In the United States Bankruptcy Court

for the Northern District of Iowa

NATIONAL CATTLE CONGRESS, INC. Debtor.	Bankruptcy No. 93-61986KW Chapter 11

ORDER

On September 25, 1995, the above-captioned matter came on for hearing on Debtor's Motion for Determination of Value for Secured Claim Owned by Jamco, Inc. The following appearances were noted: Attorney John Titler on behalf of Debtor; Attorney John Holmes on behalf of Jamco, Inc.; Attorney William Smith on behalf of the City of Waterloo; and Attorney Tom Fiegen on behalf of the Unsecured Creditors' Committee. Evidence was presented and arguments were made to the Court after which the matter was taken under advisement. The parties submitted briefs prior to the commencement of hearing.

STATEMENT OF THE ISSUES

The National Cattle Congress filed this Chapter 11 petition seeking reorganization of the National Cattle Congress and Greyhound Racing Park in Waterloo, Iowa. At the time of filing of the petition, Debtor-in-possession was the owner of real estate located in Black Hawk County, Iowa upon which the National Cattle Congress and dog racing track were located. The real estate was subject to a mortgage held by certain Bondholder Banks in the amount of $3,231,688 as of the date of filing. On June 9, 1994, pursuant to motion and order of this Court, the automatic stay was modified to allow the Bondholder Banks to commence a foreclosure action in the Iowa District Court in Black Hawk County, Iowa. The Motion to Lift Stay was limited. It allowed the Bondholder Banks to foreclose and establish the amount and priority of liens against both the real estate and personal property of Debtor but did not authorize a foreclosure sale. Summary judgment was granted in Black Hawk County and a decree was entered on January 13, 1995.

In April of 1995, the Bondholder Banks filed a second motion seeking modification of the automatic stay to allow them to proceed with the sheriff's sale. The terms of the order were negotiated between the Bondholder Banks and Debtor and pursuant to agreement, the Court entered a Consent Order on April 25, 1995 allowing modification of the stay to conduct the sheriff's sale under specified conditions.

The sheriff's sale was held on June 7, 1995. The Bondholder Banks submitted a credit bid and were the ultimate purchasers at the sheriff's sale. A sheriff's certificate was issued to them in the face amount of $3,731,700.

On July 17, 1995, the Bondholder Banks executed a contract with Jamco, Inc. in which the Bondholder Banks transferred their interest in the sheriff's certificate to Jamco. The offer and acceptance contract was received into Court as Debtor's sealed Exhibit "A". The parties to this

transaction had, as a negotiated term of the contract, a confidentiality agreement. It was argued at hearing that the document is confidential and irrelevant to these proceedings. The Court received the Exhibit subject to the confidentiality agreement. It was received as a sealed Exhibit pending the Court's determination of relevance. Counsel for Debtor was allowed to examine the document prior to sealing.

Debtor has now filed a Plan of Reorganization which provides for Plan treatment of Jamco, Inc. The pending motion was filed by Debtor asking the Court to determine the value of the secured claim held by Jamco, Inc.

Debtor seeks this valuation under two separate theories. First, Debtor asks the Court to determine that under existing bankruptcy law, the Court has the authority to modify State property rights to conform to reorganization through specified Plan treatment. Alternatively, Debtor asks the Court to make the determination that specific rights were included in the April 25, 1995 order which reserves to Debtor the authority to treat the Bondholder Banks and Jamco, Inc. as secured creditors in the Plan of Reorganization. Under one or both theories, Debtor has filed a Plan of Reorganization which provides for treatment of Jamco, Inc. as a secured claimant in an amount to be determined by the Court. Debtor alleges that it has, in effect, divided the claim of the Bondholder Banks into three distinct claims: namely, the secured claim which Debtor asserts is now held by Jamco; a secured claim in the amount of $200,000 retained by the Bondholder Banks and secured by a lien on much of Debtor's personal property; and an unsecured claim which Debtor asserts was retained by the Bondholder Banks in the transaction between the Banks and Jamco.

More specifically, Debtor asserts that Jamco, Inc. is a secured creditor and as such the Court has the authority to determine the value of Jamco, Inc.'s claim under 506 of the Bankruptcy Code based on the value of the real estate which is represented by the sheriff's certificate. The secured claim on the personal property is largely independent of this litigation and is not in significant controversy here. Debtor states that the unsecured claim retained by the Bondholder Banks would be treated in the Plan in an amount which constitutes the difference between $3,231,685 minus the $200,000 for the personal property, and the value which the Court places upon the secured claim of Jamco. The Bondholder Banks are in accord with Debtor's analysis and seek Plan treatment of the unsecured claim in an amount equal to the previous formula.

Jamco, however, rejects the foregoing analysis. Jamco asserts that, under Iowa law, it holds the sheriff's certificate of purchase. It states that Iowa law controls on this issue and Jamco is entitled to payment in an amount equal to the face value of the certificate. Without consideration of the April 25, 1995 order lifting the stay and any limitations inherent in that order, Jamco asserts that the mortgage lien is terminated by the foreclosure sale and that nothing in a judgment of foreclosure preserves any rights to the mortgagee beyond the sheriff's sale. The only right which survives the foreclosure judgment is the right to redeem by Debtor paying into the Clerk's office the face amount of the sheriff's certificate plus certain additional costs authorized under 628.13, I.C.A.

Secondly, Jamco asserts that there is nothing in the April 25, 1995 order that can be construed to allow Debtor to pay less than the face amount of the sheriff's certificate. Jamco asserts that the order of April 25, 1995 can only be interpreted to mean that the foreclosure sale is subject only to whatever provisions of Chapter 11 might allow alteration of the rights of the parties to the foreclosure but does not allow alteration of existing law.

The respective interpretation of the parties, as they are impacted by these facts, overlap to some extent in the parties's briefs. In order to clarify the respective positions, the Court will first present its

conclusions assuming that the order of April 25, 1995 did not exist, or alternatively, does not impact the rights of the parties. Secondly, the Court will include the April 25 order and interpret its impact on the rights of the parties.

The property has been sold at sheriff's sale with the sheriff's certificate being awarded to the Bondholder Banks by way of a credit bid. The Noteholders sold and assigned their rights in the certificate to Jamco, Inc. for a cash payment and a release of a super-priority claim. The Court must now determine the rights of Debtor, the Bondholder Banks and Jamco, Inc. absent any limitations which may be placed on these transfers in the order of April 25. It is well settled that the Constitution grants Congress the authority to establish uniform bankruptcy laws. However, in the area of property rights, State laws give way to bankruptcy law only to the extent that they are in direct conflict with existing bankruptcy law. Johnson v. First Nat'l. Bank, 719 F.2d 270, 273 (1983), cert. denied, 465 U.S. 1012 (1984). Therefore, absent a compelling reason to override State law, State property law controls all issues relating to property rights. Butner v. United States, 440 U.S. 48, 55 (1979). The 8th Circuit holds that State property rights are to be given great deference. No case has been cited to this Court wherein State property rights have been altered to accommodate the interests of a debtor in a Chapter 11 reorganization. Justice v. Valley Nat'l. Bank, 849 F.2d 1078, 1086 (8th Cir. 1988); Demers v. Federal Land Bank, 853 F.2d 605, 606 (8th Cir. 1988); In re Spaude, 112 B.R. 304, 307 (Bankr. D. Minn. 1990). This Court cannot identify nor are there allegations made of any direct conflict between the property laws of Iowa and the Bankruptcy Code in the present context which allow the Court or Debtor unilaterally to modify State property law. As no justifiable reason exists to override Iowa property law, the Bankruptcy Court is denied authority to utilize its equitable powers to "create substantive rights which do not exist under State law". Johnson, 719 F.2d at 274. This Court concludes that Iowa property law controls the extent of the parties' rights in this case absent whatever limitations exist by way of the order of April 25, 1995.

Iowa law relating to the determination of property rights in this area is controlled by Chapter 628 of the Iowa Code and existing case law interpreting those provisions. In this area, Iowa law is consistent with Minnesota and South Dakota law which were the subject of discussion in Justice, Demers, and Spaude. In Iowa, foreclosure sale and issuance of a sheriff's certificate extinguishes the mortgage. As the mortgagee is entitled to one satisfaction of the indebtedness, the bidding in of the debt to purchase the mortgaged property, thereby cutting off lower bidders, constitutes a full satisfaction of the indebtedness. Farmers Savings Bank v. Gerhart, 372 N.W.2d 238, 243 (Iowa 1985); Farmers & Merchants Savings Bank v. Farm Bureau Mutual Ins. Co., 405 N.W.2d 834, 837 (Iowa 1987). The mortgage lien, as well as a debtor's interest in property, continues to exist after the foreclosure. In Iowa, however, as in most States, the foreclosure sale and issuance of the sheriff's certificate completely terminates the mortgagee's interest in the property. Todd v. Davey, 60 Iowa 532, 15 N.W. 421 (1883); Escher v. Simmons, 54 Iowa 269, 6 N.W. 274 (1880).

