

In the United States Bankruptcy Court

for the Northern District of Iowa

DAVID R. HEGG
ELAINE A. HEGG

Debtor(s).

Bankruptcy No. 95-20920KD

Chapter 13

ORDER RE CONFIRMATION OF PLAN

On August 2, 1995, this matter came on for hearing in Dubuque pursuant to assignment. The matters before the Court were Confirmation of Debtors' Chapter 13 Plan and objections thereto. Attorney Brian Peters appeared with Debtors David and Elaine Hegg. Also appearing were Attorney Richard Zahasky for Objector Durwin Hegg and Chapter 13 Trustee Carol Dunbar. The U.S. Trustee has also filed a comment to the proposed Plan. After the presentation of evidence and argument, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

STATEMENT OF THE CASE

Debtors propose to fund their plan entirely with proceeds from a lawsuit. The plan anticipates one payment of \$348,000 "upon settlement of pending litigation" and "settlement should be in less than one year." Debtors' schedules indicate that they have no disposable income with which to make periodic payments. Their monthly expenses essentially consume all of their monthly income.

In the lawsuit, Debtors David and Elaine Hegg are the Plaintiffs and Hawkeye Tri-County REC is the Defendant. The lawsuit arises out of Debtors' allegations that stray voltage has damaged their dairy operation. Although the matter is presently set for trial in Winneshiek County District Court on November 15, 1995, it does not have priority and is subject to the trial schedule in that County. At the hearing, Debtors offered exhibits which the Court received as evidence relating largely to the pending lawsuit. Debtors' Exhibit No. 1 sets forth an evaluation of Debtors' economic loss from the stray voltage of \$426,000. Exhibit No. 2 is the apparent expert opinion of Mr. David Winter in analyzing the cause of the stray voltage problem. It asserts various instances in which Hawkeye Tri-County REC was allegedly negligent in isolating the stray voltage and resolving the problems by utilization of a grounding system.

Debtors propose to utilize the proceeds from this lawsuit to finance their Plan. However, the matter is not set for trial until November of this year. If Debtors receive an award in the amount which they anticipate at trial, it is almost certain that Defendant Hawkeye Tri-County REC will appeal. The appeal process then will take anywhere from one to two years to complete and certainly no money will change hands until the appeal process is completely exhausted. It is reasonable to conclude that, absent a settlement, Debtors would not receive any money from the lawsuit until the earliest possible date of November or, more likely, at the end of the year in 1996 or later after the appeal is final. Therefore, the money is certainly not readily available in the absence of a settlement. Based upon the apparent contentious nature of this lawsuit and the fact that it would be unreasonable to conclude that the Defendant would want to set a precedent by settling, it appears that it is going to trial.

Creditor Durwin Hegg objects to confirmation of Debtors' plan. He asserts that the plan cannot be confirmed because 1) Debtors do not meet the "regular income" eligibility requirement for Chapter 13, 2) the plan is not feasible and 3) the plan is not proposed in good faith. The U.S. Trustee, joined by the Chapter 13 Trustee, also argues that Debtors should be required to show they meet the regular income and feasibility requirements. The U.S. Trustee states that it may be appropriate to permit Debtors to go forward with the lawsuit scheduled for November, if they agree to make regular

progress reports.

CONCLUSIONS OF LAW

The Bankruptcy Code does not explicitly prohibit Chapter 13 plans which call for lump sum payments. In re Stone, 145 B.R. 38, 39 (Bankr. C.D. Ill. 1992). Courts tend to scrutinize such plans, however, in terms of eligibility for Chapter 13 relief or feasibility of the plans. In re Hogue, 78 B.R. 867, 870 (Bankr. S.D. Ohio 1987). The objecting Creditor also raises the issue of good faith under § 1325(a)(3).

ELIGIBILITY

According to § 109(e), a Chapter 13 debtor must be an individual with regular income. An "individual with regular income" is defined as an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title." 11 U.S.C. § 101(30). Courts generally give the concept "regular income" a liberal interpretation. In re Sigfrid, 161 B.R. 220, 221 (Bankr. D. Minn. 1993). The test is not the type or source of the income, but rather its regularity and stability. Id. The "regular income" requirement calls for stability and regularity of income in excess of expenses allowing the debtor to maintain a regular payment schedule. In re Anderson, 21 B.R. 443, 446 (Bankr. N.D. Ga. 1981).

The court in In re Jones, 174 B.R. 8, 13 (Bankr. D.N.H. 1994), considered eligibility for Chapter 13 relief in the context of a motion to dismiss by the U.S. Trustee. The debtor proposed to fund his plan, in part, with proceeds from litigation against his former employer. Id. at 10. The court stated that, in terms of eligibility under § 109(e), the debtor needs more than mere allegations that there is income potential which is contingent. Id. at 13. The court found that the debtor was not an individual with regular income because the entire Chapter 13 case revolved around litigation which had been going on for years. Id. Since the debtor's plan relied on successful litigation, it was not a confirmable plan of reorganization within the spirit of Chapter 13. Id. at 14.

FEASIBILITY

Under § 1325(a)(6), Debtors have the burden to prove that their plan is feasible, i.e. that they "will be able to make all payments under the plan and to comply with the plan." In re Craig, 112 B.R. 224, 225 (Bankr. N.D. Ohio 1990). Where the consummation of a Chapter 13 plan hinges entirely on the happening of a speculative, contingent event scheduled to occur years after the date of confirmation, the plan cannot meet this feasibility requirement. Hogue, 78 B.R. at 873-74. In Hogue, the debtors proposed to consummate their plans with sales of their residences at the end of their three to five year plans. Id. at 869. In Craig, the debtors proposed to fund their plan with money collected two years after confirmation from a promissory note admitted to be uncollectible. Craig, 112 B.R. at 224. In In re Reines, 30 B.R. 555, 557 (Bankr. D.N.J. 1983), the debtor's plan proposed payment through the proceeds of a lawsuit which the trustee had refused to pursue. The court found that the plan was not feasible since it was in part predicated on the highly speculative return from a lawsuit. Id. at 562.

GOOD FAITH

The objecting Creditor herein also raised the issue of whether the plan has been proposed in good faith as required by § 1325(a)(3). In order to determine good faith, the Court looks at the ability to pay criteria in § 1325(b) as well as the totality of circumstances in light of the structure and purposes of Chapter 13. In re LeMaire, 898 F.2d 1346, 1353 (8th Cir. 1990). The court in Jones considered good faith in the context of dismissal under § 1307(c) where the debtor intended to fund the plan through proceeds from lawsuits. 174 B.R. at 12. The Court held that dismissal was proper for several reasons, including the facts that the debtor did not have regular income and the plan was a plan of litigation. Id. at 14.

CONCLUSION

Applying the foregoing to this case, the Court concludes that Debtors' Chapter 13 Plan cannot be confirmed. Debtors' schedules reveal that they do not have sufficient regular and stable income beyond that required to meet their monthly expenses with which to fund their plan. Proceeds of the lawsuit are at this time contingent and speculative such that the Court cannot conclude that it is reasonably probable that Debtors will be able to comply with their plan. Considering the contentious nature of the lawsuit, it is debatable whether Debtors proposed the plan in good faith or merely as a delaying tactic to avoid paying their debts for the duration of the litigation. Confirming Debtors plan funded by contingent proceeds from the lawsuit would stymy creditor activity for probably two or more years with no guarantee to creditors of any return from the lawsuit with which to eventually fund the plan.

WHEREFORE, Confirmation of Debtors' Chapter 13 Plan of Reorganization is DENIED.

FURTHER, Debtors shall either convert to Chapter 7 or dismiss under § 1307(c)(5) within 10 days from the filing of this Order.

SO ORDERED this 29th day of August, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge