creditors are scheduled as holding unliquidated claims, only those filing proofs of claim which are allowed may vote to accept or reject the plan. The debtors, on the date of trial, also filed a claims report. It stated that eight creditors filed proofs of claims. As a result of the report, and a prior court order, seven of those claims have been allowed as unsecured. They are J. C. Penney; First National Bank of Omaha; Avenue Vets Clinic; Iowa State ASCS Office; First Commercial Financial Group; Discover Card Services; and Sioux County State Bank.

None of those voting in class D filed a proof of claim. Under the law, their votes may not be counted. Therefore, no affirmative votes were cast in class D by those entitled to vote.

As to class E, only four creditors who filed allowed proofs of claims voted: Avenue Vets Clinic, in the amount of $4,648.24; First Commercial Financial Group, in the amount of $138,155.28; the ASCS, in the amount of $26,304.79; and Sioux County State Bank, in the allowed unsecured amount of $260,404.92. In considering only those permitted votes, debtors did not gain the acceptance of Class E, as three of the four creditors rejected the plan. Acceptance of Class E was not obtained by number or amount, as debtors did not gain the class by the acceptance of more than half in number of claims and at least two-thirds in dollar amount of the voting claims. 11 U.S.C. § 1126(d).

Because the debtors have not obtained the acceptance of an impaired class, as required by § 1129(a)(10), the plan cannot be confirmed.

Even if the foregoing voting issue did not exist, the court would not confirm the plan.

Debtors have offered class D as an administrative convenience class. This classification is suspect, and the court believes that the class was designated, not for convenience, but to gain the acceptance of an impaired class. The class D unsecured creditors, those holding claims of $500.00 or less, were separately classified, according to debtors' counsel, because they were small, and immediate payment of 20 per cent of those claims enabled the debtors to pay them off and not have to deal with the inconvenience of payment and record keeping for a number of claims in small amounts.

Yet, this reason is not borne out by the plan itself. The plan listed the estimated number of Class D claims at 11, while listing the number of Class E claims at 14. Although it might be understandable that debtors would want to reduce the number of payments by almost half, the plan requires annual payments of pro rata profit to both classes for up to 10 years. If the reason for establishing the class is to reduce the number of annual payments and the cost of record keeping, the plan itself prevents the desired result.

Therefore, the court declines to approve Class D as an administrative convenience class. Sioux County State Bank has objected on that ground. The failure of the Bank to file a pre-confirmation motion under Fed.R.Bankr.P. 3013 is not fatal to the Bank's objection. Either Bank or debtors could have brought the matter to the court's attention by motion, but failure to do so does not preclude objection to the plan on classification grounds or acceptance grounds.

Although this plan may not be confirmed because of lack of acceptance, it has nother defects which would prevent confirmation.

The plan violates the absolute priority rule found in § 1129(b)(2). This Code section provides the guidelines for when a plan may be confirmed over the objection of an impaired class of creditors. To be confirmed under the "cram down" section of the Code, as to a rejecting unsecured class, the plan must be "fair and equitable," that is, the plan must provide that each holder of a claim in such class must receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the amount of the claim. This means they must be paid in full the allowed claim plus

interest to the date of post-confirmation payment. The plan does not propose this.

Alternatively, to be fair and equitable, the holder of a claim or interest junior to the claims of the rejecting class must not receive or retain anything under the plan on account of their claim or interest. 11 U.S.C. § § 1129(b)(2)(B)(i) and (ii).

Because debtors' plan does not propose payment in full with interest, neither debtor may retain anything under the plan on account of their ownership interests.

The plan provides that Judy Jansma will retain control and ownership fo the operation as Carl Jansma will transfer all of his ownership rights to her as a result of confirmation.

Debtors contend that because the debtors are insolvent, this transfer and retention has no value. Creditors disagree, contending that there are unencumbered assets having value and that they are being retained. The court does not need to reach the value of those assets.

