

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Central Division

In re:

	)	
	)	Bankr. Case No. 92-30070
PATRICK CHRIS HARTER,	)	
	)	Chapter 12
Social Security No. 504-44-9490	)	
	)	MEMORANDUM OF DECISION RE:
Debtor.	)	DEBTOR'S PROPOSED POST-
	)	CONFIRMATION MODIFICATION
	)	OF A PLAN
	)	

The matter before the Court is Debtor's First Post-confirmation Modification to Chapter 12 Reorganization Plan filed January 18, 1994 and the objections thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum and accompanying Order shall constitute findings and conclusions under F.R.Bankr.P. 7052.

I.

A confirmation hearing on Debtor's modified Chapter 12 plan was held July 20, 1993. Appearances included John E. Harmelink for Debtor, Trustee Lovald, Thomas M. Maher for Weber Implement and John Deere, Donald E. Covey for Rosebud Federal Credit Union, and Brent A. Wilbur for First Fidelity Bank. The Court granted confirmation of Debtor's plan dated June 28, 1993.

On October 25, 1993, only two months after confirmation and while a stipulation between Debtor and John Deere was not yet approved, Debtor filed a Notice of Proposed Sale of Property Free and Clear of Liens. Therein, Debtor proposed to sell at auction his real property, including his homestead and a modular home, and

his interest in cattle, machinery, feed, grain, and miscellaneous personal property. The Notice stated Debtor's non debtor wife, LaVonne Harter, had consented to the sale and would sell her joint interests at the same time (the parties are divorcing). The Notice also stated the net sale proceeds would be placed in trust pending an agreement for disbursement.

A hearing on the proposed sale was held November 16, 1993. To satisfy an objection to the sale, Debtor agreed to let Weber Implement sell a John Deere baler that Debtor had purchased on credit from Weber Implement. The Court advised Debtor's counsel that Debtor must modify his plan to recognize the sale and propose a distribution of the proceeds.

On November 19, 1993, Deere Credit Services and Weber Implement were given relief from the automatic stay to take possession of the baler, sell it, and to apply the proceeds to their claim. An Order Approving the Sale of Property was entered November 19, 1993. Sale proceeds, less the sales commission, were ordered to be held in escrow by the realtor.

On January 18, 1994, Debtor filed a proposed modification of his confirmed plan. The modified plan provided that from his share of the sale proceeds Debtor would pay legal fees, real estate taxes, and the secured claims of First Fidelity Bank, Rosebud Federal Credit Union, John Deere, and Art Noelle (the contract for deed holder on the real property that was sold). Debtor did not propose to alter the treatment of J.I. Case's secured claim nor the claims of unsecured creditors. After payment of the claims stated

above, Debtor's proposed modification estimated that the sale proceeds would exceed the immediate disbursements by approximately \$46,000.00. The proposed modification also stated that the Trustee's fees would be "negotiated by the parties or resolved by the court."

On January 18, 1994, LaVonne Harter objected to the plan modification to the extent that it proposed to use her share of the proceeds to pay claims against Debtor.

Rosebud Federal Credit Union objected to the modification on February 8, 1994. It stated the excess sale proceeds should be paid immediately to unsecured creditors as disposable income. Rosebud Federal also objected to the modification on the grounds that Debtor was now essentially liquidating his estate and did not intend to reorganize under Chapter 12.

Weber Implement and John Deere objected to the modification on February 9, 1994. They stated Debtor's proposed modification failed to recognize the stipulation that the parties had made previously.

Trustee Lovald conducted a pre-modification meeting with interested counsel on February 17, 1994. He reported the parties had agreed that the secured claims of First Fidelity Bank, Rosebud Federal Credit Union, and Art Noelle could be paid immediately but that they resisted payment of Debtor's attorney's fees or other claims at this time. Trustee Lovald also reported that LaVonne Harter's share of the proceeds needed to be determined. Finally, Trustee Lovald stated he would resist any plan modification, and

ultimately a discharge under Chapter 12, if Debtor did not use the excess sale proceeds to pay his unsecured creditors.

A hearing on Debtor's proposed post-confirmation modification and Debtor's motion for approval of the sale was held March 15, 1994. Appearances included Trustee Lovald, John E. Harmelink for Debtor, Thomas M. Maher for Weber Implement and John Deere, Donald E. Covey for Rosebud Federal Credit Union, James E. Carlon for LaVonne Harter, and Brent A. Wilbur for First Fidelity Bank. The parties agreed on the record that the sale costs and the secured claims of Art Noelle, Rosebud Federal Credit Union, and First Fidelity Bank could be paid by the realtor from the escrowed funds. The Court approved the sale and directed that any funds remaining after the agreed payments are made shall be turned over to Trustee Lovald for placement in an interest bearing account. The Court then took Debtor's proposed modification under advisement.

## II.

Under 11 U.S.C. § 1229(a), a Chapter 12 debtor may seek modification of his confirmed plan to:

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
- (2) extend or reduce the time for such payments; or
- (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

A Chapter 12 plan modified after confirmation must meet the same requirements as the initial plan because §§ 1222(a), 1222(b), 1223(c), and 1225(a) apply to any modification. 11 U.S.C. § 1229(b). Consequently, a modified plan must be proposed in good

faith and it must be feasible. 11 U.S.C. §§ 1225(a)(3) and (a)(6). Further, the value of the distributions under the plan on the effective date of the plan may not be less than the creditors would receive in a Chapter 7 liquidation -- the "best interest of creditors" test. 11 U.S.C. § 1225(a)(4).

The weight of authority indicates that a modified plan must meet the best interest of creditors test as of the date of the proposed modification; that is, the effective date of the modified plan is the day the modification takes effect. See *In re Bremer*, 104 B.R. 999 (Bankr. W.D. Mo. 1989); *In re Musil*, 99 B.R. 448 (Bankr. D. Kan. 1988); *In re Perdue*, 95 B.R. 475 (Bankr. W.D. Ky. 1988); *In re Bluridg Farms, Inc.*, 93 B.R. 648 (Bankr. S.D. Iowa 1988); *contra In re Nielsen*, 86 B.R. 177 (Bankr. E.D. Mo. 1988), overruled by *In re Hopwood*, 124 B.R. 82, 85 (E.D. Mo. 1991).

This conclusion is in accord with § 1229, which states a modified plan must comply with § 1225(a). This conclusion is also supported by 11 U.S.C. § 1207(a), which states property of a Chapter 12 estate includes property and income that accumulates after the petition but before the case is closed, dismissed, or converted to Chapter 7.

The Court of Appeals for the Eighth Circuit addressed a similar question in *Hollytex Carpet Mills v. Tedford*, 691 F.2d 392 (8th Cir. 1982). That decision, however, is limited to the conclusion that exemptions are to be determined based on the law applicable on the petition date. In *Hollytex*, the court relied on a Bankruptcy Court decision which held that the best interest of

creditors test in a modified plan is determined on the petition date. *In re Statmore*, 22 B.R. 37 (Bankr. D. Neb. 1982). This Court joins several others in concluding that *Hollytex* and *Statmore* should not be read or applied too broadly.<sup>1</sup> *Bremer*, 104 B.R. at 1003-05; *Musil*, 99 B.R. at 450-51; see also *Hopwood*, 124 B.R. at 85, and *Bluridg Farms, Inc.*, 93 B.R. at 651-653. Further, a later decision by the United States Bankruptcy Court for the District of Nebraska, that defines the effective date of a Chapter 12 plan to be the date the plan takes effect -- not the petition date --, questions the continued viability of *Statmore*. *In re Milleson*, 83 B.R. 696, 699 (Bankr. D. Neb. 1988).

### III.

Debtor's proposed modified plan will not be approved. There are two problems.

First, Debtor's financial picture has been altered greatly by the post-confirmation sale of assets and the payment of several secured claims. However, Debtor has not shown that his modified plan complies with the best interest of creditors test because he has not submitted a new liquidation analysis.

Second, Debtor has not proposed the modification in good faith. Shortly after confirmation of his Chapter 12 plan, Debtor's

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<sup>1</sup> As this Court held in *In re Berger*, Bankr. No. 87-10289, slip op. at 11 n.5 (Bankr. D.S.D. January 7, 1994), the Court's earlier decision in *In re Oletzke*, Bankr. No. 186-00254, slip op. (Bankr. D.S.D. December 11, 1990), is overruled to the extent that it held that a modification of a Chapter 12 plan may not alter the effective date of the plan for the purpose of applying the best interest of creditors test.

farm assets were liquidated. In the absence of other evidence on the circumstances surrounding the liquidation, the Court may only conclude that the plan was never feasible or that Debtor never intended to reorganize. Moreover, the present posture of the case conflicts with the purpose of Chapter 12, which is "to assist the family farmer by allowing him to successfully complete a plan of payments that enables him to keep his land and continue his farming operation." *In re Gage*, 151 B.R. 522, 528 (Bankr. D.S.D. 1993) (citing H.R. Rep. No. 958, 99th Cong., 2d Sess. 48 (1986), reprinted in 1986 U.S.C.C.A.N. 5227, 5249), rev'd on other grounds, *Nail v. Harmelink & Fox Law Office*, Civ. No. 93-4050, slip op. (D.S.D. November 1, 1993). Debtor has already sold his land, cattle, and equipment. He has nothing to reorganize. Thus, the question now becomes whether Debtor is still entitled to the protection and benefits of Chapter 12.

Debtor's modification is also proposed in bad faith because he is offering little, if anything, to unsecured creditors. Under the modified plan, Debtor's secured creditors are being paid in full. Unsecured creditors, however, are still getting only disposable income although excess sale proceeds may be available immediately. Debtor's offer of disposable income while he was still farming is an entirely different treatment for unsecured claims than now offering disposable income when he is no longer farming. Assuming Debtor is still entitled to Chapter 12 relief, he must show how unsecured creditors will benefit under the modified plan. The Court cannot approve a modified Chapter 12 plan that exists only to

give unsecured creditors the *possibility* of disposable income a few years down the road. If there is nothing available for these unsecured creditors, the case should be dismissed or Debtor should voluntarily convert to Chapter 7. The Court will not give Debtor a Chapter 12 discharge if this modified plan is nothing more than a delayed Chapter 7 liquidation.

An order will be entered denying approval of Debtor's proposed modification.

Before Debtor may propose another modification, LaVonne Harter's interest in the sale proceeds and any remaining estate property must be determined. Trustee Lovald, Debtor's counsel, and LaVonne Harter's counsel should confer to determine how and where they want LaVonne Harter's interest determined. This Court will not make an equitable property distribution for application in the divorce proceeding because that task is more appropriate for the state court to determine. While this Court may determine the legal rights and obligations that Debtor and LaVonne Harter have as to bankruptcy estate property and remaining debts, that is a task which the state court may address as part of the property settlement in the divorce. Trustee Lovald should report the status of that question to this Court within twenty days.

Dated this \_\_\_\_ day of March, 1994.

BY THE COURT:

ATTEST:  
PATRICIA MERRITT, CLERK

By: \_\_\_\_\_

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

(SEAL) Deputy Clerk

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Central Division

In re: )  
 ) Bankr. Case No. 92-30070  
PATRICK CHRIS HARTER, )  
 ) Chapter 12  
Social Security No. 504-44-9490 )  
 ) ORDER DENYING APPROVAL OF  
Debtor. ) DEBTOR'S POST-CONFIRMATION  
 ) MODIFICATION OF A PLAN  
 )  
 )

In compliance with and recognition of the Memorandum of Decision Re: Debtor's Proposed Post-confirmation Modification of a Plan,

IT IS HEREBY ORDERED that approval of Debtor's Proposed Post-confirmation Modification of a Plan filed January 18, 1994 is DENIED; and

IT IS FURTHER ORDERED that Chapter 12 Trustee John S. Lovald shall report to the Court by letter on or before April 11, 1994 how and where interested parties intend to determine LaVonne Harter's claim to or interest in the post-confirmation sale proceeds and any remaining estate property.

So ordered this \_\_\_\_ day of March, 1994.

BY THE COURT:

\_\_\_\_\_  
Irvin N. Hoyt  
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By \_\_\_\_\_  
Deputy Clerk  
(SEAL)