

In the United States Bankruptcy Court

for the Northern District of Iowa

Western Division

CARL JANSMA and JUDY JANSMA
Debtors.

Bankruptcy No. 94-51889XS
Chapter 7

UNITED STATES OF AMERICA
Plaintiff

Adversary No. 95-5047XS

vs.

CARL JANSMA
Defendant.

ORDER RE COMPLAINT TO DETERMINE DISCHARGEABILITY OF DEBT

The matter before the court is the final trial of the complaint of the United States, on behalf of the Consolidated Farm Services Agency, to determine the dischargeability of its claim against defendant Carl Jansma. Trial was held February 22, 1996 in Sioux City, Iowa. Assistant United States Attorney Donna K. Webb appeared for FSA. Attorney Donald H. Molstad appeared for Jansma. The court now issues its findings of fact and conclusions of law as required by Fed.R.Bankr.P. 7052. This is a core proceeding pursuant to 28 U.S.C. 157(b)(2)(I).

FINDINGS OF FACT

Carl Jansma and his wife, Judy Jansma, filed their Chapter 7 bankruptcy petition on November 24, 1994.

Carl and Judy Jansma live on a parcel of real estate owned by Carl's brother Floyd Jansma, which is located approximately a quarter mile from Floyd's farm near Hull, Iowa. Carl has been involved in farming since he was a teenager. In 1989 the Jansmas raised hogs in a farrow-to-finish operation; they also had cattle which were fed on custom lots. Their hog facility had a capacity for 250 sows. They raised more than 4,000 pigs per year. In 1991, Jansmas had more than 1,000 head of cattle in custom lots.

Floyd Jansma is a custom cattle feeder. Early in 1992, Carl and Floyd entered into an oral agreement for Floyd to custom feed Carl's cattle on Floyd's farm. They agreed that Carl would pay Floyd one dollar per day per head of cattle, which would cover yardage, feed, and labor. The number of cattle Carl had on Floyd's lot varied, and ranged up to 500 or 600. Floyd billed Carl monthly for the feed bill, which amounted to between \$12,000 and \$15,000 per month.

Carl borrowed against a line of credit at the Sioux County State Bank to pay his feed bill. Jansma suffered a number of financial difficulties in the few years prior to filing a bankruptcy petition. In 1991, he suffered a large loss because of a drop in the cattle market. In 1992, he again lost money on cattle. In June, 1992, he lost 650 pigs during a power outage. He eventually reached his lending limit at the Bank. Jansma was unable to borrow to pay his feed bill.

Carl usually paid his bill to Floyd within ten days of its receipt. After August or September, 1992, Carl made no more payments to Floyd for feed. Floyd eventually stopped billing him, but continued to feed Carl's cattle through May, 1993. The brothers' relationship deteriorated. They tried to ignore each other and argued when they could not. Floyd estimated that by January 1, 1993, Carl owed him approximately \$45,000 to \$50,000.

Floyd Jansma's cattle lot had a capacity of approximately 5,000 head. In 1992, he had between 3,500 and 4,000 head of cattle on the lot on a daily basis. The cattle other than Carl's were owned by investors. Floyd had a partnership arrangement with the investors, under which he was paid one dollar a day per head. The investors received the first \$20 of profit. Floyd received the rest and stood all losses. Floyd harvested his own corn in 1992, but it was not enough to feed the cattle. For 4,000 head of cattle, he needed approximately 120,000 lbs. or 1,800 to 2,000 bushels of corn each day. Floyd was under great financial pressure because of Carl's failure to pay for feed, Floyd's need to purchase grain, and the declining cattle market. Floyd was heavily in debt to several grain elevators.

Weather interfered with normal harvesting in 1992. Carl Jansma harvested his corn in the middle to latter part of December. He completely filled three silos with shelled corn. One silo was on the acreage where Carl lived. Floyd gave Carl permission to use two silos located on Floyd's farm.