The United States Supreme Court has rejected the "no value" theory. The court stated in Norwest Bank Worthington v. Ahlers, 108 S.Ct. 963 (1988):

> We join with the overwhelming consensus of authority which has rejected this "no value" theory. Even where debts far exceed the current value of assets, a debtor who retains his equity interest in the enterprise retains "property." Whether the value is "present or prospective, for dividends or only for purposes of control" a retained equity interest is a property interest to "which the creditors [are] entitled . . . before the stockholders [can] retain it for any purpose whatever."

108 S.Ct. at 969 (footnote and citation omitted).

Thus, the retention of the right to control the farm operation as a business is a retention of property. The court disagrees that it is without value. Debtors contend that this farm operation would produce a stream of income which could pay off all unsecured debt in the case proposed within 10 years but perhaps in as little as four to five years.

Debtors contend that there is an exception to the absolute priority rule--the new value exception set out in Case v. Los Angeles Lumber Products Co., Ltd., 308 U.S. 106 (1939). The exception permits continued debtor or stockholder participation based on a fresh contribution of money or money's worth to the operation. According to the Supreme Court, in the Ahlers case, a promise of future services is intangible, inalienable and, in all likelihood, unenforceable and may not be considered to qualify for the Los Angeles Lumber exception. Ahlers, 108 S.Ct. at 967.

In this case, debtors contend that the new value provided, so as to qualify for the exception, comprises four elements:

- insurance proceeds on the life of Floyd Jansma, Sr. in the amount of $170,000.00;
- post-petition hogs having a value of $115,000.00;
- crop inputs for three years beginning in 1995, totaling $90,000.00 to be borrowed from Karl Krapfl, an ag lender;
- and proceeds of a 1994 soybean crop grown by debtors after the appointment of a case trustee. This is projected at $10,000.00.

Bank's counsel argues that the first two are already property of the estate, and the court agrees. Neither the insurance policy nor the postpetition livestock are new value. They are assets of the estate, with the insurance existing at the time of filing and the hogs being purchased or obtained for the operation of the estate or with estate property.

The borrowing of money to operate post-petition to be paid back with income from post-confirmation operations is not new value, or the new value exception would be swallowed up by any debtors' post-confirmation income.

As argued by the Bank, the only item which may be new value is the proceeds of a soybean crop raised by the debtors after the appointment of the chapter 11 trustee. This is estimated to be about $10,000.00. Although this may be new value, the debtors have failed to show that this amount is reasonably equivalent to the participation of the debtors or the retained interest.

Although I believe the Eighth Circuit Court of Appeals recognizes the new value exception to the absolute priority rule, the debtors have failed to prove that new value is being contributed in money or money's worth. In re Blankemeyer, 861 F.2d 192, 194 (8th Cir. 1988) (for the proposition that the new value exception still exists in the Eighth Circuit).

I do not view that the exception is satisfied by a promise to contribute money in the future from the operation of the business, or to contribute borrowed funds, which will be paid back from the operation of the business. The contribution must be of money or money's worth contributed at the time of confirmation in a measurable amount reasonably equivalent to the value of the rights and property being retained.

The debtors have failed to show that they have made or proposed to make such a contribution.

Last, the court finds that the plan is proposed in bad faith. Bank claims it has been defrauded by Carl Jansma regarding pre-petition cattle transactions and conversions. This court has previously ruled that evidence of pre-petition dishonesty warranted the appointment of a chapter 11 trustee. The Bank presently has an adversary pending seeking a determination that its claim against Carl Jansma is nondischargeable under 11 U.S.C. § 523. The court does not have to decide that claim for purposes of this proceeding. However, the court does find that there is a likelihood of success by Bank. Carl Jansma proposes in the plan to discharge all his debt not excepted from discharge under 11 U.S.C. § 523. He further proposes to transfer all ownership rights in property to his spouse and that she will make all plan payments and be the sole operator of the farm. He will essentially be a hired man for the wages of food and lodging. Even if the Bank is successful on its claim, by virtue of the plan, Carl Jansma will have rendered himself judgment proof, with the Bank having no opportunity to pursue post-confirmation equity or new operation assets or income.

Yet, the court believes that Jansma's transfer of control is illusory. There is little if any evidence that Judy Jansma has the capacity to operate the farm alone, either physically or administratively. Most the decisions have been made pre- and post-petition by Carl. The court does not believe that debtors propose a genuine transfer of control.

The transfer appears to be a method to put the assets of Carl Jansma outside the reach of the Bank so that any judgment that may result from the nondischargeability adversary may not reach those assets. The court finds the proposal to be in bad faith.

Bank and ASCS contend that the plan is not feasible. Although the court does not need to reach that ground to deny confirmation, the court does doubt that debtors have shown the plan is feasible.

Hog prices for the plan are projected at in excess of 40 cents per pound. The market has dropped at present to about 33 cents. This drastically affects cash flow. Carl Jansma says this can be solved by price forwarding, but he has only limited experience with this method as to hogs.

More importantly, the feasibility test of the Code must be firmly rooted in predictions based on objective fact. Clarkson v. Cooke Sales and Service Co. (In re Clarkson), 767 F.2d 417, 420 (8th Cir. 1985).

In that case, the court quoted a Second Circuit opinion that stated that the feasibility test contemplates "the probability of actual performance of the provisions of the plan. Sincerity, honesty, and willingness are not sufficient to make the plan feasible, and neither are any visionary promises. The test is whether the things which are to be done after confirmation can be done as a practical matter under the facts." Id., citing In re Bergman, 585 F.2d 1171 (2d Cir. 1978).

Here there is a projection of profit unlike any rooted in historic fact. The debtors' own disclosure statement shows operational losses from 1989 through July 1993. The court doubts the debtors could perform the plan.

For the foregoing reasons, the court finds and concludes that the debtors' proposed Second Amended Plan of Reorganization filed February 7, 1994, as amended, may not be confirmed. Judgment shall enter accordingly.

SO ORDERED THIS 28th DAY OF OCTOBER, 1994.

William L. Edmonds
Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U. S. mail to: William Needler, Roger Carter, Jon Sullivan, US Attorney, 2002 List, Wil Forker, Jeff Henderson and US Trustee.

United States Bankruptcy Court

for the Northern District of Iowa

Western Division

CARL L. JANSMA and JUDY L. JANSMA — Bankruptcy No. 93-51290XS
Debtors. — Chapter 11

ORDER RE: MOTION TO DISMISS
MOTION TO CONVERT TO CHAPTER 12

Sioux County State Bank has filed a motion to dismiss this chapter 11 case. On October 27, 1994, the court issued its oral decision denying confirmation of debtors' second amended plan. The oral decision was issued one day following trial on confirmation issues. The court then was to take up the motion to dismiss filed by Bank and joined by the Agricultural Stabilization and Conservation Service and the United States on behalf of the Internal Revenue Service.

Prior to the hearing on the motion, the debtors, by their counsel, made an oral motion asking that the debtors be permitted to convert the case to chapter 12. Debtors also asked that the court defer hearing the motion to dismiss until it had ruled on the motion to convert. The court declined to postpone hearing and consideration of the motion to dismiss. The court permitted the debtors to argue their motion and the Bank to proceed with its motion.

Jon P. Sullivan appeared for the Bank; Lawrence D. Kudej appeared for ASCS and IRS; and William L. Needler appeared for the debtors, Carl and Judy Jansma.

Debtors contend that the motion to convert should be granted so that debtors can take advantage of the reorganizational benefits of chapter 12, the reorganization chapter designed for family farmers. Debtors contend that they qualify for chapter 12 and that as it does not have a provision similar to chapter 11's "absolute priority rule" (11 U.S.C. § 1129(b)(2)(B)), they would more easily be able to reorganize and keep their farm.

One of the court's grounds for denying confirmation was that the debtors' plan violated the absolute priority rule. Debtors do not contend that they were not qualified initially to file chapter 12. They argue that they intentionally chose chapter 11 over chapter 12 because of perceived tax advantages. Debtors argue that it would be equitable to permit an attempt to reorganize under chapter 12.

Bank argues that debtors knew from filing (July 28, 1993) that the Bank would not agree with the debtors' proposals and that the absolute priority rule would be implicated in the case. The Bank says it would be unfair now to permit conversion so that debtors might file a new plan.

Bank's dismissal motion contends that debtors are and will be unable to effectuate a plan of reorganization under chapter 11 (Motion, docket no. 285, 3). Debtors agree that this is the case, that they will not be able to effectuate a plan. This inability is grounds for dismissal under 11 U.S.C. § 1112(b)(2).

Therefore, if debtors may not convert their case, the case should be dismissed. The grounds for conversion are stated in 11 U.S.C. § 1112(d). It states:

> The court may convert a case under this chapter to a case under chapter 12 or 13 of this title only if--
>
> 1. the debtor requests such conversion;
> 2. the debtor has not been discharged under section 1141(d) of this title; and
> 3. if the debtor requests conversion to chapter 12 of this title, such conversion is equitable.

11 U.S.C. § 1112(d). Further, the debtors must be eligible for chapter 12 relief. See 11 U.S.C. § § 1112(f), 109(f) and 101(18)-(21).

The critical issue in this matter is whether it would be equitable to permit conversion. Debtors' argument seems to assume that the equity of the conversion is examined solely from the standpoint of what is equitable to the debtors. But that cannot be the sole consideration. Even if the Code would require consideration of the equitable treatment of the debtors, the Code provision should also be read as providing a limitation on a debtor's opportunity to convert. The debtor may be prevented from converting if conversion from chapter 11 to chapter 12 is not fair or just to a creditor or creditors.

In this case, conversion would not be equitable. Debtors filed their joint chapter 11 case on July 28, 1993. Bank sought appointment of a trustee or dismissal of the case. The court granted the motion for the appointment of a trustee because it found there was pre-petition dishonesty and fraud in Carl Jansma's dealings with the Bank. The court declined to dismiss. The court's decision stated:

> As to Bank's motion to dismiss, it will be denied without prejudice. Debtors have filed a plan. It may be that the debtors are unable to reorganize, but at this time, the court considers the record insufficient on that point. Reorganization may be the only hope of creditors other than Bank to obtain any payment on their claims.

Order, docket no. 77, October 12, 1993, page 9.

Debtors were not able to obtain confirmation of their plan. They admit they cannot effectuate a plan. Now, at the eleventh hour, they seek to convert and begin the reorganization process anew under a chapter admittedly more favorable to farmer reorganization. Debtors' counsel is not unaware of the difficulty of obtaining confirmation of a chapter 11 plan over the objection of a major secured and unsecured creditor. Nonetheless, the debtors proceeded under chapter 11 for strategic reasons. They were not successful. Permitting conversion now would, in effect, add more than one year to the front end of the chapter 12 process, a reorganization process that Congress had intended to be rapid for the benefit of creditors. Greseth v. Federal Land Bank of St. Paul (In re Greseth), 78 B.R. 936, 944 and n.4 (D. Minn. 1987) (quoting statement of Senator Grassley, a sponsor of the chapter 12 litigation).

This case will be dismissed. The court will retain jurisdiction of the orderly closing of the case, including the filing of a final report and account by the trustee and his application for compensation. The trustee shall immediately surrender to the debtors all personalty and realty in his possession other than cash, deposit accounts and other cash equivalents. He shall be required to file a final report and account and an application for compensation within 21 days. Accordingly,

IT IS ORDERED that the motion to dismiss filed by Sioux County State Bank is granted. This chapter 11 case is dismissed.

IT IS FURTHER ORDERED that debtors' motion to convert this case to chapter 12 is denied.

IT IS FURTHER ORDERED that case trustee Wil L. Forker shall file a final report and accounting and an application for compensation within 21 days from the date of this order. He shall immediately surrender to debtors all property of the estate with the exception of cash deposit accounts and other cash equivalents which he shall hold until further order of this court.

SO ORDERED ON THIS 28th DAY OF OCTOBER, 1994.

William L. Edmonds

Chief Bankruptcy Judge

I certify that on _____ I mailed a copy of this order and a judgment by U. S. mail to: William Needler, Roger Carter, Wil Forker, Jon Sullivan, US Attorney, 2002 List, Jeff Henderson, US Trustee.