After issuance of the sheriff's certificate, the purchaser acquires a statutory lien during the redemption period. Thereafter, the title holder may redeem the property pursuant to Iowa Code sec. 628.13 which states that:

The terms of redemption, when made by the title- holder, shall be the payment into the clerk's office of the amount of the certificate, and all sums paid by the holder thereof in effecting redemptions, added to the amount of the holder's own lien, or the amount the holder has credited thereon, if less than the whole, with interest at contract rate on the certificate of sale from its date, and upon sums so paid by way of redemption from date of payment, and upon the amount credited on the holder's own judgment from the time of said credit, in each case including costs.

There is substantial agreement that, in States with redemption laws similar or identical to Iowa, the foreclosure sale is a critical step in the foreclosure process. Until that time, the titleholder retains a property interest which may be the subject of Bankruptcy Court jurisdiction. However, upon completion of the foreclosure sale, the only property right in the titleholder which survives is the right to redeem the sheriff's certificate by paying into the Clerk's office the amount specified in 628.13, I.C.A.

The law is clear, absent limiting provisions in the April 25, 1995 order, that Debtor's interest in the property terminated with the foreclosure sale and the issuance of the sheriff's certificate to the Bondholder Banks. At that time, the Bondholder Banks' interest also changed. When the Bondholder Banks bid in the debt to purchase the mortgaged property, this act constituted a complete satisfaction of the debt and their rights were absorbed into the sheriff's certificate.

Debtor has asserted that the Bondholder Banks, as well as Jamco, Inc., are holders of a claim as defined in 101(5) of the Bankruptcy Code. However, under the foregoing analysis, it is clear that neither the Bondholder Banks nor Jamco are the holders of a "claim" as defined in the Bankruptcy Code. Section 101(5) states in applicable part:

(5) "claim" means -

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach or performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured;

Section 101(5)(A) states that a claim is based upon a right to payment in favor of a creditor. The Bondholder Banks' rights to payment terminated when they bid for the property at the sheriff's sale. Assuming arguendo that some right to payment existed beyond this point, the assignment of the Bondholder Banks' certificate to Jamco would also terminate any right to payment which the Bondholder Banks held. For this reason, the Bondholder Banks no longer hold a claim as defined in the Bankruptcy Code.

Nor does Jamco, Inc. hold a claim as defined under 101(5)(A). Jamco, Inc. being the assignee of the sheriff's certificate holds the entire property interest by reason of existing law. In order for a claim to exist under 101(5), Jamco, Inc. must be able to assert some additional right to payment against Debtor. All of Jamco's rights now exist solely in the sheriff's certificate. While Debtor could voluntarily tender payment to Jamco to redeem the property under Chapter 628, Jamco has no independent right under any theory of law to demand additional payment. Therefore, Jamco does not hold a claim under 101(5). As neither the Bondholder Banks nor Jamco have a claim under 101(5), they also do not qualify as creditors under 101(10)(A) which defines a creditor as an entity that has a claim against Debtor that arose at the time of or before the order for relief concerning Debtor.

Absent some cognizable reservation of property rights to Debtor, or the Bondholder Banks, in the April 25, 1995 order, the rights of the Bondholder Banks were completely extinguished at the time of the foreclosure sale. The assignment of the certificate of sale to Jamco assigned all interest which the Bondholder Banks had in the certificate to Jamco, Inc. Thus, Jamco, Inc. is not a creditor but is rather an entity holding a sheriff's certificate which can only be redeemed by paying the face value of the certificate. Absent some reservation of authority in the April 25 order, neither Debtor nor the

Bondholder Banks hold a claim nor do they have any legal authority to bifurcate the claim into a secured and unsecured portion for purposes of Plan treatment. As the Noteholders and Jamco have no claim as defined in 101(5) and are not creditors, there is no right to a valuation hearing under 506(a). The value of the property is determined under Iowa law which provides, in Chapter 628, that the sole mechanism for payment is the face amount of the sheriff's certificate.

It is apparent that any alternative to this analysis must be found in the April 25, 1995 order. This order consists of eleven pages. It was prepared by the parties and presented to the Court for signature as a consent order. The first four and one-half pages relate to matters which are not contested. They establish the background of the litigation and recite facts and rules of law which are not in significant dispute. The areas of controversy relate to matters contained in paragraphs 13, 14 and 15 of the order and subsequently incorporated into the wherefore clause. Paragraph 13 states that the Court finds that the motion of Homeland Bank should be granted conditioned on certain provisions which are incorporated in letters "A" through "F" of that paragraph. Many of the provisions merely recite matters recognized in State law or Bankruptcy law. They establish that the sheriff's sale shall be subject to the one year period of redemption, it allows Debtor to remain in possession of the real estate and personalty under certain conditions, and it provides that Debtor would properly preserve the property.

The areas in controversy are found in lettered paragraphs (C) and (D) of numbered paragraph 13 of the order. These state that:

C. To the extent that a holder of a sheriff's certificate of sale of the real estate, or any portion thereof (whether by reason of a bid at such sheriff's sale, or by reason of exercise of redemption rights under state law) holds such certificate by reason of payment of a cash amount, then to that extent, such purchase shall be absolute, final and binding upon the Debtor, subject only to the Debtor's redemption rights as provided by state law.

D. Except as provided in subparagraph C, the sheriff's sale of real estate, or any portion thereof, shall be subject to the provisions of Chapter 11 relating to secured creditors.

Paragraph 14 of the order states that:

14. The court expressly retains jurisdiction of the subject matter of the real estate and personal property of the Debtor for purposes of entry of such other and further orders which are not inconsistent with the provisions of this Order, as may be allowed by the provisions of Chapter 11 relating to secured creditors.

Paragraph 15 of the order states that:

15. Nothing contained in this Order shall be construed as being binding upon the parties to this proceeding on the issue of the value of either the real estate or personal property of the Debtor in any subsequent bankruptcy proceedings in which said value is or may become an issue.

Debtor presents the position that the April 25, 1995 order altered the provisions of the underlying mortgage and also altered the provisions of Iowa law relating to possession of the real estate. Debtor asserts that the Bondholder Banks and Debtor agreed that the sheriff's sale would be subject to the provisions of the order in that Debtor would retain a property interest in the property beyond the foreclosure sale and that the effect of lettered paragraphs (C) and (D) were to preclude any "credit

bid" at the sheriff's sale from determining the final value of the property for purposes of a subsequent reorganization plan. Additionally, Debtor asserts, in its brief, that:

For that reason, paragraph (C) specifically states that a holder of the sheriff's certificate "by reason of payment of a cash amount" could consider its purchase or redemption to "be absolute, final and binding upon the debtor, subject only to the debtor's redemption rights as provided by state law". The effect of that provision would be to set the value which would be required for payment to the holder of the certificate by the debtor-in-possession or anyone else in the context of a reorganization plan filed and confirmed under Chapter 11.

Debtor's brief, page 5.

Jamco, Inc. takes the contrary position and asserts in its' brief that:

Any attempt by a bankruptcy court to modify Debtor's statutory rights would constitute an improper use of "equitable powers to create substantive rights which do not exist under state law".

Jamco brief, page 9.

Jamco asserts that:

At most, the Second Lift Stay Order states no more than the foregoing proposition: that the Foreclosure Action was subject to whatever provisions of Chapter 11 might allow alteration of the rights of the parties to the foreclosure. The only provisions of Chapter 11 which would appear to apply would be the provisions for "cramdown" under 11 U.S.C. 1129(b)(2)(A). None of these provisions expand the Debtor's state law redemption rights.

Jamco brief, page 12.

This Court has previously concluded that Jamco is correct in that any attempt by a Bankruptcy Court or Debtor to unilaterally modify State property law rights in Iowa under the Bankruptcy Code would be unsuccessful. However, the parties to the April 15 order negotiated its terms which were incorporated into a consent order. In this context, the Court was not asked to unilaterally modify State law nor was Debtor unilaterally seeking to modify State law. Debtor seeks to enforce a consent order which was executed after negotiation between the Bondholder Banks and Debtor.

A consent order requires separate analysis. Ordinarily, a consent order embodies characteristics of both contracts as well as judicial decrees. The most fundamental characteristic of a consent order is that it is a voluntarily negotiated agreement. It is the agreement of the parties which ultimately creates the obligations contained in the order. In re Pan Trading Corp., 125 B.R. 869, 878 (Bankr. S.D.N.Y. 1991) (citing AFL-CIO v. City of Cleveland, 478 U.S. 501, 519 (1986)). While it is true that the general rule provides that no contract or agreement can modify existing law, an exception exists where no principles of public policy are violated. Under those circumstances, the parties are free to forego the protections of the law and statutory provisions which are designed to benefit individuals may be waived by the parties consent unless the agreement violates legislation which is designed to establish public policy or public morals. If public policy is violated, consent of the parties will render noncompliance with the statute ineffective. McNair v. Dotham Marine, 656 So.2d 1217 (Ala. App. 1995); Wells Fargo & Co. v. Enright, 60 P. 439, 442 (Cal. 1900); Quick v. Corlies, 39 N.J.L. 11 (N.J. 1876). The Iowa Supreme Court has recognized that a consent order entered in Federal Bankruptcy Court can modify existing Iowa property rights if the agreement between the mortgagor and the

mortgagee does not violate any existing public policy. Federal Land Bank v. Bollin, 408 N.W.2d 56, 59 (Iowa 1987). In Bollin, the Iowa Supreme Court was presented with a consent order modifying Iowa law relating to redemption rights and the redemption period. The Iowa Court stated that:

The language of section 628.4 furnishes no evidence that the legislature intended to prohibit such an agreement with respect to waived redemption rights. Nor do we discern any violation of public policy because of such an agreement. To the contrary, our case law recognizes that the right of redemption is favored by the law.

Id.; see also Metropolitan Life Ins. Co. v. DeKlotz, 437 N.W.2d 925, 926 (Iowa 1989).

Applying the foregoing principles to the present facts, the Bankruptcy Court had jurisdiction of the property at the time of the filing of this petition. The Court continued to have jurisdiction over the real estate in question throughout the period from the filing of the petition until the foreclosure sale. Thus, this Court had subject matter jurisdiction over the real estate and authority to consider the consent order presented to the Court by Debtor and Bondholder Banks. The agreement presented to the Court in the form of an order constitutes a consent order as the Court has defined that term. The Bondholder Banks and Debtor negotiated between themselves to arrive at a solution whereby Debtor could go forward with a plan of reorganization while simultaneously accommodating the rights of the Bondholder Banks. Their agreement also recognized the fact that Debtor had no defense, at that time, to avoid modification of the stay and sale of the property. On that basis, the parties entered into the consent decree which was executed by the Court on April 25, 1995.

As the consent order addresses property rights, there is nothing in the consent order which is offensive to the public morals or in violation of any public policy. Between the parties to the consent order, Iowa law recognizes that property rights can be modified to accommodate the interests of the parties. This Court concludes that while neither the Court nor a debtor has the unilateral authority to modify State property rights in Iowa, under a properly drafted and executed consent decree, Iowa law provides that property rights can be modified.

As there is no per se prohibition against such the provisions of this consent order, the Court must determine the intent of the parties in the creation of the consent order. As a judgment by consent is regarded as a contract, contract rules of construction apply. 49 C.J.S. Judgments 178 (1947); Federal Land Bank v. Bollin, 408 N.W.2d 56, 60 (Iowa 1987); United States v. ITT Continental Baking Co., 420 U.S. 223, 236, 95 S.Ct. 926, 934 (1975). A consent order embodies a compromise between the parties and the scope of the agreement must be gleaned from the four corners of the order and not by reference to what might satisfy the purposes of one of the parties to it. United States v. Armour & Co., 402 U.S. 673, 682, 91 S.Ct. 1752, 1757-58 (1971). Reference to extrinsic evidence, such as the circumstances of the formation of the order, is permissible only if the order is ambiguous in some respect. Robinson v. Vollert, 602 F.2d 87, 92 (5th Cir. 1979).