On December 31, 1992, Carl Jansma went to the Agricultural Stabilization and Conservation Service (ASCS) office in Orange City, Iowa to apply for a loan secured by the grain. The ASCS office administered programs of the former Commodity Credit Corporation. ASCS and CCC are now part of the Consolidated Farm Service Agency. The type of loan Jansma sought is known by the ASCS as a "farm stored loan." The process of obtaining such a loan is known as "sealing grain" or making a "sealed loan." Jansma had never sealed grain before. His loan was a high moisture certified loan. His corn contained 22 percent moisture. Certification is the method of determining the amount of grain sealed. The ASCS office calculates the quantity from the dimensions of the bin provided by the farmer, rather than having an ASCS inspector physically measure the bins and the grain.

At the ASCS office, Jansma met with Elizabeth Kellen, a program assistant in charge of compliance. Kellen explained the procedure and requirements of the sealed grain program. Jansma first completed a Farm Stored Loan Quantity Certification. Exhibit 4. The document stated the location of the farm where the grain was stored, identified the bins as Hansen silos, and gave their dimensions. His application stated that he was sealing three silos of corn, each containing 15,080 bushels. Kellen calculated that the quantity of grain in each silo was equivalent to 13,813 bushels of dry corn, using a factor based on 22% moisture in the grain. By executing the document, Jansma certified the quantity of grain, that he had control of the grain, and that he would maintain its condition. He further certified that he would post seals on the bins, maintain the identity of the grain, and not move or commingle it with other grain without prior written approval.

The Sioux County State Bank had a lien on the corn. Kellen provided Jansma a form to obtain a lien waiver from the Bank. The Bank authorized the proceeds of the loan to be disbursed by check payable jointly to the Bank and Jansmas. The ASCS office then filed a financing statement covering the Jansmas' corn. Exhibit 7.

Carl Jansma executed a Commodity Loan Agreement in which he agreed not to remove any of the sealed grain without ASCS authorization. Exhibit 3. Kellen signed the document to indicate that she had discussed the requirements of the loan agreement with him.

The ASCS makes a high moisture loan as a recourse loan. The farmer is required to pay back at least the value of one ninth of the sealed grain each month. Payment of the monthly amount redeems an equivalent number of bushels of grain, which the farmer is then allowed to use. At the time of Jansma's application, Kellen calculated the number of bushels he would have to redeem each month.

Jansma's loan application documents were then given to Wanda Hofmeyer who prepared a note and security agreement. She mailed them to Carl and Judy Jansma for their signatures. Jansmas executed the note and security agreement January 15, 1993. Exhibit 1. Carl Jansma also executed a Disbursement and Conditions Agreement. The agreement verified receipt of the terms and conditions of the note and a notice regarding moving and disposing of the grain. Jansma stated that he understood the documents and agreed to their terms. Exhibit 5.

Jansma asked to be allowed to buy back one silo every three months rather than the usual one-ninth of the grain each month. The county committee denied his request on January 6, 1993. Exhibit 8. On January 14, 1993, Jansma telephoned the ASCS office to eliminate from the loan the third silo located on the acreage where he lived. Jansma did not use the corn in the third silo. Sometime in 1995, Floyd Jansma purchased the corn from Sioux County State Bank. The ASCS loan was secured by the corn in the two silos on Floyd's farm, containing a total of 27,626 bushels. Kellen recalculated that Carl Jansma would have to pay for 3,070 bushels each month. Because the loan was accruing interest at a variable rate, Jansma was to contact the ASCS office each month to obtain the amount required for that month. On January 15, 1993, he signed a statement agreeing to these terms. Exhibit 2. The receipt document (Exhibit 5) predates the note and security agreement (Exhibit 1) because it was mailed to Jansma before he removed the third bin from the loan. ASCS prepared a new note and security agreement document showing that the loan was secured by grain in the two remaining bins.

When the ASCS office received all loan documents executed by Jansma, a check was prepared for \$44,477.86, the amount of the loan. The ASCS office's procedure then is to mail to the farmer the check, a copy of the note and security agreement, a repayment schedule for a high moisture loan, and a seal to be placed on each grain bin. Wanda Hofmeyer, the ASCS employee who would have mailed these items to Jansma, did not testify. The seal is a bright yellow plastic sticker in the form of Exhibit 6. The check was prepared January 19, 1993. Jansma received the check, but claims he did not receive a seal.

Sometime in January, after an argument about the feed bill, Carl told Floyd to use the corn in the bins on Floyd's farm. Their conversation was not very specific about their arrangement. They did not discuss what effect the corn would have on their previous deal of one dollar per day per head. Floyd estimated his cost was still 40 to 50 cents per day per head. He did not keep records of what Carl owed him in 1993 and did not bill Carl at any time in 1993. Floyd fed all the cattle on his lot, not just Carl's, with Carl's corn. Because Carl's corn had a high moisture content, it had to be mixed with dry corn for feed. The ration was a mixture of corn, silage, hay and protein. Carl's corn made up 75 percent of the corn in the ration Floyd fed to all the cattle on the lot. Floyd did not keep track of how much was fed to Carl's cattle and how much was fed to the other cattle. Carl Jansma says he learned that the corn was all gone by early June. At no time did he notify ASCS that the grain was gone.

The note with the ASCS was to mature October 31, 1993 and was payable in nine monthly installments. Carl Jansma made only four payments on his loan as follows:

Date	Amount Paid	Bushels Redeemed
3-1-93	\$ 4,964.03	3,070
3-29-93	4,977.00	3,069
4-28-93	4,933.48	3,033
5-25-93	4,975.00	3,050
TOTALS	\$19,849.51	12,222

Exhibits 9-16. After these payments, the balance on the loan was \$24,800.46. The balance due at the time of trial was approximately \$29,891.34. Joint Pretrial Statement, Admitted Facts 16. The balance of corn still subject to the security agreement, the minimum that should have remained in the bins, was 15,404 bushels. Exhibit 16. The price of corn at that time ranged from \$1.92 to \$2.17 per bushel. ASCS should have had collateral valued between \$29,500 and \$33,500.

All Jansma's cattle were sold by the early part of May, 1993. Carl Jansma submitted sale receipts to indicate the number of his cattle that were on Floyd's lot between January and May, 1993. Exhibits A-K. He used the number of cattle to calculate the amount of corn that they would have consumed during this time. Jansma identified two categories of cattle: those that were in the feed lot from the beginning of January until the date sold, which were eating corn at the rate of 30 pounds per day; and those that were in the lot for 14 to 21 days and which were eating about 18 pounds of corn per day. The exhibits do not include the receipts for cattle that were bought and sold again within a day or so. The court has calculated the possible total amount of corn consumed using Jansma's testimony about which type of cattle was represented by each receipt:

Date Sold	No. of Head	Days Fed	Corn/Day/Head	Total Corn Consumed
2-1-93	15	32	30 lb.	14,400 lb.
2-8-93	16	39	30	18,720
2-15-93	15	46	30	20,700
3-1-93	49	60	30	88,200
3-12-93	62	14-21	18	15,624-23,436
3-22-93	10	81	30	24,300
3-26-93	1	14-21	18	252-378
4-2-93	67	14-21	18	16,884-25,326
4-9-93	61	14-21	18	15,372-23,058
5-3-93	2	14-21	18	504-756
5-3-93	114	14-21	18	28,728-43,092
Total				243,684-282,366

Exhibits A-K. Jansma testified that a bushel of No. 2 grade corn weighs 56 pounds. He estimated that the corn stored on Floyd's farm, "22 percent corn," being high moisture corn weighed a little more than 60 pounds per bushel. The court calculates that the cattle identified in Exhibits A-K would have eaten at most 5,042 bushels of corn. Jansma said he calculated the figure at 6,380 bushels. In any event, his evidence is that his cattle would likely have eaten far less than the 12,222 bushels he had redeemed. Jansma sealed the equivalent of 27,626 bushels of dry corn. Assuming his cattle ate 6,380 bushels of the corn in Floyd's silos, there should have been at least 21,246 bushels remaining.

On July 13, 1993 Carl and Judy Jansma filed a Chapter 11 bankruptcy petition. They did not list Floyd Jansma as a creditor. Floyd was owed about \$40,000 to \$50,000 at the end of May. The case was involuntarily dismissed October 28, 1994. Jansma refiled under chapter 7 less than a month later.

ASCS procedure is to make an on-site inspection of sealed grain when it receives notice of a farmer's bankruptcy petition. On August 10, 1993, Mark Von Arb inspected the two grain silos which were to be storing sealed grain. He reported that both bins were empty, and no seals were posted on the bins. Exhibit 17.

DISCUSSION

FSA claims that Carl Jansma's obligation under the ASCS loan is nondischargeable pursuant to 11 U.S.C. 523(a)(6) as debt for willful and malicious injury. The standard of proof in a 523(a) claim is the preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654 (1991).

FSA claims that Jansma made a willful and malicious conversion of the corn securing the ASCS loan. The Eighth Circuit has defined willful and malicious conduct in the context of breach of security agreements in Barclays American/Business Credit, Inc. v. Long (In re Long), 774 F.2d 875 (1985). Willful means intentional or deliberate. Id. at 880. Malicious conduct is "targeted at the creditor ... at least in the sense that the conduct is certain or almost certain to cause financial harm." Id. at 881. Proof of malice requires a showing of a "heightened level of culpability ... going beyond recklessness and beyond intentional violation of a security interest." Id.

In Long, the debtor knowingly used the creditor's collateral but acted in an effort to reorganize his business. Jansma denies that there was an intentional breach of the security agreement. He admits that he allowed use of the corn to feed his own cattle. However, Carl contends that he had redeemed more grain than the cattle could have consumed. Carl denies he permitted any other use of the grain by Floyd. Both Carl and Floyd deny that Floyd knew the corn was ASCS collateral.

Looking back to 1993, it now seems plausible that Carl redeemed more grain than his cattle ate that year. However, Carl admitted that he told Floyd in January 1993 to use the corn. This was approximately two months before he had redeemed any grain. The court finds that there was a willful breach of the security agreement. Carl's arguments will be considered to determine whether the breach was a malicious injury.

FSA alleges that Carl Jansma transferred the sealed corn to his brother in satisfaction of his debt. FSA alternatively argues that Carl put the corn in Floyd's possession under circumstances in which Carl intended and knew it was almost certain that Floyd would take it for himself. FSA analogized it to leaving a diamond ring out on a table. The court believes the alternate theory is the less likely situation. If Carl intended Floyd to take the grain, it seems more likely he would have done it directly. The more plausible hypothesis is that Carl gave Floyd all the corn in disregard of FSA's security interest, either with or without Floyd's knowledge that it was sealed grain.

FSA's case depends on circumstantial evidence. The first issue for the court is whether the facts of this case create an inference that Carl committed a willful and malicious conversion. If FSA has made a prima facie case, only then will the court consider whether Carl's explanation of events is credible. To determine whether FSA has made out a case, the court will consider all the circumstances surrounding the use of the corn.

Carl and Floyd Jansma were both under a great deal of financial pressure by the end of December 1992. Carl had recently suffered large losses in his hog operation and in the cattle market. The 1992 harvest was late, and the corn was wet. Carl owed Floyd approximately \$45,000.00 to \$50,000.00 for his feed bill and had reached his lending limit at Sioux County State Bank. Floyd, in turn, was under extreme financial pressure from grain elevators. Carl had not paid Floyd for a number of months. Floyd needed vast quantities of feed every day to feed the thousands of head of cattle on his lot. Floyd did not have enough of his own corn and had to purchase grain. His debt to grain elevators was in the range of hundreds of thousands of dollars. He was also under pressure from a declining cattle market.

Floyd pressed Carl for payment. Carl told Floyd to use the corn in the silos. Floyd used all the grain in both silos to feed all the cattle on his lot.

Carl and Floyd are brothers; Carl lives less than a mile from Floyd's homestead on an acreage owned by Floyd. Floyd allowed Carl the use of his silos. From Carl and Floyd's close relationship, I can infer that Carl gave Floyd the corn. Carl could be expected to prefer Floyd over other creditors. Although their relationship was strained, it was not severed. Floyd cared for Carl's cattle even though Carl had not paid his feed bill. Floyd continued feeding them until the last of Carl's cattle were sold.

There were no seals on the grain silos. Carl says he did not receive them. I find that Carl did receive the seals from the ASCS office to place on the grain bins. The evidence showed that it was the custom and practice of the ASCS office to mail the seals with the loan check; Jansma admitted receiving the check. The size and color of the seal make it likely that the person mailing out sealed loan materials would notice whether the packet contained the seal. Carl's claim that he did not receive seals seems too convenient and appears to be designed to protect Floyd.

Carl claims that he never told Floyd that the grain was sealed. It seems more likely that Floyd knew it was sealed grain and that the brothers agreed to use it. However, even assuming Floyd did not know it was sealed grain, I conclude that Carl's failure to disclose that fact was willful and malicious. He gave Floyd the grain in disregard of ASCS's lien. Carl testified that he had never sealed grain before and did not know about seals. Even if he had not personally taken out a sealed loan himself, I find it difficult to believe that Carl, as an experienced farmer, did not know about grain seals. He had farmed all his adult life. His brother Floyd had sealed grain. When he applied for the loan, an ASCS officer explained the details of the program to him, including the requirement to post seals. He knew he would receive seals; he signed a document certifying that he would post seals on his grain bins. He knew the significance of "sealing" grain, that he had a duty to maintain the quantity, quality and identity of the grain until the collateral was redeemed from the ASCS.

Carl Jansma sold his last cattle on about May 3, 1993. He claimed it was not until early June that he first learned the remaining approximately 21,000 bushels were gone. His last payment to ASCS was made May 25, 1993. It is understandable that he would make no further payments to redeem grain that no longer existed. However, he never told the ASCS that the grain was gone, even to claim that his brother took the grain by mistake. In the past, he had told the bank of losing pigs and losing money in the cattle market. This act of concealment supports an inference of malice toward ASCS in permitting use of the grain.

Carl Jansma did not list Floyd as a creditor in his Chapter 11 bankruptcy petition filed in July 1993. Floyd estimated that Carl owed him approximately \$40,000.00 at that time. Carl claims that Floyd orally forgave the debt because Floyd did not want the trouble of being involved in a bankruptcy proceeding. This explanation seems unlikely. Considering Carl's story now that Floyd stole approximately 21,000 bushels of grain from him, it would be more logical to schedule the debt to

Floyd to eliminate any doubt as to its status. Not listing Floyd as a creditor omitted from Carl's schedules a fact related to the disappearance of the grain.

The court has found there was a technical conversion of the grain, because Carl told Floyd in January 1993 to use the corn, but Carl did not redeem any grain until March that year. I will assume Carl is arguing that he knew he would be redeeming more grain than his cattle would consume. However, he could not have known in January with any precision how much his cattle would eat. Carl was trading cattle frequently throughout this time.

Carl's testimony about giving Floyd permission to feed the grain was vague. Carl claims that he told Floyd to feed only Carl's cattle. Carl gave Floyd permission to use the grain prior to redeeming any grain. If Carl had any intent to limit Floyd's use of the grain, it seems he also would have told him that it was sealed grain, and he would have put limits on the amount of grain he could use. For example, he could have told him to take corn from only one of the silos. Carl did not tell Floyd when grain had been redeemed or in what amounts. Because Carl did not put any limits on Floyd's use as to amount, and made no attempt to exercise any control over it, it seems more likely that his intention was to give all of the corn to Floyd. I find that Carl gave Floyd the grain, in disregard of the ASCS lien, to offset against his debt to Floyd for feed.

I conclude that Carl's conduct was malicious under the Eighth Circuit standard. His willful breach of the security agreement was targeted at the ASCS in the sense that it was certain to cause financial harm. Long, 774 F.2d at 881. Giving the grain to Floyd was not an effort to reorganize his farm operation. Carl knew when he gave the corn to Floyd that his financial condition was serious enough that the ASCS would not get paid.

No single fact in this case is dispositive. This decision is based on the cumulative effect of all the circumstances and the credibility of the witnesses. I find and conclude that Carl Jansma willfully and maliciously converted ASCS grain. His debt to the FSA should be held nondischargeable.

ORDER

IT IS ORDERED that the debt of Carl Jansma to Farm Service Agency is excepted from his discharge pursuant to 11 U.S.C. 523(a)(6).

SO ORDERED THIS 30th DAY OF JULY 1996.

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: Don Molstad, U.S. Attorney, Wil Forker and U.S. Trustee.