The four corners of the document establish that Debtor and the Bondholder Banks were attempting to negate the ordinary foreclosure sale principles which would otherwise have terminated Debtor's interest in the property. While Jamco asserts that a reasonable interpretation of this order is to conclude that the parties to the consent order were merely agreeing to utilize principles allowable under the Bankruptcy Code, it is apparent that the parties intended to preserve to Debtor, rights beyond those accorded by Chapter 11 of the Bankruptcy Code. This Court concludes that the Bondholder Banks and Debtor intended to preserve jurisdiction of the Bankruptcy Court over the real estate. The parties also intended to retain authority for the Bankruptcy Court to value either the real estate or the personal property under 506 in subsequent proceedings. This Court concludes that as the

Bondholder Banks provided a credit bid and not a cash bid at the time of the foreclosure sale, it was intended that Debtor retain the authority to treat the Bondholder Banks as secured creditors to the extent of the value of the real estate and as unsecured creditors for the remainder of the claim above and beyond the value of the collateral.

If the Bondholder Banks had retained possession of the sheriff's certificate, under the peculiar circumstances presented, the consent order would authorize the Court to retain jurisdiction of the real estate under Iowa law and treat the Bondholder Banks in a manner consistent with their intent in the consent order. However, the Bondholder Banks subsequently transferred their interest in the sheriff's certificate to Jamco, Inc. on July 17, 1995. Even though the Court has concluded that under certain circumstances within the context of a consent order, the parties to the contract between themselves have the authority to modify State law, the consent decree is only binding upon the parties to the agreement. Centron Corp. v. United States, 585 F.2d 982, 989 (Ct.Cl. 1978). It also follows that as the consent decree is only binding upon the parties to it, a consent decree is not able to prevent a third-party from asserting the full protection of the law under both State and Federal law which was waived in the consent order unless the third-party affirmatively adopts those provisions. Contract principles also apply in making the determination whether such a third-party actually adopted the applicable provisions of the consent order. The April 25, 1995 consent order between the Bondholder Banks and Debtor contains no provisions relating to possible resale of the sheriff's certificate. The agreement entered into between the Bondholder Banks and Jamco on July 17, 1995 (Debtor's Exhibit "A" under seal) makes no reference to Jamco accepting the terms of the previously entered consent order. The offer and acceptance contract merely states in relevant part:

Whereas, purchaser wishes to buy for valuable consideration the said sheriff's certificate of purchase acquired and held by trustee under the terms and conditions of this agreement, and the trustee is willing to assign all its right, title and interest in said sheriff's certificate of purchase for a valuable consideration under the terms of this agreement;

There is no reference in the document that Jamco and the Bondholder Banks negotiated to include the terms of the April 25 consent order in their contract. The record made at the time of hearing was less complete than on other issues, prossibly based on the parties' perception that this was not the most critical issue. Jamco took the position and argued that as this was an arm's-length transaction negotiated in good faith, it was not bound by any agreements made between Debtor and the Bondholder Banks modifying State law. Debtor and the Bondholder Banks argued that Jamco has been very involved in these entire proceedings. They assert that a copy of the April 25, 1995 order was attached to all of the State pleadings including the foreclosure sale order and that Jamco, through negotiations, was aware of the terms of the order. Debtor and the Bondholder Banks assert that Jamco had actual knowledge of the existence of the order and is, therefore, bound by its premises.

However, a consent order embodies certain characteristics of both a contract and a judicial decree. The most fundamental characteristic of a consent order is its voluntary nature. It is the agreement between Debtor and the Bondholder Banks which created the underlying obligations of the April 25 order. See In re Pan Trading Corp., 125 B.R. 869, 878 (Bankr. S.D.N.Y. 1991). While third-parties are ordinarily bound by bankruptcy orders, under a contract analysis as is appropriate here, Jamco is not bound by the original provisions modifying State law absent affirmative acceptance in the offer and acceptance contract between Jamco and the Bondholder Banks. As Jamco is not bound by the modification of law and as Jamco does have the affirmative right to enforce its legal rights under existing law, Jamco is not bound by the previous two-party agreement between Debtor and the Bondholder Banks.

Nevertheless, for reasons set out later, the result would not differ even if the Court concluded that Jamco is bound by the April 25 Consent Order. For purposes of the final analysis relating to valuation, the Court will conclude arguendo that Jamco is bound by the original agreement and consent order of April 25, 1995. If Jamco were bound, the Court would then be in a position to value the collateral under 506(a) of the Bankruptcy Code. In making this valuation, the Court relies on existing 8th Circuit case authority which holds that the proper analysis is to value the property as a going concern and not under a liquidation analysis. In so doing, the 8th Circuit has held that:

We adopt the reasoning of the Fifth Circuit in In re Rash, and other courts that have focused on the second sentence of Section 506(a) and we now conclude that the value of Metrobanks's lien interest is properly based on the retail value of the collateral without deduction for costs of sale. We agree with the Fifth Circuit that the retail valuation method is the only method that gives full effect to the entire language of Section 506(a). "If the first sentence of 506(a) were interpreted to mean that the value must be fixed at the amount which the creditor would receive on foreclosure, then the last sentence of the statute which provides that the value should be determined in light of the purpose of the valuation and of the proposed disposition or use of the property, would be surplusage." In re Rash, 31 F.3d at 329 (quoting In re Courtright, 57 B.R. 495, 497 (Bankr. D. Or. 1986)). Under the wholesale valuation method, the creditor's interest would always be valued at the amount the creditor would receive upon disposition of the collateral, regardless of the purpose of the valuation or of the proposed disposition or use of the property. The wholesale method would not be affected by whether the debtor intended to release the property or intended, instead, to retain and use the property. Rather, where a debtor intends to retain and use the collateral, the purpose of the valuation is to determine the amount an undersecured creditor will be paid for the debtor's continued possession and use of the collateral, not to determine the amount such creditor would receive if it hypothetically had to repossess and sell the collateral. Such an interpretation ignores the express dictates of Section 506(a).

In re Trimble, 50 F.3d 530, 531-32 (8th Cir. 1995).

The parties submitted substantial evidence on the issue of value. Debtor asserts that conclusively the value is the price paid by Jamco for the sheriff's certificate. Jamco, however, asserts that the value is substantially higher and that anyone purchasing a sheriff's certificate does so at foreclosure rates and assumes certain risks attendant to purchasing such a certificate. Jamco states that the purchase price is not going concern price and is a depressed price more closely resembling that of a foreclosure sale. Additional evidence was presented by Jamco which reflects that an appraisal was done on the real estate in question in December of 1992 and continuing over into January of 1993. This valuation was offered into evidence as Exhibits F1 and G1. This appraisal values the fairgrounds as well as the dog track. The appraiser valued the property as a going concern. That is, the fairgrounds property was valued based on its continued use as a fairgrounds and the dog track property as a greyhound dog track. A second appraisal was done in January of 1995. This appraisal was offered into evidence as Exhibit F2 and G2. This appraisal assumed that the properties would not be used for their present use but rather for alternative uses.

The 1993 appraisal values both parcels of property as going concerns in a total amount of $8,400,000. The same appraiser valued both properties in 1995 under alternative uses as having a combined value of $2.3 million. The valuation placed on these properties in 1995 is similar to the purchase price of the sheriff's certificate by Jamco in July of 1995.

The Court must place a 506(a) valuation on these properties consistent with the 8th Circuit requirement that these properties be valued as going concerns; the record establishes that $2.3 million constitutes a liquidation value grossly less than its going concern value. The property was valued at a

total of $8.4 million in January of 1993. While this valuation may be overstated, the going concern value of this property is significantly higher than the $2.3 million valuation placed upon the property in January of 1995. It is also significantly higher than the purchase price of the sheriff's certificate by Jamco in July of 1995.

This Court, as the trier of fact, determines that the fair market value is less than that placed upon the property by the appraiser for other purposes but substantially higher than that placed upon the property under an alternative use analysis for foreclosure purposes. This Court concludes that the value of these properties under 506(a) is $3.8 million.

Thus, as the value is similar to the face value of the sheriff's certificate as purchased by Jamco, the result reached would be similar, if not identical, to this Court's previous conclusion that Jamco is not bound by the consent order agreed upon between Debtor and the Bondholder Banks.

WHEREFORE, it is the ruling of this Court that Jamco is not bound by the consent order of April 25, 1995 and that in order to redeem the property, Debtor must pay the face value of the certificate in compliance with the Iowa statute.

SO ORDERED this 10th day of October, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge